

THE CONSTITUTIONALIZATION OF QUEBEC LIBEL LAW, 1848-2004[©]

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In 1848, a Quebec judge changed the law of defamation to accord with the newly-applicable constitutional right to freedom of speech. His decision and those that followed seem strange now that the Supreme Court of Canada has held that Charter rights do not apply to private law. These decisions show that the constitutionalization of libel law was not an American innovation, but rather one that emerged in Canada over a century earlier. This article analyzes the Quebec cases in detail, and suggests that they were grounded in liberal ideas about the British Constitution that were prevalent in Lower Canada at the time of the Rebellions. It then goes on to discuss how Charter rights have changed Quebec defamation law at the dawn of the twenty-first century, and maintains that Quebec jurisprudence can be useful precedent for the development of the tort of defamation in the common law provinces.

En 1848, un juge du Québec a modifié le droit de la diffamation, pour l'harmoniser au droit constitutionnel à la liberté d'expression, d'application récente. Son jugement, et ceux qui s'ensuivent, peuvent sembler curieux, maintenant que la Cour Suprême du Canada a statué que les droits garantis par la Charte ne s'appliquent pas au droit privé. Ces jugements montrent que la constitutionnalisation du droit de la diffamation ne représentait en rien une innovation américaine, mais plutôt une nouveauté venue du Canada, un siècle plus tôt qu'aux États-Unis. Cet article analyse dans le détail les affaires jugées au Québec, et suggère qu'elles portaient des idées libérales au sujet de la Constitution britannique, dominantes au Bas-Canada à l'époque des Rebellions. L'article se poursuit par une dissertation sur la façon dont les droits garantis par la Charte ont modifié le droit de la diffamation au Québec à l'aube du XXI^e siècle, et soutient que la jurisprudence du Québec peut constituer un précédent utile au développement du délit civil de diffamation dans les provinces de *common law*.

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Until 1982, Canada ... never looked at notions of free speech from a perspective of freedom of expression. There was hardly any discussion in Canadian courts about the value of free speech.

---Edward Greenspan¹

I am prepared to express an opinion as to our law of libel ... and that opinion is, that what we read of the doctrine of that country from which we have our civil law, that is inconsistent with the liberty of the press (as understood in England) is to be modified so as to leave intact that constitutional principle. That this boon, so much and so deservedly valued by a British subject, necessarily exists in all British colonies. That it is unimpaired by existing legislation at the time they became part of the realm (being part of the public law) ... With this opinion deliberately given on this occasion ... I entertain a hope that we shall hear no more of the imperfection of the law of this country, emphatically called the law of libel in Lower Canada, as regards the liberty of the press.

---Judge Jean-Roch Rolland²

I. INTRODUCTION

When Canada's *Charter of Rights and Freedoms*³ was introduced many commentators predicted, or hoped, that its guarantee of freedom of expression would reshape the common law of defamation.⁴ The predictions did not come true. In the United States, first amendment guarantees of freedom of speech had made it more difficult for public figures to sue for libel, requiring that actual malice be proven before they could win a lawsuit. The Supreme Court of Canada, however, has so far strongly rejected any

¹ "Freedom of Expression in Canada: 'Ifs, Buts & Whereases'" (1996) 29 L. Soc'y Gaz. 212 at 213-14.

² *Gugy v. Hicks* (1848), as cited in *Mousseau v. Dougall* (1871), 5 R.L. 442 at 446-47, Rolland J. [*Gugy v. Hicks*].

³ *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 [*Charter*].

⁴ R.J. Sharpe, "The Charter and Defamation: Will the Courts Protect the Media?" in Phillip Anisman & Allen M. Linden, eds., *The Media, the Courts and the Charter* (Agincourt: Carswell, 1986); M.R. Doody, "Freedom of the Press, the Canadian Charter of Rights and Freedoms, and a New Category of Qualified Privilege" (1983) 61 Can. Bar Rev. 124; John D. Richard & Stuart Robertson, *The Charter and the Media* (Ottawa: Canadian Bar Foundation, 1985); Amy Stein, "Libel Law and the Canadian Charter of Rights and Freedoms: Towards A Broader Protection For Media Defendants" (1987) 10 Fordham Int'l L.J. 750; Lewis Klar, "If You Don't Have Something Good To Say About Someone" in David Schneiderman, ed., *Freedom of Expression and the Charter* (Toronto: Thomson Professional Publishing, 1991) at 261 [Klar]; Rodney Smolla, "Balancing Freedom of Expression and Protection of Reputation Under the Charter" (in David Schneiderman, ed., *ibid.* at 272) [Smolla]; Richard Dearden, "Constitutional Protection for Defamatory Words Published About the Conduct of Public Officials" (in David Schneiderman, ed., *ibid.* at 287).

such “Americanization” of libel law. It has treated defamation purely as a matter of private law, one to which *Charter* protections do not apply.

This paper presents one argument for the constitutionalization⁵ of libel law based on uniquely Canadian case law, drawn from the efforts of nineteenth-century Quebec judges to integrate English parliamentary principles into a civil law framework. Quebec courts decided as early as 1848 that constitutional protections of freedom of speech restricted the scope of libel law where public figures were concerned. They applied different rules to public and private figures long before any such distinction was recognized in American constitutional law, and the distinction was endorsed by judges of the Supreme Court of Canada in the first decades of the twentieth century. The Quebec decisions suggest that libel law can be changed to comply with *Charter* rights, not by following American examples, but in accordance with the historical evolution of Canadian law.

After giving a brief summary of the common law of defamation and the constitutionalization of libel law in the United States, I will then provide a detailed discussion of how Lower Canadian⁶ judges first declared that Quebec libel law should be amended to conform to a new constitutional system. Some commentators have interpreted these decisions as being a wholesale adoption of common law principles, which is part of the reason why so little attention is paid to them now; I will argue, instead, that the decisions were an affirmation of the civil law tradition. Partially submerged under the legal positivism and isolationism of the first half of the twentieth century, these ideas re-emerged in a new form after the Canadian *Charter* and the Quebec *Charter of Human Rights and Freedoms*⁷ passed into law, even as the Quebec courts adopted a standard of care in defamation lawsuits that brought the law close to the American constitutional standard.

The recent *Charter*-based case law from Quebec is of interest because of its result: it relaxes the traditional strict liability test for

⁵ The word “constitutionalize” in the sense used here is of relatively recent American coinage. David Mellinkoff defines it as “a slangy pejorative: to subject something to the burden of passing constitutional muster.” See *Mellinkoff's Dictionary of American Legal Usage* (Minnesota: West, 1992) s.v. “constitutionalize”. I use the word as defined in *Black's Law Dictionary*, 7th ed., s.v. “constitutionalize”: “to make constitutional; to bring into line with a constitution” and “to make a constitutional question out of a question of law.” The definition encompasses both changes to the law required to comply with constitutional provisions and changes that are made in accordance with constitutional values. On this distinction, see *Retail Wholesale and Department Store Union, Local 580 v. Dolphin Delivery*, [1986] 2 S.C.R. 573 at 603 [*Dolphin Delivery*] and *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1164-72 [*Hill*].

⁶ What is now the province of Quebec was officially named Lower Canada from 1791 to 1841. The name continued in common use for some time after that.

⁷ R.S.Q., c. C-12.

defamation. In the common law provinces, journalists can as a general rule be held liable if they publish a falsehood, but in Quebec they will not be held liable so long as they have taken reasonable care before publication to verify its truth. The older, largely forgotten, jurisprudence is of interest because of its method: it used new constitutional law principles to make major changes in the law of defamation. It was for the most part based on principles of public law, which Quebec shares with the rest of Canada, and as such should have more persuasive value in other provinces than decisions based solely on Quebec's Civil Code.⁸ Quebec judges applied constitutional principles to libel law before Canada even had a written constitution, and their decisions are worthwhile precedents for those who wish to argue that the *Charter* should apply to the common law of libel.⁹

II. COMMON LAW DEFAMATION

Libel and slander are the common law remedies for injury done to a person's reputation.¹⁰ If a statement is made about a person to a third party that lowers that person in the esteem of right-thinking people or holds

⁸ For a recent example of the use of Quebec public law jurisprudence as precedent in Ontario, see *Corporation of the Canadian Civil Liberties Association v. Ontario Civilian Commission on Police Services* (2002), 61 O.R. (3d) 649 at 675 (C.A.). In *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 at 865, the Supreme Court of Canada stated that judges should consider decisions from both legal systems in cases where the courts in the two systems have adopted similar solutions based on similar principles. The Supreme Court has cited Quebec civil law jurisprudence as authority with respect to the common law of libel. See *Hill supra* note 5 at 172, citing *Gazette Printing Co. v. Shallow*, [1908] 41 S.C.R. 339 [*Gazette Printing*].

⁹ This paper does not present a normative or theoretical argument as to what influence the Charter should have on the law of defamation. Such analyses can be found in Denis Boivin, "Accommodating Freedom of Expression and Reputation in the Common Law of Defamation" (1997) 22 Queen's L.J. 229; June Ross, "The Common Law of Defamation: Failure to Enter the Age of the Charter" (1996) 35 Alta. L. Rev. 117; and David Lepofsky, "Making Sense of the Libel Chill Debate: Do Libel Laws 'Chill' the Exercise of Freedom of Expression?" (1994) 4 N.J.C.L. 168. There is a wealth of normative and philosophical discussion on the application of the American First Amendment to defamation law. See, among many others, Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996) c. 7, 8; Lucas A. Powe, Jr., *The Fourth Estate and the Constitution: Freedom of the Press in America* (Berkeley: University of California Press, 1991) c. 3, 4; R. George Wright, "Why Free Speech Cases Are As Hard (And As Easy) As They Are" (2001) 68 Tennessee L. Rev. 335; and articles mentioned in Frank Houdek, "Constitutional Limitations on Libel Actions: A Bibliography of *New York Times v. Sullivan* and Its Progeny, 1964-1984" (1984) 6 Comm/Ent 447. For an analysis of the differing norms embodied in American and Canadian law, see Douglas Bicket, "Drifting Apart Together: Diverging Conceptions of Free Expression in the North American Judicial Tradition" (1998) 20(4) Comm. & L. 1 [Bicket].

¹⁰ In the common law, libel refers to written defamation and slander to spoken words, with variations in the rules applying to each. These terms are also used in Quebec cases, but with no legal consequences flowing from the distinction.

them up to ridicule, then the person about whom the statement was made can sue for defamation.

Truth is an absolute defence to a defamation claim in the common law. If the defendant can prove that the statement was true, the lawsuit fails. Justifiable error or innocent mistakes, however, are not excuses. No matter how reasonable it may have been to believe in the truth of the statement, one will be liable if it turns out to have been false. Even if there was no intention of referring to the plaintiff, one can be liable if other people took the remark to be about the plaintiff. Malice is technically an element of the tort, but in most circumstances it is no more than an historical artifact; there is no general requirement to prove malice and it is usually presumed.

In order to protect certain forms of expression against the chilling effect of libel suits, the courts and legislature have marked off certain kinds of speech as privileged. Statements made in the course of judicial or legislative proceedings are absolutely privileged; they cannot expose the speaker to liability for defamation even if the statement was made for the sole purpose of harming another's reputation. A witness cannot be sued under any circumstances for statements made in court, and litigants cannot be sued for what they or their lawyers write in court documents. Other kinds of statements are protected by qualified privileges, meaning that the speaker will be exempt from liability unless malice can be proven. One kind of qualified privilege applies to statements made out of duty to someone who had an interest in hearing them, as for example credit ratings and employer references. Insulting and hurtful opinions may be protected as "fair comment," provided that the facts upon which they are based are true, and provided that they are made on a matter of public interest.¹¹

Two features of common law libel—truth as a defence and the absolute privilege for courtroom testimony—became central to the constitutionalization of Quebec libel law, as judges began to integrate equivalents of these defences into the law inherited from France. I will discuss these attempts in more detail, after describing how libel law became constitutionalized in the United States.

¹¹ For the basic principles of libel law set out above, see Clement Gatley, Patrick Milmo & W.V.H. Rogers, *Gatley on Libel and Slander*, 9th ed., (London: Sweet and Maxwell, 1998), especially paras. 31-49, 221, 281, 289-90, 341-340, 351, 441-582, 691ff, and 761; Jeremy S. Williams, *The Law of Libel and Slander in Canada*, 2d ed. (Toronto: Butterworths, 1988); and Raymond Brown, *The Law of Defamation in Canada*, 2d. ed., (Scarborough: Carswell, 1994).

III. CONSTITUTIONS

For most of American history, the law of libel in England and the United States was substantially the same. The American constitutional provision that “Congress shall make no law ... abridging the freedom of speech, or of the press ...”¹² was considered to not apply to defamation.¹³ This belief was shattered in the 1964 case of *New York Times v. Sullivan*,¹⁴ when the Supreme Court overturned a state court’s finding of libel on the grounds that it infringed the defendant’s freedom of speech. Libel law had become subject to the constitution, and, in the aftermath of the decision, “the common law applicable to libelous utterances that had prevailed in the United States since the country was founded was all but swept away.”¹⁵

The case that started this flood was brought against *The New York Times* by an Alabama Police Commissioner, over an advertisement in the newspaper that had solicited funds for the civil rights movement. The advertisement described the persecution of Martin Luther King and his followers by the police, but in an exaggerated and mistaken way. Among other errors, it claimed that King had been arrested by the police seven times, rather than only four, and that university students had been padlocked in their dining hall when in fact they had not been. The Police Commissioner claimed that statements in the advertisement constituted a libel against the police and, implicitly, against himself. The errors of fact in the advertisement meant that the defendants could not rely on the defence of fair comment. The Alabama courts had found in the Commissioner’s favour, and the *Times* appealed to the Supreme Court.

The Police Commissioner claimed that the Supreme Court had no jurisdiction to hear the case. He argued that libel law did not raise constitutional issues, because the First Amendment offered protection only against restrictions imposed by government, not against lawsuits brought by private individuals. The Court rejected this, finding that the fact that a libel action is brought and enforced through the courts was a sufficient show of state power to justify the application of constitutional principles. As the majority explained, “it matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute

¹² U.S. Const. amend. I.

¹³ *Beauharnois v. Illinois*, 343 U.S. 250 (1952) at 266 and at 292ff.

¹⁴ 376 U.S. 254 (1964) [*Sullivan*].

¹⁵ Edward Hudon, “The Supreme Court of the United States and the Law of Libel: A Review of the Decided Cases” (1979) 20 C. de D. 833 at 853.

The test is not the form in which state power has been applied but, whatever the form, whether such power has, in fact, been exercised.”¹⁶

The Court weighed the public interest in a free discussion of political issues against the rights of public officials to protect their reputations and settled on a compromise between the two. The Court decided that a public official must bear the additional burden of proving “actual malice”—that is, that the defendant published with knowledge that the imputations were false, or with reckless disregard of whether they were false or not.

The *Sullivan* decision was binding on lower courts only in cases concerning public figures, but in the years after it was decided, the standard of care in a defamation action was relaxed in most jurisdictions even in cases where constitutional protections did not apply. The influential *American Restatement of the Law of Torts* provides that the plaintiff must prove the defendant was at least negligent in making the defamatory statement,¹⁷ and most state jurisdictions have adopted the negligence standard.¹⁸

A distinction between private and public figures similar to the one adopted in *Sullivan* exists in the law of Scotland and the law of the European Community¹⁹ and, when the Canadian *Charter* was introduced, several commentators expressed the hope that it would cause something like the *Sullivan* standard to be introduced into Canadian law. As it is, journalists are held to a higher standard of professional liability than any other professional: doctors who cripple their patients through a mistake of judgment are not liable to those patients if a reasonably competent practitioner could have made the same mistake, but an honest mistake made by journalists can make them liable even if they exercised all reasonable care. A change in libel law to an “actual malice” standard could have moved journalistic mistakes from a strict liability standard to one based on fault.

Expectations of change were dealt a serious blow by the Supreme Court of Canada in *RWDSU, Local 580 v. Dolphin Delivery*.²⁰ The Court decided that picketing should be considered a form of expression protected by the *Charter*; however, it decided that this protection did not apply to common law remedies in a suit between private parties. Where the *Sullivan*

¹⁶ *Sullivan*, *supra* note 14 at 265.

¹⁷ *Restatement (Second) of the Law of Torts* §580B (1965) [*Restatement*].

¹⁸ *Ibid.* at Appendix, Reporter’s Note.

¹⁹ See generally Alistair Bonnington, “Public figure v. private person” (1997) 147 New L.J. 270.

²⁰ *Dolphin Delivery*, *supra* note 5.

Court had considered the enforcement of the common law to be a form of government action that opened up the U.S. Court's ruling to constitutional review, *Dolphin Delivery* held to the opposite opinion. Although the Court held that the normal case-by-case evolution of the common law should be guided by Charter values, it insisted that the Charter had no direct application to the common law.

Dolphin Delivery did not deal with libel law and did not review the *Sullivan* principles themselves. The Supreme Court of Canada did not consider these principles until a decade later, in *Manning v. Hill*,²¹ where the Court held that the Charter did not apply to the common law of libel and that there was no need to amend libel law to be in accord with fundamental Charter values. According to Justice Cory for the majority:

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. The most that the private litigant can do is argue that the common law is inconsistent with Charter *values*. ... Far-reaching changes to the common law must be left to the legislature.²²

Hill dealt with defamatory comments made by a lawyer for the Church of Scientology at a press conference that was televised and widely reported in the newspapers. Although the plaintiff had sued the organizations that reported the statements made at the press conference together with the lawyer and his client, the claims against the media defendants were settled before the case came to trial,²³ so that their conduct was never an issue before the courts. Justice Cory's reasons did leave the door open a crack to those who would wish to argue in future cases that journalists should be treated more liberally. He observed that "none of the factors which prompted the United States Supreme Court to rewrite the law of defamation in America [in *Sullivan*] are present in the case at bar. First, this appeal does not involve the media or political commentary about government policies" ²⁴

²¹ *Hill*, *supra* note 5.

²² *Ibid.* at 157. On how Canadian courts have made incremental changes in the common law to reflect Charter values, see Sheila Block & Zarah Walpole, "Application of Charter Values to Defamation Actions" in *Human Rights in the 21st Century: Prospects, Institutions and Processes* (Montreal: Editions Themis, 1997) 77; and *Campbell v. Jones* (2002), 220 D.L.R. (4th) 201.

²³ Michael Doody, "New Common Law Libel Privilege to Report on Court Documents: *Hill v. Church of Scientology of Toronto*" (1996) 18 *Advocates' Q.* 251 at 251.

²⁴ *Hill*, *supra* note 5 at 170.

Even with this caveat, Justice Cory's judgment gave little comfort to journalists.²⁵ It balanced the public's right to be informed against the right of the individual to protect her reputation and came out strongly in favour of the latter, upholding the trial verdict that required the Church to pay \$1.6 million in damages. Justice Cory criticized *Sullivan* because, in his view, it had diverted the focus of libel trials from the truth of the impugned statement to the question of whether the person who made it was negligent, depriving plaintiffs of the opportunity to vindicate themselves. He also maintained that the adoption of a negligence standard increased the length and cost of litigation, and that its protection of false statements had caused the deprecation of truth in public discourse. For these and other reasons, Justice Cory stated that "I can see no reason for adopting [the U.S. *Sullivan* principles] in Canada in an action between private litigants."²⁶

Apparently unknown to Justice Cory, however, a negligence test for libel by journalists had already been adopted in Canada by the Quebec Court of Appeal in the previous year.²⁷

As I show in the following section, the Supreme Court of Canada, in making these statements, was not just ignoring the Quebec Court of Appeal, it was also ignoring its own earlier decisions. The Supreme Court had in fact acknowledged the constitutionalization of the law of defamation over eighty years before, accepting a line of jurisprudence going back to the mid-nineteenth century. Constitutionalization of the common law of libel is not just a recent American innovation; Canada had adopted similar principles over a century before they were adopted in the United States.

IV. QUEBEC DEFAMATION LAW

A. *The Nineteenth Century Application of Constitutional Principles*

There is a long line of jurisprudence in Quebec holding that legal rules more favourable to freedom of the press should apply to defamation lawsuits brought by public figures; the law of defamation has a

²⁵ See discussion by Grant Huscroft, "Defamation, Damages and Freedom of Expression in Canada" (1996) 112 Law Q. Rev. 46 at 47-48.

²⁶ *Hill*, *supra* note 5 at 169. Comparative analyses of the *Sullivan* and *Hill* decisions can be found in Marie-France Major, "Sullivan Visits the Commonwealth" (1999) 10 Ind. Int'l & Comp. L. Rev. 1 and Bicket, *supra* note 9.

²⁷ *Société Radio-Canada c. Radio Sept-Iles Inc.*, [1994] R.J.Q. 1811 (C.A.) [*Radio Sept-Iles*]. It should be noted that the Supreme Court's decision in *Hill*, *ibid.* at 172-73, did cite an earlier case concerning the civil law in Quebec as authority concerning the common law, however, referencing *Gazette Printing*, *supra* note 8, as authority concerning qualified privilege.

constitutional and public law dimension; and the role of a judge in a time of constitutional change is to modify traditional private law so as to integrate new constitutional principles with the law of defamation. In this section, I will demonstrate how that approach began, how it was largely abandoned, and how Quebec courts have returned to a similar approach in recent years.

In English private law, truth is an absolute defence. Under the old French law that applied in Quebec, however, it did not matter whether the libel was true or false²⁸ unless the libelous allegations were already a matter of general public knowledge.²⁹ The law was such that “la vie privée doit être murée”—private life has to be walled up.³⁰ Truth could be seen not as a defence but as an aggravation of the injury:³¹ as it was sometimes put, “the greater the truth, the greater the libel.”³² For some time there was a legal debate over whether it was even permissible for the defendant to include in their defence an assertion that the statements complained about were true,³³ with some arguing that truth should at least be allowed to be pleaded as a reason for reducing the damages to be awarded even if it could not be an actual defense.³⁴

²⁸ Adjutor Rivard, “De la liberté de la presse” in *Royal Society of Canada: Proceedings and Transactions*, series 3, vol. 17 (Ottawa: Royal Society of Canada, 1923) 35 at 58 [Rivard, “De la liberté de la presse”]. In parts of southern France before the French Revolution, truth could be a defence, but in regions governed by the Coutumes de Paris, which applied in New France, the opposite held true: *Price v. Chicoutimi Pulp Inc.* (1915), 51 S.C.R.179 at 207-08 [*Price*] and *Martineau v. Roy* (1887), 16 R.L. 257 at 257-60 [*Martineau*].

²⁹ See e.g. Peter Moogk, “‘Thieving Buggers’ and ‘Stupid Sluts’: Insults and Popular Culture in New France” in *Interpreting Canada’s Past: Before Confederation*, vol. 1 (Oxford: Oxford University Press, 1986) 62 at 72; Pierre-Basile Mignault, *Le droit civil canadien*, vol. 5 (Montreal: C. Theoret, 1901) at 356 [Mignault]; and Carl Goldenberg, *The Law of Delicts Under the Civil Code of Quebec* (Montreal: Wilson & Lafleur Ltd., 1935) at 47.

³⁰ *Gazette Printing*, *supra* note 8 at 343. See also *Genest v. Normand* (1873), 5 R.L. 161, and applying the same principle in a criminal case, *R. v. Dougall* (1874), 18 L.C. Jur. 85 at 93-94 [*Dougall*]. This emphasis on family privacy was reflected in other areas of the law as well. One of the arguments against creating a land registry system was that the registration of charges against land would reveal the “secrets and situations of families”: F. Murray Greenwood, *From Higher Morality to Autonomous Will: The Transformation of Quebec’s Civil Law, 1774-1866* (Winnipeg: University of Manitoba, Canadian Legal History Project Working Paper Series, 1992) at 12, n. 32 [Greenwood].

³¹ *Guimond v. Montreal* (1872), 4 R.L. 132.

³² *Trudel v. La Compagnie d’Imprimerie et de Publication du Canada*, [1889] 5 Mtl. L. R.. 297 at 303 (Sup. Ct.) [*Trudel*].

³³ *Moquin v. Brassard* (1875), 20 R.L. 111 and *Beauchene v. Couillard* (1893), 16 L.N. 306 (C.A.) both held that truth could not be pleaded as a defence.

³⁴ *Ferguson v. Roger*, *In the Queen’s Bench, appeal side [microform]* : Caroline J. Ferguson, appellant, and Charles Roger, respondent, (1855) Canadien Institute for Historical Microreproductions/Institute canadien de microreproductions historiques, Microfiche series, no 49897;

This left journalists in a particularly difficult position; they could be sued for printing news of a political scandal, even if every detail of the report was true.

This issue was addressed in the 1848 case of *Gugy v. Hicks*.³⁵ Although the opinion was part of the charge to the jury and apparently never reported, the key portions of it proved influential and have been quoted at length in subsequent cases.³⁶ In *Gugy*, Judge Jean-Roch Rolland stated that:

[W]hat we read of the doctrine of that country from which we have our civil law that is inconsistent with the liberty of the press, as understood in England, is to be modified so as to leave intact that constitutional principle; that this boon, so much and so deservedly valued by a British subject, necessarily exists in all British colonies; that it is unimpaired by existing legislation at the time they became part of the realm (being part of the public law).³⁷

The anglophile sentiment of this direction to the jury was not unusual; similar sentiments were part of general political discourse in the nineteenth century in French as well as English.³⁸ They were characteristic of George-Etienne Cartier's Conservative Party³⁹ and can be found in judicial opinions and lawyers' closing submissions at least until World War

Graham v. McLeish (1883), M.L.R. 475 (5 Q.B.); *Bois v. Deschêne*, [1915] C.S. 178; and Mignault, *supra* note 29 at 357.

³⁵ *Supra* note 2.

³⁶ *Mousseau v. Dougall* (1871), 5 R.L. 442 at 446-47 [*Mousseau*]; and, more briefly, in *Trudel, supra* note 32 at 303. The facts of the case are not mentioned in either of these two citations, but it is likely that the plaintiff was a litigious lawyer and politician named Bartholomew Conrad Augustus Gugy, who initiated a number of libel claims during the course of his career, including *Ex parte Gugy* (1858), 6 R.J.R.Q. 267 and (1859), 7 R.J.R.Q. 98; *Gugy v. Donahue* (1858), 7 R.J.R.Q. 234, 237 and (1861) 7 R.J.R.Q. 246; and *Gugy v. Maguire* (1863), 11 R.J.R.Q. 240. He was also sued in defamation for calling a witness a "perjured scoundrel": *Ferguson v. Gugy* (1861), 10 R.J.R.Q. 84 at 84. The comment was made in the course of a lawsuit between Gugy and his neighbour over the construction of a wharf, in which Gugy represented himself. The case lasted 22 years and went twice to the Privy Council in England: *Brown v. Gugy* (1864), 10 R.J.R.Q. 1; *Gugy v. Brown* (1867), 10 R.J.R.Q. 92. See generally Pierre-Georges Roy, *Les avocats de la région de Québec* (Lévis: Le Quotidien, 1936) at 211.

³⁷ *Supra* note 2 at 446.

³⁸ See Douglas Verney, *Three Civilizations, Two Cultures, One State: Canada's Political Traditions* (Durham: Duke University Press, 1986) at 223, 230; Greg Marquis, "Doing Justice to 'British Justice': Law, Ideology and Canadian Historiography" in *Papers Presented at the 1987 Canadian Law in History Conference, held at Carleton University, Ottawa, June 8-10, 1987* (Ottawa: Carleton University, 1987) at 20; Lawrence A. H. Smith, "Le Canadien and the British Constitution" in Cook, Brown & Berger, eds., *Constitutionalism and Nationalism in Lower Canada* (Toronto: University of Toronto Press, 1969) 17.

³⁹ Brian Young, "Federalism in Quebec: The First Years After Confederation" in J.M. Bumsted, ed., *Interpreting Canada's Past: After Confederation*, vol. 2 (Toronto: Oxford University Press, 1986) 17 at 20.

I.⁴⁰ Judge Rolland's language echoed that of the demands for reform put forward by Louis-Joseph Papineau's Patriote Party in the 1830s. Their ninety-two resolutions of 1834 had included the demand that the Legislative Assembly of Lower Canada

s'est empressée d'adopter et de consolider dans la province, au moyen des lois, non seulement le droit constitutionnel et parlementaire anglais, nécessaire à l'opération du son gouvernement, mais aussi toutes les parties du droit public du Royaume-Uni qui lui ont paru salutaires et protectrices, et conformes aux besoins et au vœux du peuple ...⁴¹

The rejection of these resolutions by the imperial government had been one of the precursors to the Rebellion of 1837.

In the American colonies before the Revolutionary War, many had adopted that "curious interpretation, or rather misinterpretation, of the British constitution as a fundamental law which could limit the legislative powers of Parliament."⁴² French-Canadian lawyers and politicians in the first third of the nineteenth century had followed in this tradition, contesting the power of colonial governors by insisting on the enforceability of the British Constitution in the colony.⁴³ Judge Rolland's appeal to British law concerning liberty of the press is in the same tradition as Papineau's appeal to "les droits et les sentiments les plus chers à des sujets britanniques."⁴⁴

⁴⁰ "In Quebec, a British City, with British courts of justice," closing arguments for the plaintiff in *Ortenberg v. Plamondon* (1913), 14 D.L.R. 549 [*Ortenberg*, 1913], published as *The Quebec Jewish Libel Case, Address delivered by S.W. Jacobs, K.C., counsel for the Plaintiff, before the Superior Court, Quebec, May 23, 1913* (Montreal: The Jewish Times, 1913) at 31, and quoted in *Anti-Semitism II: The Plamondon Case and S.W. Jacobs, Part 2, compiled by David Rome* (National Archives, Canadian Jewish Congress, 1982) at 151.

⁴¹ *Resolutions of the House Assembly of Lower Canada* (21 February 1834) at Res. 5 [Resolutions], online: La Bibliothèque électronique du Québec <<http://jydupuis.apinc.org>>; and 1837 Nos Héros, <<http://pages.infinit.net/nh1837>>.

⁴² Hannah Arendt, *On Revolution* (London: Faber and Faber, 1963) at 177 [Arendt, "Revolution"]. See also Barbara Black, "The Constitution of Empire: The Case for the Colonists" (1976) 124 U. Pa. L. Rev. 1157; Liam Séamus O'Melinn, "The American Revolution and Constitutionalism in the Seventeenth-Century West Indies," Note, (1995) 95 Colum. L. Rev. 104.

⁴³ Fernand Ouellet, "Le Mandement de Mgr Lartigue de 1837 et la réaction libérale" in Cook, Brown & Berger, *supra* note 38, 67 at 73; and Robert Chodos & Eric Hamovitch, *Quebec and the American Dream* (Toronto: Between the Lines, 1991) at 56ff. This interpretation will be discussed in more detail, in section IV(B).

⁴⁴ Resolutions, *supra* note 41 at Res. 2. Rolland's background and his links to this tradition are discussed in more detail below. Quebec journalists had made claims to freedom of the press on the basis of the English Constitution as early as 1788: Marcel Trudel, *Mythes et réalités dans l'histoire du Québec* (Montreal: Hurtubise HMH, 2001) at 253.

Judge Rolland's allusions to the rights of British subjects have led some to understand him as saying that Quebec should adopt the English law of libel.⁴⁵ As he put it, however,

I am not ... to be understood to say that the law here which gives redress in cases of defamation is the same as the law of England. I mean no such thing; for it is different in many respects. It is not for me to vindicate our municipal [Lower Canadian] law; it may be better or worse. The courts are to judge according to law, taking the law to be wise.⁴⁶

If anything, there is reason to suspect that other judges had decided earlier cases according to common law principles, and that Judge Rolland was disputing that approach by showing that the civil law was capable of evolving so as to recognize freedom of the press. Although there are few records of judicial decisions in Lower Canada in the first half of the nineteenth century, at least one later case suggests that some Quebec judges had applied the English law of libel without regard to civil law principles.⁴⁷ This seems to have been in accordance with the general practice of some of the judges of that period, many of whom had emigrated from the United Kingdom and been trained in law there.⁴⁸ Judge Rolland stated in his address to the jury that

... as respects the general doctrine of libels as connected with the press, no British subject need be alarmed, for he is to have all the benefit arising from constitutional rights. ... With this opinion deliberately given on this occasion, ... I entertain a hope that we shall hear no more of the imperfection of the law of this country ... as regards the liberty of the press.⁴⁹

His words seem like one half of an argument as to whether the civil law or the common law should be followed, a response to opinions expressed in other cases now lost to us.⁵⁰

⁴⁵ Nicole Vallières, *La Presse et la Diffamation: rapport soumis au Ministère des communications du Québec* (Montreal: Wilson & LaFleur, 1985) at 45.

⁴⁶ *supra* note 2 at 446.

⁴⁷ See *Poitevin v. Henry Morgan & Co.* (1866), 10 L.C. Jur. 93 at 97: "... the jurisprudence of this province has necessarily followed the English practice as in all respects the most fitting and convenient."

⁴⁸ Greenwood, *supra* note 30 at 25-26; Evelyn Kolish, *Nationalisme et Conflits de Droits: le débat du droit privé au Québec, 1760-1840* (La Salle, Québec: Hurtubise HMH, 1994) at 107-26, 143-59 [Kolish, *Nationalisme*].

⁴⁹ Mousseau, *supra* note 36 at 446.

⁵⁰ But see Evelyn Kolish, "The Impact of the Changes in Legal Metropolis on the Development of Lower Canada's Legal System: Judicial Chaos and Legislative Paralysis in the Civil Law, 1791-1838" (1988) 3 Can. J.L. & Soc. 1. Kolish maintains, with respect to legislative initiatives during the period before the Rebellions, that the British "refused to countenance any modernization or clarification of the law that followed the French model, since improvement of the civil law would in no way aid in

Judge Rolland's praise of British institutions may not have been unusual, but the assertion that British subjects in the colonies had the same constitutional rights as English citizens was. When Judge Rolland made his judgment, responsible government⁵¹ in Quebec was perhaps a year old. The extension of English parliamentary principles to the Colony had been resisted by both prior British colonial administrations and by rival political parties, and the idea that English constitutional principles fully applied to the Colony was still novel.

At the same time, freedom of speech in France, "that country from which we have our civil law,"⁵² remained far more restricted than in England. Although the French Revolution had proclaimed the free communication of ideas and opinions as one of the most precious of the rights of man, and stated that every citizen may speak, write, and print with freedom,⁵³ post-revolutionary governments imposed heavy-handed penalties, including capital punishment, on journalists who wrote defamatory columns.⁵⁴ Repression ebbed and flowed but during the century after the Revolution censorship existed in France almost continuously. Laws preventing the free expression of opinion were passed there in the 1830s, and again in 1848, the year that *Gugy* was decided.⁵⁵

This meant that for most of the nineteenth century the Quebec courts had little civil law tradition of freedom of expression on which they could draw, either in the received law of the French Monarchy, as it existed at the time when Quebec became subject to the British Empire, or in later French jurisprudence. By treating freedom of the press as a matter of constitutional law, Judge Rolland was able to invoke English tradition instead. Libel law was still, in his reasoning, part of the French-derived civil law, but it had to be modified to reflect new constitutional principles.

remaking the Canadiens into British subjects": *ibid.* at 6. If this attitude carried over into 1848, Rolland's approach was more controversial than it would seem at first glance.

⁵¹ The usual meaning of responsible government in the Canadian context is colonial self-government in which control of government is vested in a popularly elected legislature, rather than in appointees of the colonial office, and the executive holds power only so long as it has the confidence of the legislature.

⁵² *Supra* note 2 at 446.

⁵³ France, National Assembly, *Declaration of the Rights of Man and of the Citizen* (26 August 1789), art. 11.

⁵⁴ Bruno Cyr, *La Diffamation, l'Injure, le libelle, dans la Province de Québec* (B.C.L. Thesis, McGill University, 1953) [unpublished] at 15.

⁵⁵ *Ibid.* at 15-16; Vallières, *supra* note 45 at 46; Rivard, "De la liberté de la presse," *supra* note 28 at 37-38.

Accordingly, Judge Rolland adopted a distinction between public and private figures. In a defamation lawsuit brought by a private figure, the defendant was not allowed, in most cases, to even plead the truth of the libel. However, if the statement was made in a newspaper about a public figure, or concerning the actions of government, truth became a defence. As he explained:

... there are imputations affecting character where evidence of truth may be admitted even in this country. For instance, when in the discussion of political affairs and public occurrences a writer in a newspaper canvasses the public character of public men, or the measures of government, *which every citizen has a right to do*, there may be justification and evidence of truth would not be rejected, provided that it be the opinion of a court or jury that it was done with a laudable motive; not so, however, if with a malignant intention, and particularly if private character is assailed, for there can be no justification for malignity.⁵⁶

The apparent anglophilia of Judge Rolland's decision was mild in comparison with *Champagne v. Beauchamp*,⁵⁷ where British-born, French-educated judge, Sir Francis Godschall Johnson⁵⁸ wrote:

... however great our obligations in other respects to the civil law of France, ... we owe it nothing as respects the liberty of the press or the right of public discussion. Whatever we have of these, is due to a beneficent rule of England, and to the constitutional freedom that followed it, and without which the early and heroic French colonists of this country could never have dreamed of, nor their descendants ever have attained, the blessings of the liberty they now enjoy.⁵⁹

Judge Johnson's language evokes the ideology of imperialism, according to which the British invaded and took up the burden of administering foreign lands in order to civilize and educate the local inhabitants.⁶⁰ Liberty of speech was seen as a blessing given by a beneficent sovereign. However, the language of Judge Rolland's decision was different. Although he called freedom of speech a "boon," he also characterized it as a right that is intrinsic to the status of being a British citizen.⁶¹ This language is similar to

⁵⁶ *Mousseau*, *supra* note 36 at 447.

⁵⁷ [1886] 2 M.L.R.(S.C.) 484 at 488, *aff'd* (1887), 16 R.L. 506 [*Champagne*].

⁵⁸ Pierre-Georges Roy, *Les juges de la Province de Québec*, (Québec: R.Paradis, Imprimeur de Sa Majesté le roi, 1933) at 277.

⁵⁹ *Champagne*, *supra* note 57.

⁶⁰ See e.g., Hannah Arendt, *Imperialism: Part Two of The Origins of Totalitarianism*, (New York: Harcourt, Brace & World, Inc., 1968) at 87ff.

⁶¹ *Supra* note 2 at 446.

that of liberal reformers in both Upper and Lower Canada during the first half of the nineteenth century.⁶²

Judge Johnson dealt with the issue again three years later in the case of *Trudel v. La Compagnie d'Imprimerie et de Publication du Canada*,⁶³ a defamation suit over newspaper reports concerning a member of the Senate of Canada that stated that, among other libelous allegations, he had visited the *folies bergères*.⁶⁴ The Senator was a newspaper publisher himself, described in the defence to his claim as “the most outrageous, the most violent, the most insolent, and the most insulting of all known journalists and polemicists.”⁶⁵

The Quebec civil law had been codified in 1866, eighteen years after Judge Rolland’s decision. Accordingly, the Court began its analysis with article 1053 of the Civil Code, which, as it then read, stated that “every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.”⁶⁶ Nonetheless, according to the Court, reporting on the deeds and misdeeds of public figures was a public good according to basic principles of public law. Making such reports could not be considered a “fault” as that term is used in article 1053. As the Court explained:

[T]he rights and liberties of the people of Canada completely take out of the category of wrong-doing or fault (*culpa*), to which alone the article relates, the performance of a public duty in a truthful and honest manner. ... This is the law of England, and even of modern France⁶⁷

Where Judge Johnson’s earlier decision had described liberty of speech only as a gift from the Crown, this one explicitly saw it as inhering in the structure of government:

⁶² See Paul Martin Romney, *Getting It Wrong: How Canadians Forgot Their Past and Imperiled Confederation* (Toronto: University of Toronto Press, 1999) c. 3-5.; Smith, *supra* note 38.

⁶³ *Trudel*, *supra* note 32.

⁶⁴ On the infamous visit to the Folies-Bergères, see Kenneth J. Munro, *A Biography of François-Xavier-Anselme Trudel, Quebec's Foremost Political Maverick in the Nineteenth Century* (Lewiston, N.Y.: Edwin Mellen Press) at 117-18.

⁶⁵ Trudel, F.X.A., *Cour Supérieur no 1036 [microforme]: l'honorable F.X.A. Trudel, demandeur et la Compagnie d'imprimerie et de publication du Canada, défenderesse*, (1888) Canadian Institute for Historical Microreproductions/Institut canadien de microreproductions historiques, Microfiche series, no 93461 (Statement of Defence) [translated by author]. Original can be found at the Quebec National Library, Montreal.

⁶⁶ *Civil Code of Lower Canada*, Art. 1053.

⁶⁷ *Trudel*, *supra* note 32 at 302.

I certainly understood from the time of Judge Rolland's ruling [in *Gugy v. Hicks*], and have ever since held, that this liberty [of the press] is part of our law, as necessarily incident to our political constitution, which itself is surely part of our law, and without this liberty and this law we could not use our constitution. But ... if it can be shown that the things published by the defendants are not true, and are not for the public good, they must lose the benefit of their plea of justification; for private slander or libel admits of no excuse or justification whatsoever; and the only truly modern application of the old saying, "the greater the truth, the greater the libel" consists of the personal and private nature of the thing charged, the publication of which becomes the grosser offence in proportion to the more personal and private character of the act or the infirmity which the victim has a right to withhold from the public gaze ...⁶⁸

In the opinion of the court, damaging statements about a private individual were actionable even if they were true; truth could, however, be a defence to a libel claim against a journalist, where the statements complained of were published in the public interest, about public men or women.

The case of *Vigeant c. Poulin*⁶⁹ adopted the same principle, but without any reference to British liberties. It arose out of another election dispute, in which one side publicized comments that had been made privately by the other side's candidate about the immoral conduct of nuns in Beloeil and in France, and about the "moeurs et habitudes séductrices et sodomitiques de tous les curés en général, et de certains curés spécialement indiqués ...".⁷⁰ The defendant pleaded that he had been exercising a "droit sacré" guaranteed by the constitution, and had a right to make the candidate's comments known to the public. The trial judge acknowledged that "la liberté électorale, consacrée par notre droit public" could not function if voters did not have a right to discuss the candidates, and that electoral rights could not be subordinated to the ordinary rules of defamation.⁷¹ Nevertheless, he found the defendant liable because the conversations had been private, not public matters. The appellate court reversed the decision, holding that these conversations had to do with the candidate's public life, and that in denouncing these malicious and outrageous remarks, the defendant was fulfilling a duty of conscience "dans l'exercice d'un droit garanti par la constitution, celui du libre examen de la conduite et des actes publics des candidats ...".⁷²

⁶⁸ *Ibid.* at 303.

⁶⁹ (1890), 20 R.L. 567 (C.A.).

⁷⁰ *Ibid.* at 569-70.

⁷¹ *Ibid.* at 571.

⁷² *Ibid.* at 577-78.

These principles were again acknowledged by the Quebec appellate court in *Graham c. Pelland*.⁷³ That case concerned allegations made at a political meeting by the province's Minister of Public Works that the rival for his party's nomination had been put forward by "mountebanks" who "concocted their plans in a backshop on Saturday night in the course of a drunken orgy."⁷⁴ The court decided that the publication of these remarks in a newspaper was a purely private matter, not covered by the privileges for statements made in the public interest. The court also accepted that the distinction between libels against private individuals and those against public figures and institutions was a part of Quebec law,⁷⁵ considering it unnecessary in the circumstances to address the role that freedom of the press plays in a parliamentary democracy.⁷⁶

In *La Compagnie de Publication du "Canada Revue" c. Mgr. Fabre*,⁷⁷ the court maintained that

the right of free discussion of public matters ... exists as the right of the subject as such. In the interpretation of our law as to what constitutes injurious defamation ... we must consider not what rights ... the citizen may have had under the old *régime*, but what rights he has to-day under our constitution. If we find that in England to-day, wider liberty of criticism is allowed to the subject as such, than might perhaps have been tolerated in France under the old *régime* ... we must in the application of our law bear in mind the existence of that wider liberty.⁷⁸

The case should not necessarily be considered a victory for liberty of the press; this line of reasoning was used to support the right of the archbishop to exercise his freedom of speech by issuing a ban prohibiting Roman Catholics from reading, printing, selling, or possessing the plaintiff's publications.

At the end of the nineteenth century, although freedom of speech became better established in France and Quebec's private law had become codified in the first *Civil Code* of Lower Canada, the courts generally continued to ground freedom of the press in English constitutional principles. *Gugy* remained the leading case on the issue into the early part of the twentieth century.⁷⁹ Quebec law had evolved a distinction between

⁷³ (1896), 5 B.R. 196.

⁷⁴ *Ibid.* at 197.

⁷⁵ *Ibid.* at 202-03.

⁷⁶ *Ibid.* at 205.

⁷⁷ (1894), 6 C.S. 436.

⁷⁸ *Ibid.* at 446-47.

⁷⁹ *Gazette Printing*, *supra* note 8 at 345, Girouard J., dissenting.

private and public figures, pursuant to which libels against public figures were to some degree shielded from defamation suits by constitutional protections, while libels against private figures were not. Truth was a defence to a libel lawsuit in public matters; but, unlike the common law, truth was not a defence to a defamation lawsuit brought by a private figure.

As one legal scholar wrote in 1907, Quebec's law of libel was neither English nor French; it was based on Quebec case law and was different from either the English common law or the European civil law systems.⁸⁰ Although several of the reported judgments expressed admiration for British legal principles, most did not say that the English law of libel applied in Quebec. They generally stated the matter in terms of the application of English constitutional principles, not English libel law.⁸¹ Instead of applying the common law, the judges elaborated legal rules that were unique to Quebec and manifested the spirit of those general principles.

B. *Historical Context: The Judiciary, Rebellion, and Change*

In this section, I will discuss the role that the British Constitution played in Quebec political and legal thought and the backgrounds of two of the judges who invoked it. Many of the relevant cases seem particularly dated, if not embarrassing, because of their extravagant praise of British institutions and traditions. In order to understand that language and why it was used, I will attempt to provide historical context, suggesting that the expression of such sentiments was in fact characteristic of those advocating liberal reform and greater colonial self-government.

When the Quebec cases, discussed above, spoke of the English "Constitution," they were appealing to something that many people in North America now would not even think of as fitting under that label.⁸² Unlike Canada or the United States, Great Britain has no single document or set of documents that can be referred to as its constitution. The English Constitution is one only in an older sense of the word.⁸³ It is a set of basic rules and principles that restrain, structure, and give authority to the exercise of government power. It is built on documents such as the Magna

⁸⁰ Frederick Parker Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (Montreal: Wilson & La Fleur, 1907) at 116 [Walton].

⁸¹ See e.g. *Belleau v. Mercier* (1882), 8 Q.L.R. 312 at 316.

⁸² See Alexis de Tocqueville, *Democracy in America, 1848*, vol. 1 (New York: Vintage, 1945) at 104: "In England, the constitution may change continually, or rather it does not in reality exist..."

⁸³ Cf. James Tully, *Strange Multiplicity: Constitutionalism in an age of Diversity*, (New York: Cambridge University Press, 1995) at 59-62, 149-54 (a comparison of ancient and modern constitutions).

Carta, but also on traditions that have never been definitively written down. It is often described as unwritten and flexible, in contrast to the codified and difficult-to-amend American Constitution.

Many would argue that it gives no real protection to individual rights. For example, in a 1942 decision of the House of Lords, Lord Wright maintained that “in the constitution of this country there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved.”⁸⁴ “For the past two centuries,” according to a recent evaluation, “the prevailing British constitutional ideology ... has treated British citizens as subjects of the Crown, without the benefit of fundamental constitutional rights giving legal protection to the individual against the state and its agents.”⁸⁵ Thomas Paine would have agreed; his call for the independence of the American colonies from Britain was in part based on the claim that “the so much boasted constitution of England” offered no protection for freedom.⁸⁶

The view that the constitution did not protect individual rights may have dominated by the end of the nineteenth century, but it was not the only view. Others maintained that basic liberties such as freedom of speech were protected under it.⁸⁷ I will discuss two such writers, Joseph Towers and Jean Louis de Lolme.

Towers, writing in the late eighteenth century, focused on a narrow issue: the extent of the power of juries in libel trials. A number of judges instructed juries in criminal libel cases that the role of the jury was limited to determining whether the words about which the plaintiff complained had actually been published; by contrast, assessing whether the statements were actually libelous was a question of law reserved for the judge.⁸⁸ Towers, saying that “no constitutional question of more consequence has been agitated since the [English] Revolution,” argued that this measure was

⁸⁴ *Liversidge v. Anderson*, [1942] A.C. 206 at 261.

⁸⁵ Lord Lester of Herne Hill, “Human Rights in the British Constitution” in Jeffrey Jowell & Dawn Oliver, eds., *The Changing Constitution*, 4th ed. (New York: Oxford University Press, 2000) 89 at 90.

⁸⁶ Thomas Paine, “Common Sense” in *Writings*, ed. by Moncure Daniel Conway (New York: AMS Press, 1967) at 72.

⁸⁷ A.W.B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Toronto: Oxford University Press, 2001) at 32-33 [Simpson].

⁸⁸ See *Dougall*, *supra* note 30, for a later Quebec case discussing this issue.

incompatible with freedom of the press and a free constitution, and that the jury had a duty to decide all questions of law and fact in a criminal trial.⁸⁹

Jean Louis de Lolme's *The Constitution of England*, first published in Amsterdam in 1770 or 1771, devoted two chapters to the liberty of the press.⁹⁰ He maintained that the English Constitution had, in effect, taken the power of censorship from officers of the state and placed it "into the hands of the people at large,"⁹¹ so that there could be no censorship prior to publication, and any attempt to sanction publications had to proceed by way of trial before jury.⁹² At that time, these were understood to be significant protections. In the words of the editor of the 1853 edition, commenting on these passages: "There is nothing more remarkable in the history of the British Constitution than the liberty which has been acquired by the press."⁹³

De Lolme's book was widely read. At least fifteen editions of it were published in England between 1775 and 1853.⁹⁴ De Tocqueville considered him, with Blackstone, one of the two "most esteemed authors who have written upon the English Constitution,"⁹⁵ and his book has recently been described as "far and away the most successful work on the English Constitution [in the late eighteenth and early nineteenth centuries], apart from Blackstone."⁹⁶ Sir William Blackstone's *Commentaries on the Laws of England* supported the positions taken by Towers and De Lolme; Blackstone had maintained that "[t]he liberty of the press is indeed essential to the nature of a free state."⁹⁷

⁸⁹ Joseph Towers, *Observations on the Rights and Duties of Juries, in Trials for Libels: Together with Remarks on the Origin and Nature of the Law of Libels* (London: For J. Debrett, 1784), reprinted in Joseph Towers & Francis Maseres, *An Enquiry and Observations on the Rights and Duty of Juries/Enquiry into the Extent of the Powers of Juries* (New York and London: Garland, 1978).

⁹⁰ Jean Louis de Lolme, *The Constitution of England: or, An account of the English government; in which it is compared, both with the republican form of government, and the other monarchies in Europe*, ed. by John Macgregor (London: Henry G. Bohn, 1853) c. 12, 13.

⁹¹ *Ibid.* at 200.

⁹² *Ibid.* at 203.

⁹³ *Ibid.* at 202..

⁹⁴ Simpson, *supra* note 87, identifies fifteen English editions between 1772 and 1834, and I relied on a later edition, not mentioned by him, published in 1853. French editions were published in Amsterdam and Paris.

⁹⁵ Alexis de Tocqueville, *Democracy in America, 1848*, vol. 2, ed. by Phillips Bradley (New York: Knopf, 1963) at 355.

⁹⁶ *Supra* note 87 at 32.

⁹⁷ Sir William Blackstone, *Commentaries on the Laws of England*, vol. 4, ed. by William G. Hammond (San Francisco: Bancroft-Whitney, 1890) at 151.

There is room to argue over whether these studies of the British Constitution were an accurate description of the system or an idealization.⁹⁸ It is always difficult in law to separate description from advocacy; as in any system that looks to old texts as authority, actors will often bring about change by presenting the changes as a true interpretation of the older texts. What is important for our purposes is that there was an established tradition within the British Empire according to which the Constitution was seen as preserving basic civil liberties.⁹⁹

This tradition was strong in Lower Canada in the decades before the 1837 Rebellions. De Lolme, a lawyer from Geneva whose book was first published in French, was often cited, as was Blackstone.¹⁰⁰ Their doctrines were invoked by parliamentarians at the beginning of the nineteenth century as a way of opposing the measures of the colonial government.¹⁰¹ Long after responsible government was achieved, Quebec jurists in the late nineteenth century continued to maintain that the rights and freedoms inherent in the British Constitutional structure had become part of Quebec law when Quebec became an English colony,¹⁰² and to base claims for provincial autonomy on the argument that the provincial governments had gained their existence and powers in accordance with the British Constitution.¹⁰³ As two nineteenth century authors put it: “With the British Constitution Jean Baptiste was a veritable Oliver Twist. He was not satisfied with the morsels doled out, but ever asked for more.”¹⁰⁴

⁹⁸ Cf. Baron de Montesquieu, *The Spirit of the Laws*, trans. by Thomas Nugent, vol. 1 (New York: Hafner Press, 1959) at 162, ending his influential account of the liberties enjoyed under the British Constitution by writing that: “[i]t is not my business to examine whether the English actually enjoy this liberty or not. Sufficient it is for my purpose to observe that it is established by their laws; and I inquire no further.”

⁹⁹ See Marquis, *supra* note 38; Smith, *supra* note 38; Romney, *supra* note 62.

¹⁰⁰ Smith, *supra* note 38 at 24-25, 27-28.

¹⁰¹ Ouellet, *supra* note 43; Chodos & Hamovitch, *supra* note 43.

¹⁰² Edmond Lareau, *Histoire du droit canadien depuis les origines de la colonie jusqu'à nos jours*, vol. 2, Domination anglaise (Montreal: A. Périard, 1889) at 54-68.

¹⁰³ T.J.J. Loranger, *Lettres sur l'interprétation de la constitution fédérale dite l'Acte de L'Amérique britannique du Nord, 1867* (Quebec: Imprimerie A. Coté et Cie, 1883).

¹⁰⁴ Robina Lizars and Kathleen Macfarlane Lizars, *Humours of '37, grave, gay and grim: rebellion times in the Canadas* (Toronto: W. Briggs; Montreal: C.W.Coates, 1897), using “Jean Baptiste” as a generic French Canadian everyman.

In Lower Canada, the most passionate judicial appeals to British liberties were made by reformers¹⁰⁵ and by judges who made efforts to restrain state power, rather than by advocates of imperial control. The language they used was often similar to the way moderate Americans had appealed to British constitutional rights as a way of opposing oppressive measures of the English crown in the years before the American Revolutionary War.¹⁰⁶

Among the reported libel law cases, the most seemingly fervent expressions of admiration for British constitutional principles are in Charles-Elzéar Mondelet's dissenting opinion in *Gugy v. Maguire*.¹⁰⁷ The appeal turned on a government official's claim that he could refuse to produce crucial evidence under the cloak of executive privilege. One cannot fully convey Mondelet's enthusiastic mixture of passion and sarcasm without quoting him in detail:

I can not, I ought not, for a moment as a judge living and administering justice under constitutional institutions, admit such a monstrous doctrine, a doctrine which prostrates to the ground that liberty, that protection to life, honor, property, and to civil and religious liberty, which this country has so much right to boast of, too valuable to be thus thrown away and scattered to the four winds of Heaven! ... I cannot, I must not assent to it. It is not law, it is unconstitutional, it is tyrannical, it is monstrous; and it must more glaringly appear so, when we come to reflect that an attempt is made to give it currency, and to fasten it on the judges of the land, under constitutional responsible government

In France, the *Charte* of 1814, has had the constitutional effect of effacing, obliterating, nullifying the tyrannical 75th article of the Constitution of the *an VIII*, and it will be seriously contended, that the glorious British Constitution will have less power to secure the rights of the subject, than the *Charte* of 1814, under the French government! Impossible! Impossible! With *Magna Charta* before my eyes, with the working of the incomparable constitution of Britain and our own, with the Imperial Act of 1774, (Quebec Act) as the bulwarks of our civil and political rights to fortify my position, I can never be brought to believe, and much less to concede and proclaim, in a Court of Justice, that as British subjects, we are less free, less secure in the exercise of our rights, than French subjects under the *Charte* of 1814, at the time of the restoration. I never can, and I trust never shall acknowledge as a true one, the paradoxical proposition, that, under the protection of the freest and best constitution in the world, and the most solemn imperial statute guaranteeing our rights ... that it will be in the

¹⁰⁵ See Marquis, *supra* note 38; Smith, *supra* note 38; Romney, *supra* note 62; Jean-Marie Fecteau & Douglas Hay, "Government By Will and Pleasure Instead of By Law": Military Justice and the Legal System in Quebec, 1775-83" in F. Murray Greenwood & Barry Wright, eds., *Canadian State Trials: Law, Politics and Security Measures, 1608-1837* (Toronto: University of Toronto Press, 1996) 129 at 160-61.

¹⁰⁶ On this tradition in American thought, see Clinton Lawrence Rossiter, *The Political Thought of the American Revolution: a revised version of part iii of Seedtime of the Republic* (New York: Harcourt, Brace & World, 1963) at 46; Staughton Lynd, *Intellectual Origins of American Radicalism* (New York: Pantheon Books, 1968) at 25; Arendt, "Revolution," *supra* note 42; Romney, *supra* note 62 at 52-55; Tully, *supra* note 81 at 152-54.

¹⁰⁷ (1863), 11 R.J.R.Q. 240 (Q.B. C.A.).

power of ... any member of the government, to deprive the injured of the evidence which he may adduce, to entitle him legally to a verdict or a judgment.¹⁰⁸

Charles-Elzéar Mondelet's politics before he became a judge had been generally radical, and he had been charged with seditious libel in 1828.¹⁰⁹ He had been defence counsel to accused Patriotes in the aftermath of the rebellions, arguing before the court that they should be treated as political prisoners, and he spent several weeks in prison himself in 1838 without any charges having been laid.¹¹⁰ There is irony in his praise of the guarantees of rights under the glorious and incomparable British Constitution, heightened by the fact that the plaintiff, whose rights against the state he was championing, had fought on the side of the colonial government to suppress the rebellion in 1837.¹¹¹

The career of Judge Rolland, who integrated freedom of the press with traditional French law in the *Gugy v. Hicks* case, was also marked by the rebellions. When the first of the two Lower Canadian rebellions broke out, Judge Rolland was sitting as a member of the judiciary in Montreal. In March of 1838, he had issued a writ of habeas corpus releasing rebels who had been imprisoned under martial law.¹¹² Eight months later, in November, after the second of the rebellions, the governing Special Counsel retroactively suspended habeas corpus in the colony. Two other judges, Phillippe Bedard and Elzéar Panet, held that this suspension was unconstitutional. They issued writs ordering the Sheriff to release prisoners held by the military and a third judge in Trois Rivières followed their lead.¹¹³ Rolland voiced initial approval of what they had done, lauding

¹⁰⁸ *Ibid.* at 244-48.

¹⁰⁹ Pierre-Georges Roy, *Les juges de la Province de Québec* (Quebec: R. Paradis, Imprimeur de Sa Majesté le roi, 1933) at 379.

¹¹⁰ Marc La Terreur, ed., *Dictionary of Canadian Biography*, vol. 10 (Toronto: University of Toronto Press, 1972) s.v. "Mondelet, Charles-Elzéar"; *ibid.* at 379; and Francis-J. Audet, "Les Mondelet" (1938) 3 *Les Cahiers des Dix* 191 [Audet, *Les Mondelet*].

¹¹¹ Pierre-Georges Roy, *Les avocats de la région de Québec* (Lévis: The Quotidien, 1936) at 211.

¹¹² Marc La Terreur, *supra* note 110, s.v. "Jean-Roch Rolland"; Jean-Marie Fecteau, "'The Ultimate Resource': Martial Law and State Repression in Lower Canada, 1837-38" in F. Murray Greenwood & Barry Wright, eds., *Canadian State Trials: Rebellions and Invasions in the Canadas, 1837-39*, vol. 2 (Toronto: University of Toronto Press, 1996) 207 at 219.

¹¹³ Beverley Boissery, *A Deep Sense of Wrong: The Treason, Trials and Transportation to New South Wales of Lower Canadian Rebels After the 1838 Rebellion* (Toronto: Dundurn Press, 1995) at 42-43; M. Francis-J. Audet, *Les juges en chef de la province de Québec, 1764-1924*, (Quebec: L'Action sociale, 1927) at 104-05 [Audet, *Les juges*].

Bedard for his courage and intelligence.¹¹⁴ The government, in a kind of informal reference, privately asked several judges and law officers for their opinions of the Panet-Bedard rulings; Judge Rolland was the only judge consulted who said that Panet and Bedard were right.¹¹⁵ However, the government then suspended the judges who had issued the writs, and Judge Rolland changed his stance. Transferred to Trois Rivières to replace one of the three judges, Judge Rolland rendered a decision upholding the government's suspension of habeas corpus.¹¹⁶ Although Judge Rolland went on to become an appeals court judge, his failure of courage "permanently damaged his reputation in liberal *Canadien* circles."¹¹⁷

The praise for British constitutional rights in the decisions of people like Judges Mondelet and Rolland was more than pious rhetoric; they were statements of principle from men whose lives had been caught up in the fight over such ideals and who, each in their own way, had paid a price because of it. Their convictions had to be set out in the language of British constitutionalism, despite their first-hand knowledge of the limitations of that system in practice, because it was the most effective judicial language available in a British court for expressing those principles.

The rebellions in Upper and Lower Canada were minor precursors to a wave of rebellions that swept through Europe in the mid-nineteenth century. In 1848, the year that Judge Rolland rendered his decision in *Gugy*, there was a worker's rebellion in France, democratic revolutions in the German states, and rebellions in Italy, Bohemia, Hungary, Schleswig-Holstein, and Denmark. 1848 was also a year of constitution-making. Constitutions were adopted in Prussia, in the new federal union of Switzerland, and in the Italian state of Piedmont; Austria would get a constitution a year later, in 1849.¹¹⁸ Progressive or radical social change seemed, briefly, to be imminent: "Heaven on earth," wrote one historian,

¹¹⁴ Boissery, *ibid.*; F. Murray Greenwood, "The Montreal Court Martial, 1838-39: Legal and Constitutional Reflections" in Greenwood & Wright, *supra* note 112 at 325.

¹¹⁵ Fecteau, *supra* note 112 at 230.

¹¹⁶ Greenwood, "The Montreal Court Martial, 1838-9: Legal and Constitutional Reflections" in Greenwood & Wright, *supra* note 112 at 109; Audet, *Les juges*, *supra* note 113 at 111; Edmond Lareau, *Histoire du droit canadien depuis les origines de la colonie jusqu'à nos jours*, vol. 1, Domination française (Montreal: A. Périard, 1889) at 309-10.

¹¹⁷ Greenwood, *ibid.*

¹¹⁸ See E. J. Hobsbawm, *The Age of Revolution: 1789-1848* (New York: Vintage Books, 1996); entries for the years 1848-49 in Lawrence Urdang, ed., *The Timetables of American History* (New York: Simon and Schuster, 1981), and Judah Gribetz, Edward L. Greenstein & Regina Stein, *The Timetables of Jewish History: A Chronology of the Most Important People and Events in Jewish History* (New York: Simon and Schuster, 1993).

“seemed nearer in 1848 than at any other moment in modern history.”¹¹⁹ For the generations that lived during the Canadian rebellions and the revolutionary events in Europe, civil and constitutional rights had a tangible immediacy.

As the people who lived through the 1830s and 1840s retired and passed away, discussions about constitutional rights lost that immediacy. Quebec barristers continued to make arguments based on the British Constitution into the twentieth century,¹²⁰ but they were made in a more conservative social and political context and no longer in a spirit of reform. Concurrently, developments in jurisprudence led to a judicial style that had little room for the principle-based reasoning of Judges Rolland and Mondelet.

In constitutional law, Canadian judges in the nineteenth century had grounded their findings “in the light of the understandings and context of Confederation, and all wrote with passion and intensity about Canada.”¹²¹ Partly under the influence of decisions rendered in appeals to the Privy Council, this approach was supplanted as the twentieth century began with a more formalistic, positivist approach, “a way of talking that was empty and impoverished.”¹²²

A similar trend can be seen in other areas of law. Several legal historians have described a change that took place in Quebec legal discourse at the end of the nineteenth century. Where nineteenth-century jurists cited a diversity of legal sources from many different countries and legal systems, and attempted to elaborate underlying universal rules, the lawyers of the early twentieth century emphasized a hierarchy of sources, giving supremacy to the will of the local legislature.¹²³ The adoption of the *Civil Code* in Quebec may have played a part, but similar trends can be seen across North America. A parallel change is said to have occurred in

¹¹⁹ A.J.P. Taylor, *Europe: Grandeur and Decline* (Harmondsworth: Penguin Books, 1967) at 27.

¹²⁰ See e.g. the defence argument in *Ortenberg*, 1913, *supra* note 40, that “La croyance au Christ fait partie essentielle de la Constitution anglaise.” Sommaire de la plaidorie et des notes de J.E. Bedard, Pour les défendeurs Plamondon & Leduc (June 1913) Canadian Jewish Congress National Archives, Montreal (MC16, S.W. Jacobs papers, Box 2, file 1).

¹²¹ Richard Risk, “Constitutional Thought in the Late Nineteenth Century” (1991) 20 Man. L.J. 196 at 198.

¹²² *Ibid.* at 203.

¹²³ David Howe, “From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929” (1987) 32 McGill L.J. 523; Sylvio Normand, “Une culture en redéfinition: la culture juridique québécoise durant la seconde moitié du XIXe siècle” in Bjarne Melkevik, ed., *Transformation de la culture juridique québécoise* (Saint-Nicolas: L’Université Laval, 1998) 221.

Ontario,¹²⁴ and both appear to track a similar transition that occurred in the United States at the time of the Civil War, as the “Grand Style” of judging, characterized by judicial creativity, an appeal to universal principles, and a willingness to canvas civil law as well as common law doctrine, gave way to a more positivist method of deciding legal cases.¹²⁵

This transition played itself out in Quebec decisions on defamation. As the twentieth century began, the manner in which the decisions were framed began to change. The older decisions had spoken of the need to integrate basic principles of the unwritten British constitution into Quebec civil law and treated the decisions of foreign jurisdictions, whether British, American, or French, as persuasive *raison écrite* only. This approach had made necessary a certain amount of judicial creativity, rewriting the law inherited from an absolute monarchy to make it conform to new constitutional principles. In the early twentieth century, there was no longer any room for such an approach. Judges began to see the issue as an either/or choice between English and French law, with no room for local innovation.

C. *The Impact of Positivism and Nationalism, and the Sources of Qualified and Absolute Privilege*

Defamation cases from Quebec reached the Supreme Court of Canada twice in the first two decades of the twentieth century. Both cases spoke of the application of English libel law, along with, or instead of, English constitutional principles. They recognized that British principles of libel law had been modified by Quebec usage, but the emphasis was shifting, at least on the surface, to a more faithful adoption of principles from outside Quebec.

In the first such case, *Gazette Printing Company v. Shallow*, which came before the Court in 1908, Justice Girouard stated that “libel by newspapers ... should be judged according to the rules of the common law of England ... *subject, of course, to such modifications as the usage of our people have sanctioned.*”¹²⁶ Justice Girouard, writing these comments in a dissenting opinion, was the only judge to canvas the case law from Quebec. The majority decision, however, did not disagree with him on this point, simply stating that both sides conceded that under the law of Quebec, “the

¹²⁴ G. Blaine Baker, “The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire” (1985) 3 L.H.R. 219.

¹²⁵ Grant Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977) at 19-67.

¹²⁶ *Gazette Printing*, *supra* note 8 at 345 [emphasis added].

principles applicable to the particular question in controversy in this appeal do not differ from the principles of the common law,¹²⁷ and proceeding to decide the case without any reference to Quebec jurisprudence.

In *Price v. Chicoutimi Pulp Inc.*,¹²⁸ Supreme Court Justice Brodeur affirmed the distinction in law between private and public individuals, and that constitutional protections applied to the latter:

In the beginning, under old French law ... subjects of the realm were forbidden from publishing libels against the King, his counsellors, magistrates and officers or against the public administration and the government

This statute was the law of Canada at the time of the cession of the country. It was never formally revoked here, to my knowledge. But the establishment of representative and democratic institutions as part of our public law implicitly had the effect of putting to an end this vestige of an absolute monarchy. Public men, in accepting to be representatives of the people, submit themselves to the criticism of the public and questions of public interest must necessarily be debated so that the people, who are now masters of their own destinies, can judge with full knowledge of the case.

I believe therefore that we cannot find a more sure guide to this subject than English law¹²⁹

Justice Brodeur's judgment then goes on to canvas the opinions of textbook writers in England, the United States, and France as well as case law from Quebec, all to the effect that a qualified privilege provided a valid defence only if the comments made were true.

All four of the other judges proceeded to decide the issue on the basis of common law principles. Two of them, Justice Duff concurring with the majority and Justice Anglin in dissent, made it clear that English legal principles came into play only because the public interest was involved. Justice Anglin stated that "under Quebec law... the truth of the alleged libel ... should be deemed a defence only if the publication is also alleged and proved to have been made in the public interest and concerning matters of public moment,"¹³⁰ distinguishing Quebec law from the common law, under which truth is always a defence. Accordingly, a majority of the justices accepted that a different standard of liability applied when the public interest was involved, and none of the justices disagreed with this point. All of them saw the issue as being whether English or French law applied, in

¹²⁷ *Ibid.* at 359.

¹²⁸ See *Price*, *supra* note 28.

¹²⁹ *Ibid.* at 211-12 [translated by author].

¹³⁰ *Ibid.* at 202-03.

contrast to the more principle-based jurisprudence of the nineteenth-century judges.

The lower courts took up the newer formalist approach. Exemplifying the more technical, choice-of-law analysis, in 1906 the court in *Marcotte v. Bolduc*¹³¹ considered allegations that a doctor's negligence or incompetence had caused twenty-five people to die of diphtheria. According to Justice Langelier,

even though an action for injury done to another is governed by French rather than English law, we must turn to English law when it is a question of the justification for a defamation published in a newspaper article. Freedom of the press was unknown in the old French law, but it is a basic principle of our present-day public law, which is English law. Accordingly it is in English law that one must look for the rules that govern freedom of the press in matters of defamation.¹³²

No Quebec cases were cited for this argument; the decision refers exclusively to English precedents, with over a third of the reasons for the decision consisting of quotations from the English Court of Appeal.

In the twentieth century, most of the discussion over the national origins of libel law arose in cases concerning privilege for courtroom testimony and statements written in court pleadings. In English law, such statements are absolutely privileged; a person who had been defamed by a witness could not sue even if the statements were made with malice. By the first decade of the twentieth century, some Quebec judges had held that English law applied to protect such statements. Court process was a part of the administration of justice, which was governed by English practice and principles, and so the protections allowing witnesses and litigants to speak freely had to be governed by English rules.¹³³ By contrast, other cases drawing on French sources held that no privilege was absolute. They maintained that the protection for defamatory remarks contained in court pleadings applied only if the remarks were true and necessary to the argument of the case; if not, no privilege applied.¹³⁴

In the 1912 case of *Carrington v. Russell*,¹³⁵ the court avoided either approach. Justice Laurendeau held that English law had no application, but did not refer to the French sources. Instead, he held that courtroom

¹³¹ (1906), 30 C.S. 222 [*Marcotte*].

¹³² *Ibid.* at 225 [translated by author].

¹³³ See Walton, *supra* note 80 at 42; *Wilkins v. Major* (1902), 22 C.S. 264.

¹³⁴ *Pacaud v. Price* (1870), 15 L.C. J. 281 (B.R.) [*Pacaud*]; *Hall v. Le Maire de Montréal* (1883), 27 L.C. Jur. 129 (B.R.), *aff'd* (1884), 12 S.C.R. 74.

¹³⁵ (1912), 42 C.S. 71 [*Carrington*].

testimony was governed by the *Code of Civil Procedure*¹³⁶ and the basic principles concerning fault set out in the *Civil Code*. Because, he reasoned, testifying in court was a duty imposed by law, a witness was immune from suit for statements made in good faith. Differing from contemporary English law, Justice Laurendeau held that a witness could be liable if the statements were made with malice and were irrelevant to the subject of the trial.

The editor of the case reporter series in which *Carrington* was printed took exception to Justice Laurendeau's reasoning and attached to the decision a detailed annotation arguing for the application of English law. He maintained that constitutional, administrative, and political law are all part of public law, which comes from England, and that individual rights emerge from the nature of being British subjects. Accordingly, in the absence of local legislation, judges should look to English common law to determine the nature and extent of such rights.¹³⁷

The editor went on to argue that:

our courts are essentially British courts, they are one of the branches of government, they have been a British institution since the change in sovereignty was introduced to this country. It follows, from this, that those who play a role in the courts, whether as magistrate, as lawyer, as clerk, as a party or a witness, must all enjoy the privileges and immunities that are guaranteed by English public law.¹³⁸

Arguments similar to those in the annotation were urged on the court by both sides in *Ortenberg v. Plamondon* the following year.¹³⁹ The case was probably the most controversial and well-publicized libel trial in the province. The action was brought by a member of the Jewish community of Quebec City against a notary who had given an anti-Semitic speech that had been followed by acts of violence and a boycott of Jewish-owned businesses. Counsel for the defence argued that British law should apply because the defendant's rights of free speech were involved. The plaintiff, while asserting that on this issue there was no difference between the two legal systems, said that British law would apply because the

¹³⁶ *Code of Civil Procedure of the Province of Quebec*, S.Q. 1897, c. 48. See Martin Boodman & John E.C. Brierley, *Quebec Civil Law: an Introduction to Quebec Private Law* (Toronto: Emond Montgomery Publications, 1993) at 52.

¹³⁷ *Ibid.* at 71-72.

¹³⁸ *Ibid.* at 72-73 [translated by author].

¹³⁹ *Ortenberg*, 1913, *supra* note 40.

plaintiff's rights as a citizen were at stake.¹⁴⁰ The judges, on the other hand, saw no need to decide which source of law should apply. The trial judge and the appellate court based their decisions on both English and French authorities, without giving greater weight to one or the other. The appellate court decisions, which found in favour of the plaintiff, focussed on private law rather than constitutional or public law issues.¹⁴¹

The position that had been taken in the editor's *Carrington* annotation was, nevertheless, followed in the 1931 case of *Desrochers v. College des Médecins*.¹⁴² Justice Denis held that the law governing libel was found in article 1053 of the *Civil Code* and in old French law, as it existed at the time Quebec was ceded to the British Empire. However, he found article 1053 to be too general to be of much assistance, and that the old French law was in this respect out of touch with the changes in social and moral conditions that had taken place over the years. Accordingly, he stated:

... faced with this difficulty, the tribunal has two options: to innovate, that is to create rules of law that must govern the case before us, or else to borrow from foreign legislation and, by analogy, from rules whose wisdom and justice has been tested by time and experience. Between these two alternatives the tribunal opts, without hesitation, for the second.

Considering that: amongst foreign legal systems, English law is perhaps the most complete and most perfect in matters of libel, and the one that adapts best to the social and moral conditions of our province; and that, if one is to adopt foreign law, English law is surely the one to which we must look to first ...¹⁴³

Citing cases that held that it was permissible to refer to English law as *raison écrite* in cases where it did not differ from the law of Quebec, and observing that Quebec cases had always recognized the privileges that applied in English libel law, the judge exonerated the defendant by saying

¹⁴⁰ The papers of plaintiff's counsel Samuel Jacobs in the collection of the Canadian Jewish Congress National Archives, Montreal, include the pleadings and memoranda of argument in the lower court. According to the defence, "...il est impossible d'appliquer simplement notre droit civil sans tenir compte des droits que Plamondon avait de discuter publiquement ces matières, droits qui sont inhérents à la qualité de sujet britannique." Plaidoirie de Mtre. J.A. Lane, Conseil de Défendeur [n.d.], Canadian Jewish Congress National Archives, Montreal (S.W. Jacobs Papers, MC 16, Box 2, file 1). According to the plaintiff, "s'il y a des différences entre le droit anglais et le droit français, elle devrait être décidée je crois selon le droit anglais et ceci parce qu'il s'agit surtout du droit du citoyeneté, d'atteinte au droit des gens, et que dans une cause semblable les décisions anglaises doivent nous gouverner; mais je crois qu'il n'y a pas au fond de différences..." Plaidoirie de Mtre. Couture en réplique, (26 May 1913) Canadian Jewish Congress National Archives, Montreal (S.W. Jacobs Papers, MC 16, Box 2, file 1).

¹⁴¹ (1914), 24 B.R. 69, 385 [Ortenberg, 1914].

¹⁴² (1931), 69 C.S. 82 [Desrochers].

¹⁴³ *Ibid.* at 93 [translated by author].

that the defamatory remarks were privileged because the defendants had published them pursuant to a statutory duty.

English law of privilege was applied by a five-member panel of the Quebec Court of Appeal, with varying degrees of enthusiasm, in *Langelier v. Giroux*,¹⁴⁴ an extreme example of the mechanical, choice-of-law approach. The case turned on whether the privilege for statements made in courtroom testimony was absolute, as it was in English law, or whether it was a qualified privilege that could be defeated by proof of malice. The court held that the privilege protecting the testimony of a witness at trial was governed, as a matter of public law, by the common law.¹⁴⁵ However, they also held that it was the common law as it existed in 1763, when Quebec first became subject to British law, which should apply. At that time, they maintained, the privilege had not yet become absolute, and so the suit was tenable in law.¹⁴⁶

Three of the judges gave additional reasons: Justice Dorion stated that the English law of 1763 was directly applicable; Justice Rivard agreed but gave more emphasis to placing English law principles in the context of article 1053 and mentioned that French law led to the same result; Justice Letourneau stressed that the English law had to be subordinate to the *Civil Code* and that its role was to serve as a guide to the application of article 1053.¹⁴⁷ Nonetheless, the *arrêt* that spoke for the full court explicitly stated that it was the English law of 1763 that governed.¹⁴⁸ Where in *Desrochers* the court had advocated turning to English law because the law inherited from the time of the French monarchy was out of touch with changing social and moral conditions, the Court here chose as an alternative an English law that, if it ever existed, had been frozen in time for almost two centuries.

Avoiding explicit judicial law-making is an aspect of legal formalism; the judge should apply legal rules, not make up new ones.

¹⁴⁴ (1931), 52 B.R. 113 [*Langelier*].

¹⁴⁵ *Ibid.* at 113-15.

¹⁴⁶ *Ibid.* at 114-15. The contention that the privilege was only a qualified one in 1763 England is debatable. In *The King v. Skinner* (1772), 98 E.R. 529 at 530 (K.B.), Lord Mansfield stated that the privilege existed even if the witness had acted in bad faith, a defining characteristic of absolute privilege, and his reasons for judgment indicated that there were no earlier precedents to the contrary. By the late nineteenth century, British judges described the privilege as having been absolute since time immemorial: *Munster v. Lamb* (1883), L.R. 11 Q.B. 588 and *Dawkins v. Lord Rokeby* (1873), L.R. 8 Q.B. 255, *aff'd* (1875), L.R. 7 H.L. 744.

¹⁴⁷ *Langelier*, *ibid.* at 129.

¹⁴⁸ A similar position was taken in *Maillé v. La Compagnie de Publication du Canada* (1913), 43 C.S. 397, denying the applicability of a privilege created in England by legislation passed after 1763.

However, another aspect of formalism is the importance attached to consistency and to developing, or preserving, the law as a coherent legal system. The idea that the definition of a wrong should be interpreted according to one set of rules while the defences should be based on another avoids the need to innovate, but it leads to incoherence in the body of law taken as a whole. This was anathema to some who saw uniformity of the civil law system as an important value.¹⁴⁹

The theme of the integrity of the civil law system is found in the writing of both English and French jurists,¹⁵⁰ and is often viewed in terms of a struggle between legal academics, who see the bigger picture, and practitioners, who seize whatever authorities they can find to support their position.¹⁵¹ But it has also been greatly nourished by the connection drawn by many writers between the civil law and the preservation of Quebec's traditional French culture and identity, a theme that resonated particularly strongly in the years between the two World Wars.¹⁵² Law increasingly came to be seen, at least by jurists, as a cornerstone of that identity, as "l'expression naturelle des moeurs, des coutumes, de la vie même d'un peuple."¹⁵³ Where lawyers and judges in the late nineteenth century tended to emphasize similarities between the legal systems, stressing that the rules of both take "their origin in reason and the necessities of the position"¹⁵⁴ an important group of Quebec legalists in the interwar period were more inclined to stress the differences, seeing each legal system as a manifestation of a unique national spirit or genius that should be kept pure.¹⁵⁵ Even those who advocated borrowing from English precedents in order to modernize the old law still could feel compelled to describe the

¹⁴⁹ Although Pierre-Basile Mignault, one of the most prominent advocates of the need to maintain the integrity of the civil law, was more accepting of the application of English precedents with respect to the freedom of the press against libel claims than he was with respect to other areas of the law. See P.-B. Mignault, "L'Avenir de notre droit civil" (1922) 1 R. du D. 56 at 64 [Mignault].

¹⁵⁰ For an English language condemnation of the "infiltration" of English law, see Jack S. Bobrove, "The Law of Defamation in the Province of Quebec" (B.C.L. Thesis, McGill University, 1953) [unpublished] at 8.

¹⁵¹ *Ibid.* at 124; Mignault, *supra* note 149 and accompanying text.

¹⁵² Nicholas Kasirer & Jean-Maurice Brisson, "The Married Woman in Ascendance, The Mother Country in Retreat: From Legal Colonialism to Legal Nationalism In Quebec Matrimonial Law Reform, (1866-1991)" University of Manitoba Canadian Legal History Project Working Paper Series (Winnipeg: University of Manitoba, 1993).

¹⁵³ Marechal Nantel, "Autour d'un décision judiciaire sur la langue française en Canada" (1941) 6 Les Cahiers des Dix 145 at 145.

¹⁵⁴ As counsel put it in *Pacaud*, *supra* note 134 at 293.

¹⁵⁵ Normand, *supra* note 123; Lionel Groulx, *Histoire du Canada Français depuis la découverte*, t. 2, Le Régime britannique au Canada, 4th ed., (Montreal: Fides, 1960) at 318.

influence of the common law with metaphors of disease and military invasion, as a gangrene or an insidious infiltration.¹⁵⁶

In the 1830s, French-Canadian reformers had demanded the adoption of English public law in order to further colonial self-government.¹⁵⁷ In the 1930s, with the battle for responsible government long since won, the adoption of English public law was itself seen by a significant number of jurists as a form of cultural colonialism.

Adjutor Rivard, the judge who had been less enthusiastic about applying English law principles than any of the other members of the panel in *Langelier*, was one of those who believed in keeping the stream of the civil law pure, a belief that was intertwined with his devotion to traditional Quebec culture. He had written several popular books romanticizing the old rural life of the province,¹⁵⁸ and is perhaps best remembered today for his pioneering linguistic studies of the French dialects spoken in Quebec.¹⁵⁹ He valued “the doctrine of our law, natural, healthy, logical, inherited from the old French law and supple enough to adapt to the new conditions of our era, and which we must defend against the introduction of foreign elements.”¹⁶⁰ As he had explained in 1925:

If our wariness of what comes from *case law* [English law] seems exaggerated [to an observer from France], is it not justified by our particular situation? It is important from all points of view, religious, national, social and economic, to assure that our Province maintain the integrity of our French civil law; and, because of our milieu, the least concession could be the beginning of defeat.¹⁶¹

Justice Rivard first gave special attention to libel law and freedom of the press in an extended essay, “De la liberté de la presse,” presented to the Royal Society of Canada in 1923.¹⁶² In it, he argued that limitations on

¹⁵⁶ Victor Morin, a Montreal notary, began an article that advocated the adoption of a variety of English law principles concerning secured loan transactions by warning against the anglicization of the civil law, comparing the spread of common law approaches to the progress of gangrene and describing it as an “infiltration insidieuse,” a “pénétration constante et pernicieuse.” See Victor Morin, “L’Anglicisation de notre droit civil” (1937) 40 R. du N. 145.

¹⁵⁷ See Resolutions, *supra* note 41.

¹⁵⁸ Adjutor Rivard, *Chez Nous* (Our Old Home), trans. by W. H. Blake (Toronto: McClelland & Stewart, 1924); Adjutor Rivard, *Chez Nos Gens* (Quebec: Edition de l’Action Sociale Catholique, 1918); and various essays in Adjutor Rivard, *Contes et propos divers* (Quebec: Garneau, 1944).

¹⁵⁹ See e.g. Adjutor Rivard, *Études sur les parlers de France au Canada* (Quebec: J.-P. Garneau, 1914).

¹⁶⁰ Rivard, “De la liberté de la presse,” *supra* note 28 at 101 [translated by author].

¹⁶¹ Adjutor Rivard, “Bibliographie” (1925) 3 R. du D. 233 at 235 [translated by author].

¹⁶² Rivard, “De la liberté de la presse,” *supra* note 28.

freedom of the press were the price that had to be paid to maintain social order.¹⁶³ He regretted that prior censorship of newspapers no longer existed, considering that it was better to prevent harm than to punish it after the fact; for him, censorship was legitimate and it was only particular uses of it that could reasonably be disputed.¹⁶⁴ He maintained that the press should not have any special privileges and that a strict liability standard should continue to apply to defamatory statements made in newspaper articles. Good faith and a belief that the statements were true should never be an excuse, as the journalist always had the option of remaining silent.¹⁶⁵

Justice Rivard found it regrettable that Quebec jurists often referred to the English law of privilege. Instead, for him, it was preferable to argue that the existence of responsible government created a situation in which the rational application of civil law principles logically led to the same privileges. A consideration of the social conditions of the province, the character of its public institutions, and the political constitution of the country gives rise to the same privileges as in English law without need for explicit borrowing. The privileges come from public policy, not public law. As he explained, “*nôtre droit reste intact.*”¹⁶⁶

In some respects, his position was closer to the judges of the nineteenth century than to those of the first decades of the twentieth. Like Judge Rolland, he chose to adapt the civil law to a democratic polity rather than borrow doctrine from the common law. The difference was that the older judges made decisions that advanced a liberal agenda, while Justice Rivard was conservative, resisting any further changes to the law.

Perhaps out of a spirit of judicial collegiality, Justice Rivard’s concurring decision in *Langelier* had not fully reflected the stance he had taken earlier in his writing. However, in a series of cases that followed *Langelier*, he strengthened his stand, arguing that the various privileges of English libel law should be grounded in the *Civil Code* without need to refer to English sources. In *Duhaimé v. Talbot*, he argued that “the doctrine on this point [privilege] is known. It flows entirely from article 1053 of the *Civil Code*. Our borrowings from the English law of the expressions *absolute privilege* and *qualified privilege* change nothing; they are the *immunité absolue* and *immunité relative* known in French law.”¹⁶⁷ Two years later, in *Corporation du Village de St.-Félicien v. Tessier*, he argued that

¹⁶³ *Ibid.* at 57.

¹⁶⁴ *Ibid.* at 46-47.

¹⁶⁵ *Ibid.* at 65ff.

¹⁶⁶ *Ibid.* at 59-60, 80-83.

¹⁶⁷ (1937), [1938] 64 B.R. 386 at 390 [translated by author].

it is article 1053 of our Civil Code and the doctrine of fault expressed in this article that determines responsibility in cases of defamation. We have no need to borrow anything, in that respect, from English law. In any event, English and French law in such cases hardly differ in their essence. Whether one speaks of “absolute privilege” or of immunity, of “qualified privilege” or of justification and relative immunity, so long as one takes into account the special situations created by public law, one arrives at the same practical results.¹⁶⁸

Justice Rivard never persuaded enough of the other judges on the panels on which he sat to form a majority with him on this point; they either disagreed with him or did not address the issue of sources of law at all. Nonetheless, his opinion reflected a growing concern with the preservation of the integrity of the civil law as a cohesive system, one threatened by common law borrowings.

Echoing Justice Rivard, in the 1943 case of *Houde v. Benoit*,¹⁶⁹ the two judges on the panel who referred to the source of the concept of privilege stressed the pre-eminence of the *Civil Code*. According to Justice Bernard Bissonnette, “[t]he action in matters of libel and defamation rests on article 1053 of the *Civil Code*. It originates in French law and if, on many occasions, the courts have particularized this doctrine by drawing on English law, it is because English law does not differ from our old law.”¹⁷⁰ Justice St-Jacques made a similar point.¹⁷¹

Justices Rivard and Bissonnette’s opinions are sometimes taken to have settled the matter. Still, their sentiments never commanded a majority of the judges on the Court of Appeal and the rule that the English law of 1763 was the one that applied to privileges for courtroom testimony in Quebec persisted into the 1960s,¹⁷² until the court in *Langlois v. Drapeau* found that article 1053 pre-empted the application of public law principles.¹⁷³

There is little mention of the issue after *Langlois* in 1962. The jurisprudence had by then elaborated these principles until most of the important practical questions were answered. The influence of the English law became well enough entrenched in Quebec law that their sources were

¹⁶⁸ [1939] 67 B.R. 456 at 458 [translated by author].

¹⁶⁹ [1943] B.R. 713.

¹⁷⁰ *Ibid.* at 729 [translated by author].

¹⁷¹ *Ibid.*

¹⁷² *Jean Drapeau c. Albert Langlois et autres*, [1960] R.L. 209 at 226 [*Langlois*, 1960]; *Desmarchais v. Morin et autres*, [1961] C.S. 465 [*Desmarchais*].

¹⁷³ [1962] B.R. 277 at 283 [*Langlois*, 1962].

no longer an issue.¹⁷⁴ The English defence of fair comment, or *commentaire loyal*, was adopted with minor variations.¹⁷⁵ The contemporary textbook position is that references to English law are unnecessary because there is already a large body of Quebec cases that have addressed the issues and because a reasoned application of the general principles of the *Civil Code* can lead to the same immunities and privileges as the common law without the historical anachronisms that are attached to them in English libel law.¹⁷⁶

D. *The Charter Era*

In 1975, Quebec's *Charter of Human Rights and Freedoms* was enacted. It declared freedom of opinion and freedom of expression to be fundamental rights.¹⁷⁷ It also affirmed that "every person has a right to the safeguard of his dignity, honour and reputation"¹⁷⁸ and that "every person has a right to respect for his private life."¹⁷⁹ In cases of intentional and unlawful interference with a Charter right, the Charter authorizes an award of exemplary damages.¹⁸⁰ Christine Bissonnette, in her 1983 Masters thesis on Quebec's law of defamation, maintained that defamation is grounded in the Quebec *Charter*, balancing the competing rights to dignity of the person and freedom of expression.¹⁸¹ Similarly, in his dissenting opinion in *Snyder v. The Montreal Gazette*,¹⁸² Justice Lamer argued that *Charter* rights to freedom of expression should modify Quebec libel law by limiting the amount of damage awards that would be otherwise payable in a defamation lawsuit.

Bissonnette's suggestion has been followed in recent cases. The legal analyses in decided cases often begin with a statement of *Charter*

¹⁷⁴ For a contemporary assessment of the influence of English law, see Vincent Brousseau-Pouliot, "La Diffamation Médiatique" (2001) 15 R.J.E.U.L. 161 at 166-67.

¹⁷⁵ For a comparison of the fair comment defence in civil and common law, see *Bertrand c. Proulx*, [2002] R.J.Q. 1741 at 1753 [*Bertrand*].

¹⁷⁶ Jean-Louis Baudouin & Patrice Deslauriers, *La Responsabilité Civile*, 6th ed. (Quebec: Éditions Yvon Blais, 2003) at paras. 226-27, 272-78 [Baudouin & Deslauriers].

¹⁷⁷ *Supra* note 7 at art. 3.

¹⁷⁸ *Ibid.* at art. 4.

¹⁷⁹ *Ibid.* at art. 5.

¹⁸⁰ *Ibid.* at art. 49.

¹⁸¹ Christine Bissonnette, *La Diffamation Civile en Droit Québécois* (LL.M. Thesis, Université de Montréal, 1983) [unpublished] at 24-30.

¹⁸² (1988), 49 D.L.R. (4th) 17 at 28

rights;¹⁸³ the standard of care has been modified to be more compatible with freedom of expression and the *Charter* has been invoked to award exemplary damages in a libel case.¹⁸⁴

The change in the standard of care occurred in the 1994 case of *Société Radio-Canada c. Radio Sept-Iles Inc.*¹⁸⁵ In a radical departure from past precedent, the Court of Appeal brought the standard of care that applies to a journalist in a libel lawsuit close to that of the American *Sullivan* rules. Prior to this case, as in the common law, most Quebec authorities supported the proposition that any false statement that hurt a person's reputation would lead to liability. In *Radio Sept-Iles*, however, the Court of Appeal held that journalists should instead be held to the same standard of responsibility as other professionals. Publication of false information should ground liability only if the person who published it was at fault, and fault should be determined according to the standard of what a reasonable journalist would have done. If journalists take normal and reasonable care in their research, and the matter is one of public interest, they are not liable even if the statements made later turn out to have been false.

Justice Le Bel, who was on the Court of Appeal for the *Radio Sept-Iles* decision, had occasion to expand on his views in the recent Supreme Court case of *Prud'homme c. Prud'homme*,¹⁸⁶ where he and Justice L'Heureux-Dubé pushed the civil law remedy for defamation even further from the doctrines of the common law. They affirmed that the law of defamation was grounded in Quebec's *Charter* as well as in the *Civil Code* and that the standard of care was one of fault, rather than the strict liability of the common law.¹⁸⁷ They made it clear that the fault standard applied to everyone, not just to journalists, and that under the *Civil Code* it is presumed that defamatory remarks were made in good faith unless it is proved otherwise.¹⁸⁸ Fault is determined according to what a reasonable person would have said in the circumstances. In deciding what is reasonable, the court can consider whether the individual acted with malice;

¹⁸³ As in *Guitouni c. Société Radio-Canada*, [2000] R.J.Q. 2889 at 2894-95, varied on appeal, [2002] R.J.Q. 2691; *Gervais c. Bouffard*, [2001] R.J.Q. 1065; *Bertrand*, *supra* note 175 at 1749; *Michaud c. Angenot*, [2002] R.J.Q. 1771 at 1776; *Champagne c. CEGEP de Jonquière*, [1997] R.J.Q. 2395.

¹⁸⁴ *R. (H.) c. B. (G.)*, [1998] R.J.Q. 3065 at 3081

¹⁸⁵ *Radio Sept-Iles*, *supra* note 27 at 43-81, taking up arguments in Vallières, *supra* note 45.

¹⁸⁶ [2002] 4 S.C.R. 663 [*Prud'homme*].

¹⁸⁷ *Ibid.* at 688, 694-95, 698.

¹⁸⁸ *Ibid.* at 694-95.

the degree to which the individual checked the facts before they spoke;¹⁸⁹ as well as the nature of the forum, the time, and the opportunity the individual had to tell the full story.¹⁹⁰

The major conceptual innovation brought about by *Prud'homme* was the virtual elimination of fair comment and qualified privilege as distinct defences. In the view of the Court, these doctrines are useful when the ordinary standard is one of strict liability because they are needed in order to permit a more lenient standard of liability to apply to certain comments made in the public interest. Privilege allows certain statements to escape liability as long as they are made without malice; fair comment allows one to express defamatory comments on matters of public interest as long as the underlying facts are true. Nevertheless, if all defamatory comments are evaluated according to a standard of reasonableness, the special defences are unnecessary and redundant because the leeway they allow in special cases is already built into the general liability standard. The question of whether the comment was a fair one in the public interest, for example, is treated as one of the considerations in the determination of whether a reasonable person would have made the statement, rather than as a separate defence.¹⁹¹ What would be protected by fair comment in the common law provinces would still probably not give rise to liability, but there is no longer any defence of fair comment as such in the civil law.

Although the Court did not refer to American jurisprudence, its reasoning followed that of the *American Restatement of Torts*. The *Second Restatement* deleted the sections on fair comment found in the *First Restatement* because they were considered superfluous after strict liability gave way to a negligence standard.¹⁹² The *Second Restatement* also expressed the opinion that the fault standard would likely make the common law privileges redundant.¹⁹³

By stating that the reasonableness of a statement depends on its context, the Supreme Court left open the possibility that journalists may be treated somewhat differently than other libel defendants. Lower court decisions had recognized that freedom of expression and of the press are the rights of everyone, not just professional journalists. Nonetheless, according to some decisions, because journalists have a duty to inform the

¹⁸⁹ *Ibid.* at 688, 698.

¹⁹⁰ *Ibid.* at 703, 708-09.

¹⁹¹ *Ibid.* at 690-99.

¹⁹² *Restatement, supra* note 17 at § 566, 606-10.

¹⁹³ *Ibid.* at §580(1).

public,¹⁹⁴ it is easier for them than for others to argue that their statements were made in the public interest. Also, in judging whether they are acting reasonably, the courts should take into account the realities and inherent difficulties of being a journalist.¹⁹⁵

This does not mean that a defendant in a libel lawsuit is always better off in Quebec than in the common law provinces. It remains the case that even truthful statements can lead to liability in civil law if they injure a person's reputation and it is not in the public interest to disclose them.¹⁹⁶ Quebec has in the past been more receptive to group libel claims (that is, claims brought by individuals for allegations concerning the group of which they are a member) than have been the common law provinces,¹⁹⁷ and the Quebec Court of Appeal has recently authorized a class action for group defamation.¹⁹⁸ As well, it has been maintained that a public figure has a right to greater monetary damages because his or her reputation is more valuable.¹⁹⁹ However, in changing the standard of liability for defamation from one of strict liability for falsehood to one of negligence, the Quebec courts have made a major change favouring freedom of expression that the common law courts in Canada have so far refused to make.

More than a century earlier, in the *Trudel* case, it had been held that liberty of the press "is part of our law, as necessarily incident to our political constitution, which itself is surely part of our law, and without this liberty and this law we could not use our constitution."²⁰⁰ Similar arguments are used in Quebec jurisprudence now:

¹⁹⁴ *Barriere c. Fillion* [1999] R.J.Q. 1127 at 1151

¹⁹⁵ *Beaudoin c. la Presse Ltée*, [1998] R.J.Q. 204 at 212 (C.S.) [*Beaudoin*].

¹⁹⁶ *Radio Sept-Iles*, *supra* note 27 at 1814, 1819, 1821; and *Prud'homme*, *supra* note 186 at 685-86.

¹⁹⁷ *Ortenberg*, 1914, *supra* note 141; *R. v. Robillard* (1902), discussed in both David Rome, *Anti-Semitism I: The Plamondon Case and S.W. Jacobs, Part 1* (Montreal: National Archives, Canadian Jewish Congress, 1982) at 80-80B and in David Rome, *On Jules Helbronner, compiled by David Rome* (Montreal: National Archives, Canadian Jewish Congress, 1978); Bissonette, *supra* note 181 at 133-53. A claim brought against a Chinese-language newspaper by 127 Falun Gong members for, among other things, damage to reputation caused by an article critical of the Falun Gong movement was settled out of court and a later proceeding brought to enforce the settlement was dismissed: *Zhang c. Crescent Chau* (2003), 229 D.L.R. (4th) 298 (Q. C.A.).

¹⁹⁸ *Malhab c. Métromédia*, [2003] R.J.Q. 1011 (C.A.), on behalf of one thousand taxi drivers who speak Arabic or Haitian Creole. In Ontario, Justice Abella's concurring opinion in *Elliott v. Canadian Broadcasting Corp.* (1995), 125 D.L.R. (4th) 534 at 540 (Ont. C.A.), leaves open the possibility that claims for libel of a large group are maintainable.

¹⁹⁹ *Baudouin & Deslauriers*, *supra* note 176 at 203; Rosalie Jukier, "Non-Pecuniary Damages in Defamation Cases" (1989) 49 R. du B. 3 [*Jukier*].

²⁰⁰ *Supra* note 32 at 303.

the role of the press in the democratic process is fundamental and, in modern democracies, the press has in practice become the eyes and ears of the citizen and an essential tool for the citizen to play his role in a real and enlightened way. The press has become a necessary watchdog to guarantee the proper functioning of democratic institutions.²⁰¹

The law of defamation has become reconstitutionalized, and the distinction between public and private figures remains firmly established in the civil law.²⁰² In language that harks back to the jurisprudence of the nineteenth century, the courts have rejected the strict liability of common law defamation and instead applied a standard of care that is closer to the American actual malice standard.

V. CONCLUSION

English libel law has long been seen as balancing competing claims of freedom of expression, on the one hand, and protection of a person's reputation, on the other,²⁰³ even if many would argue that the balance is tilted heavily in favour of reputation.²⁰⁴ It is a balance that evolved gradually, together with changing ideas about the need for freedom of speech in a parliamentary democracy. The adoption of the Canadian *Charter of Rights and Freedoms* has not, as yet, significantly altered that balance in the common law provinces²⁰⁵ and the Supreme Court of Canada has rejected arguments that it should do so.

In Quebec, freedom of speech did not evolve as an organic part of traditional law. Instead, it was at first treated by jurists as something grafted on from without, as a change imposed on the traditional rules by the imposition of a new constitutional order. The problems that the common

²⁰¹ *Supra* note 195 at 212 [translated by author].

²⁰² Recent cases concerning a "personnage public" include *Guitouni*, *supra* note 183; *Michaud*, *supra* note 183 at 1772-73; and *Bertrand*, *supra* note 175 at 1750. The distinction between public and private personages is set out in *Baudouin & Deslauriers*, *supra* note 175 at 303; *Émile Colas*, "Le Droit à la vérité et le libelle diffamatoire" (1984) 44 R. du B. 637; and *Brousseau-Pouliot*, *supra* note 174 at 171. *Jukier* agrees only in part, maintaining that although the jurisprudence states that public figures must accept greater criticism, this principle is not generally applied in practice. See *Jukier*, *supra* note 199 at 17ff.

²⁰³ See *Pizza Pizza Limited v. Toronto Star Newspapers Ltd.* (1998), 42 O.R. (3d) 36 at 45 (Div. Ct.).

²⁰⁴ See e.g. David Schneiderman, "Damage to Reputation: Civil Defamation or Civil Liberty?" in David Schneiderman, ed., *Freedom of Expression and The Charter* (Toronto: Thomson Professional, 1991) 259 at 259; *Klar*, *supra* note 4 at 261; and *Smolla*, *supra* note 4 at 272.

²⁰⁵ But see *Campbell v. Jones* (2002), 209 N.S.R. (2d) 81 (C.A.), in which the *Charter* was used in support of the trend to expand the scope of qualified privilege to protect certain statements made to the public at large on matters of public concern.

law faced for the first time with the adoption of the *Charter* have been faced by Quebec jurists over the past two centuries.

The approach taken in Quebec has not been static during this time. It began as an explicit modification of traditional law in light of constitutional values. It became a borrowing of aspects of English libel law in cases where public law principles required a greater freedom of expression than the traditional private law would allow. As *Charter* rights have become a part of Quebec law, defamation has again become explicitly grounded in constitutional principles.

What has always remained constant in Quebec, for as long as there have been reported cases, is that public personalities have a more restricted right to sue for defamation than do private personalities.²⁰⁶ This approach evolved because judges recognized that libel law straddled the boundary between public and private law, and because they chose to apply constitutional, or public law, principles to modify a private law doctrine. In recent years, this approach has been strengthened by decisions stating that falsehood, by itself, does not automatically give rise to liability provided that a journalist has taken reasonable care before publishing the statements. The Supreme Court has rejected the constitutionalization of the common law of libel and any legal distinction between public and private figures as an American innovation that should not be accepted in Canada. But, in fact, this innovation occurred in Canada over 150 years ago and was set out in decisions of the Supreme Court of Canada well before it occurred in the United States. The doctrine created by this process of constitutionalization is firmly established in Quebec and can be used as a precedent for changes to the common law.

²⁰⁶ *Supra* note 174 at 171.