If You Do Not Have Anything Nice to Say: *Charter* Issues with the Offence of Defamatory Libel (Section 301)

DYLAN J. WILLIAMS*

ABSTRACT

The *Criminal Code* continues to include serious criminal offences for defaming other people. These provisions exist separately from ordinary civil defamation actions and can potentially criminalize true statements. They remain controversial, yet under-studied. While the narrower offence found in section 300 has been upheld at the Supreme Court of Canada, its more expansive sister provision in section 301 has never been evaluated by an appellate court. Accordingly, it remains a live option for prosecutions and continues to be charged in Canadian courts.

This paper outlines the existing debate and the *Charter* issues raised by section 301. It traces all relevant lower court decisions, each of which has ultimately struck this offence down. It argues that section 301 is unconstitutional because it infringes the freedom of expression found in section 2(b) of the *Charter*. This offence is likely to fail at both the minimum impairment and proportionality stages.

I. INTRODUCTION

It is widely known in Canada that one can be sued in civil court for damaging another's reputation. It is less known that one can go to prison. In Canada, it remains a criminal offence for one person to make public remarks about another person that are defamatory.

* Articling student in British Columbia. An early version of this paper was prepared during a course on Civil Liberties, taught by Josh Patterson and Jason Gratl, at the Peter A. Allard School of Law at the University of British Columbia.

Criminal defamation provisions are controversial around the world. Such laws remain in effect in many countries.[1] They are known to be used as tools of the politically powerful in countries with weak rule of law.[2] Where they exist in developed nations with greater expressive and press freedom, criminal defamation laws still attract strong criticism. For instance, the American Civil Liberties Union has declared: "Criminal defamation laws have no place in a democracy."[3] Yet, in Canada, there is little discussion around criminal defamation. The offences attract occasional criticism from legal practitioners but almost no academic study.[4] Though one criminal defamation offence has been to the Supreme Court of Canada (SCC) and survived scrutiny, its far more expansive counterpart has never been constitutionally reviewed by an appellate court.

This paper explores the legal history and debate surrounding Canada's defamatory libel offences. It then analyzes the constitutional validity of

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1 For detailed breakdowns of these provisions across a number of developing and developed states, see Debevoise & Plimpton LLP, Committee to Protect Journalists & Thomson Reuters Foundation, "Critics Are Not Criminals: Comparative Study of Criminal Defamation Laws in the Americas" (10 March 2016), online (pdf): *Thomson Reuters Foundation* <cpj.org/x/675b> [perma.cc/8ZU2-MJYM]; Scott Griffen, "Out of Balance: Defamation Law in the European Union: A Comparative Overview for Journalists, Civil Society and Policymakers" (2015), online (pdf): *International Press Institute* <ipi.media/wp-content/uploads/2016/08/IPI-OutofBalance-Final-Jan2015.pdf> [perma.cc/C3U8-T3T3].

2 See "How Powerful People Use Criminal-Defamation Laws to Silence Their Critics" (13 July 2017), online: *The Economist* <www.economist.com> [perma.cc/79BF-9H4R].

3 "Map of States with Criminal Laws Against Defamation" (2019), online: *American Civil Liberties Union* <www.aclu.org/issues/free-speech/map-states-criminal-laws-against-defamation> [perma.cc/G6FB-NJUX]; In American constitutional law, criminal defamation laws have been sharply limited by case law: *Garrison v State of Louisiana*, 379 US 64 (1964).

4 In this research, only one Canadian academic journal article that focused on these offences was located: see Lisa Taylor & David Pritchard, "The Process is the Punishment: Criminal Libel and Political Speech in Canada" (2018) 23:3 Communication Law and Policy 243. It provided useful coverage of their real-world impact but was not a constitutional law analysis. For existing legal commentary, see e.g. Jamie Cameron, "Repeal Criminal Libel" (5 July 2018), online: *Centre for Free Expression* <cfe.ryerson.ca/blog/2017/07/repeal-defamatory-libel>[perma.cc/HQ7D-9H86]; Peter Bowal & Kelsey Horvat, "Three Forgotten Reasons to Mind Your Manners in Canada" (2011), online: *LawNow* <www.lawnow.org/vol-36-2-novdec-2012/> [perma.cc/TKA2-84V3]; Arshy Mann, "The Trouble with Criminal Speech" (29 September 2014), online: *Canadian Lawyer* <www.canadianlawyermag.com/author/arshy-mann/the-trouble-with-criminal-speech-2627/> [perma.cc/W46G-FR8Q].

section 301 of the *Criminal Code*. Ultimately, it argues that section 301 is a decidedly unconstitutional violation of the freedom of expression under section 2(b) of the *Charter of Rights and Freedoms*.[5] Several lower court decisions in different provinces have reached this conclusion and struck it down. This paper describes and elaborates on their reasoning. Specifically, while section 301 may survive scrutiny at the early stages of the Oakes test, it is highly likely to be struck down because it is not minimally impairing and its effects are not proportional. Core to this problem is that the offence allows for valuable speech - including even true speech and criticism of public officials - to be chilled by the threat of criminal action. Ultimately, this analysis challenges whether such a crime as currently designed has any place in a modern liberal society.

II. The Defamatory Libel Offences

The *Criminal Code of Canada* sets out defamatory libel as follows:

> Definition
>
> 298 (1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.
>
> Mode of expression
>
> (2) A defamatory libel may be expressed directly or by insinuation or irony
>
> (a) in words legibly marked on any substance; or
>
> (b) by any object signifying a defamatory libel otherwise than by words.
>
> Publishing
>
> 299 A person publishes a libel when he
>
> (a) exhibits it in public;
>
> (b) causes it to be read or seen; or
>
> (c) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by any person other than the person whom it defames.
>
> Punishment of libel known to be false

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5 *Canadian Charter of Rights and Freedoms*, s 2(b), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, [*Charter*].

> 300 Every one who publishes a defamatory libel that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
>
> Punishment for defamatory libel
>
> 301 Every one who publishes a defamatory libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.[6]

The basic defamatory libel offence in section 301, then, has the following elements on its face: For the *actus reus*, one must (a) publish a matter, which is (b) likely to injure reputation *or* designed to insult, and (c) engages no lawful justification or excuse. Under the third element, the accused may rely on any of a complicated series of statutory defences, including coverage of court proceedings, response to inquiries, fair comment, and so on.[7] Most importantly, there is a defence of truth under section 311. It requires the accused to establish that "the publication of the defamatory matter in the manner in which it was published was for the public benefit" in addition to being factually true.[8] For the *mens rea*, the statement must have been intentionally published. The limited case law, discussed below, expands on and clarifies some of these elements.

For the aggravated defamatory libel offence in section 300, there are two additional and closely intertwined elements. As the text sets out, the accused must know that what they publish is false. The corollary is that the statement must actually be false.

These offences originated from the English *Lord Campbell's Act* and were included in the original Canadian *Criminal Code* in 1892.[9] Recently, in a housekeeping bill for the *Criminal Code*, Parliament removed another speech offence: blasphemous libel.[10] However, it left defamatory libel almost entirely intact and slightly amended the publication element.[11] This suggests

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6 *Criminal Code*, RSC 1985, c C-46, ss 298–301 [*Criminal Code*] [emphasis added].

7 *Ibid*, ss 303–15.

8 *Ibid*, s 311 [emphasis added].

9 *Lord Campbell's Act* (UK), 1843, 6 & 7 Vict, c 96; *R v Prior*, 2008 NLTD 80 at paras 19–20 [*Prior*].

10 Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2017, cl 31.

11 In the *Lucas* case discussed later (*R v Lucas*, [1998] 1 SCR 439 at para 10, 157 DLR (4th) 423 [*Lucas* SCC] [emphasis added]), the Supreme Court had noted that the text of paragraph 299(c) meant that "publishing" could occur even where an accused only shared the libel with the person it concerned (at that time, it read that one publishes a libel when he: "…shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person").

that Parliament has turned some attention to these particular offences and made a decision to keep them.

A. Significance of the Offences Today

The constitutional basis for defamatory libel today is mixed. The section 300 offence appears to be constitutional, though questions can be raised about whether changes in *Charter* and civil defamation law over the last 20 years cast doubt on the finding in *R v Lucas*.[12] The section 301 offence, however, is in a murkier position. While it has been treated negatively, it remains live for several reasons. First, no appeal court has decided on its constitutionality. None of the cases striking it down were appealed, so higher courts have not confirmed or denied that conclusion. Second, many provinces have not yet seen such a lower court decision. This means that while section 301 is questionable, it has not been taken off the table by binding authority in any jurisdiction. Accordingly, individual Crown prosecutors are free to lay charges if they believe the offence's probability of surviving *Charter* scrutiny meets the relevant charge approval threshold. As well, in most provinces, police officers rather than prosecutors are responsible for initial charge approval.[13] It is unlikely that most officers would be familiar with the obscure lower court history, and so people living in those provinces may be particularly exposed to section 301 charges.

This is borne out by the most detailed evidence available. In a qualitative and quantitative study of defamatory libel cases, Taylor and Pritchard found that the offences are still very much in use, often in troubling ways.[14] They respond to a common perception in the legal community that criminal defamation offences are so archaic and rarely charged as to be harmless. Taylor and Pritchard find that around 20 defamatory libel charges were laid per year in 2006–2010. That steeply climbed to 40 per year by 2011–2015.[15] Analyzing the publicly available

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The Court read in that one must share the libel with a third party in order to publish it, for the reason that A cannot defame B simply by saying an insult to B alone. Bill C-51 changed the text of paragraph 299(c) to reflect this 20-year-old interpretation of the law.

12 Cameron, *supra* note 5.

13 Chris Williams, "Crowns or Cops? An Examination of Criminal Charging Powers in Canada" (2017), online: Toronto Police Accountability Coalition <tpac.ca/show_issues.cfm?id=209> [perma.cc/E6MP-X9YZ].

14 Taylor & Pritchard, *supra* note 5.

15 *Ibid* at 251.

information on criminal defamation cases, they find that two main patterns of prosecution emerge.[16] One line of cases prosecuted men who slut-shamed former and potential romantic partners as part of various efforts to embarrass and harass them. The other, interestingly, involved statements by members of the public who had alleged inappropriate behaviour on the part of state employees such as police and judges. Taylor and Pritchard detail a range of fact situations over the past few decades in which people called public officials things like criminal, "crooked", or "lying thieving utterly corrupt", in connection to some grievance or another, and prosecution under section 300 or 301 followed.[17] It is not always possible to determine which provision was used, but several of the cases in their sample are identified as being section 301 charges. All of this establishes that the threat of defamatory libel charges remains very real, and that it has tangible consequences for what can be said in public - for better or worse. Given the legal limbo and the increasing number of charges, the constitutional validity of defamatory libel is an important issue for the criminal law to engage with.

III. THE POLICY AND LEGAL DEBATE

Defamatory libel offences have long been controversial, particularly since the adoption of the *Charter*. Most notably, the Law Reform Commission of Canada strongly criticized the provisions and called for their repeal in a 1984 working paper.[18] Comparing these offences to civil defamation law, it found many inconsistencies as well as ways in which criminal defamation is, oddly, further reaching than its civil counterpart. For instance, the Commission noted that truth alone is a defence in civil cases, whereas one needs truth and public benefit for the criminal defence. It raised numerous concerns about the drafting, which maintained arbitrary distinctions about libels that had long since been removed in the common law. The offence at that time also seemed to leave out various important elements. Writing shortly after the *Charter*'s adoption, the Commission further noted that the offences were vulnerable to challenge under sections 2(b) and 11(d).

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16 *Ibid* at 252–59.

17 *Ibid* at 254–55.

18 Law Reform Commission of Canada, *Defamatory Libel*, Working Paper No 35(1984) [Law Reform Commission, *Defamatory Libel*].

Taking up the question of whether to reform or abolish, the Commission noted that internationally, countries like the UK and New Zealand were moving away from criminal defamation. They also wrote that with a civil option readily available, charges being very rare, and sentences being light regardless, little would be lost if defamation was no longer criminally punishable. The one type of behaviour the Commission saw as potentially warranting criminal penalties was character assassination, where a person deliberately spreads lies about someone else to harm them. In examining this, however, the Commission took the position that a character assassination offence would need to be very complex and narrow to properly target the right behavior. Therefore, the preferred option was simply to abolish these offences altogether.

A. Jurisprudence on Section 300

Though rarely litigated, the defamatory libel offences received significant judicial scrutiny in the 1990s. The aggravated section 300 offence had the benefit of two major appellate cases.

1. R v Stevens[19]

First, the Manitoba Court of Appeal considered a section 2(b) challenge to section 300. There, the accused had publicized unpleasant false messages about a former romantic partner, including through posters describing her as suicidal, desperate, having had an abortion, and being a sex offender.[20] In three sets of concurring reasons, the Court explored the history and nature of the offence before finding it was justified under the *Charter*. Justice Twaddle wrote the most extensive analysis on reasonable limits. Discussing the objective of the law, he addressed the complicated historical question of whether the offence was intended to merely prevent breaches of the peace, which are caused by defamatory statements, or whether the concept of protecting reputation was actually part of lawmakers' intent when drafting it. This recurs in many defamatory libel cases. Some decisions (discussed later in this paper) conclude that there is no pressing and substantial objective in the modern day, because the original offence was designed to prevent duels from resulting when honorable men exchanged fighting words. Justice Twaddle found that because the law was simply pasted into

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19 (1995), 100 Man R (2d) 81, [1995] 4 WWR 153 (Man CA) [*Stevens*]. For a review of the Oakes framework relevant to this *Charter* analysis, see Section IV of this paper.

20 *Stevens*, *supra* note 20 at para 6.

the Canadian *Criminal Code* without much independent reasoning, one had to look to the English legislative intent. That intent did seem to include some concern for reputation at the time, which would be a valid objective today for *Charter* purposes.

Later, on whether this offence is minimally impairing of free expression, Justice Twaddle found that the value of the speech lies close to the bottom. As well, he interpreted a number of limits on the section 300 offence that made it less impairing, including that the accused must intend to defame. This excludes situations where the libel was published for other reasons, such as factual reporting. It also excludes cases where the accused did not see the message as defamatory according to their own values (i.e. an ideological fascist refers to someone else as being a fascist also). Justice Twaddle additionally found that opinions are not included because the Crown cannot prove the falsity of an opinion, and that the knowledge of falsity element shields mistakes and hyperbole that fall short of deliberate lies. Ultimately, Justice Twaddle upheld the offence.

Justice Scott, joined by Justice Helper, reasoned on similar lines and also considered the issue that intention to defame may be too easy to prove because people infer, almost automatically, that when someone makes a false claim, they mean to defame. He clarifies that with the *mens rea* interpreted strictly, the offence "can only apply to the most egregious and deliberate of character assassination."[21] On the other hand, Justices Huband and Philp found that the offence did not even engage section 2(b). They ruled that such speech contains no value, ideas, or truth of any kind and, therefore, it falls completely outside of the purposes of free expression. In their view, one surely has to exclude some meanings from the *Charter* guarantee or risk watering it down. They attempted to reconcile this view with the broad scope of freedom of speech in *R v Keegstra*.[22] The Justices found that speech like this does constitute violence of a psychological kind, because it is designed to cause pain. Among the defamatory libel jurisprudence, this appears to be the only instance where a court has declined to find even a prima facie breach of section 2(b).

2. R v Lucas[23]

Shortly afterward, this offence reached the SCC. The broader story of

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21 *Ibid* at para 86.

22 *Ibid* at para 97; *R v Keegstra*, [1990] 3 SCR 697, 77 Alta LR (2d) 193 [*Keegstra*].

23 *Lucas* SCC, *supra* note 12.

the *Lucas* case is complex and spawned several legal proceedings. There is not space to fully explore it in this paper, though it is elaborated well by Taylor and Pritchard.[24] Essentially, a boy and his sisters made rather outlandish allegations of sexual abuse against their past foster parents. However, there was also reason to believe that the boy himself had been sexually abusing his sisters. The police officer who became involved chose to lay numerous charges against the past parents and their extended families, which were later largely stayed or withdrawn. Yet, he did not act on the concerns about the boy and did not try to separate him from his sisters. John and Joanna Lucas were prisoners' rights activists who became involved with the foster parents. They believed that the officer had allowed the boy to keep abusing his sisters. They made several unsuccessful complaints. Then, together with the foster parents, they held two public protests in front of the Provincial Court. The Lucases carried signs which read: "Did [the police officer] just allow or help with the rape/sodomy of an 8 year old?" and "If you admit it [officer] then you might get help with your touching problem."[25] They were charged under sections 300 and 301. The Lucases challenged their section 300 convictions at the SCC, leading to the reasons discussed below.

Years later, the foster parents successfully brought in a malicious prosecution lawsuit against the officer. The officer was found liable for malicious prosecution, and his inaction regarding the boy abusing his sisters was described by the Court as "reprehensible...."[26] Ironically, the grievance underlying the Lucases inflammatory protest was ultimately a valid criticism of police conduct.

The SCC decision upheld the section 300 conviction. Justice Cory, writing for the majority, found a breach of section 2(b), but upheld the offence under section 1. Regarding the objective, he found that reputation protection was indeed part of the purpose. On minimal impairment, he agreed with the *Stevens* Court that subjective intent to defame is required. Justice Cory rejected the idea that the existence of a civil option negates the

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24 Taylor and Pritchard, *supra* note 5 at 259–62.

25 *Lucas* SCC, *supra* note 12 at paras 7–8.

26 *Kvello v Miazga*, 2003 SKQB 559 at paras 16, 328 (later appealed by other defendants, but not by the relevant police officer, Sgt. Dueck). For a discussion of the story around this malicious prosecution case, see Peter Bowal and Aleksandar Gvozdenovic, "Whatever Happened to... Scandalous Criminal Allegations: The Miazga Case" (3 February 2016), online: *LawNow* <www.lawnow.org/whatever-happened-to-scandalous-criminal-allegations-the-miazga-case/> [perma.cc/D78S-S7ZD].

criminal offence because civil suits are inaccessible for some and may not deter defendants who have no assets to pay damages. It posed no issue that the offence did not require any proof of harm because criminal law can validly regulate a risk of harm. At the proportionality stage, Justice Cory found that the speech captured falls far from the core of free expression and deserves "scant protection."[27] It was easily outweighed by the reputational objective, in his view. Though also upholding the offence, Chief Justice McLachlin dissented in part. She cautioned that the perceived low value of the speech should not be taken into account at the first three stages of the Oakes test and may only be considered for proportionality. Altogether, the section 300 offence has been upheld by the courts.

B. Jurisprudence on Section 301

The story is very different for the section 301 offence. In the post-*Charter* era, courts in Alberta, Saskatchewan, Ontario, New Brunswick, and Newfoundland have evaluated its constitutionality. Altogether, there are 5 known lower court decisions on section 301, and each of them has concluded that it fails *Charter* scrutiny.[28]

1. R v Finnegan[29]

In the first ruling on Section 301's constitutionality, the Court heard submissions from Crown and then rendered its decision without calling upon the self-represented accused. It is not clear from the decision what underlying allegations had brought Mr. Finnegan to court, but he was promptly discharged. In its ruling, the Court entirely adopted the Law Reform Commission report discussed earlier in this paper. The Court found an infringement of section 2(b). It held that the objective behind section 301 appeared to be preserving the peace, which did not suffice. Alternatively, if the purpose was protection of reputation, that could "possibly be accepted," but "a criminal sanction is not required to meet that concern."[30] The Court concluded that because the avenue of civil defamation is already available, section 301 is not proportional. Interestingly, the Court distinguished *Keegstra*, which had held that the

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27 *Lucas* SCC, *supra* note 12 at para 94.

28 Unreported oral decision of McIntyre J. in *R v Osborne* (2004), New Brunswick S/CR/08/02 (NB QB), cited in Taylor and Pritchard, *supra* note 5 at 247.

29 [1992] AJ No 1208 (Alta QB).

30 *Ibid* at para 25.

existence of a civil alternative (in that case, the suggestion of using a human rights tribunal) does not render the use of criminal law invalid. The difference is that for hate speech, civil defamation was not an option, whereas for individual libels, it was.

2. R v Lucas (Sask QB)[31]

In the *Lucas* case described earlier in this paper, the two accused originally faced charges under both sections 300 and 301 for their protest signs that named a police officer. At the trial level, they constitutionally challenged both offences. The Crown did not appeal the section 301 finding, so it remains good law despite the case advancing to the Supreme Court.[32] After devoting most of the reasons to a reasonable limits analysis that ultimately upholds section 300, the Court then struck down section 301. The Court explained that the latter crime is different because it captures opinions that an accused honestly believes are true and ones that actually are true. The Court stated that section 301 limits free expression in a way which fails both the minimal impairment and proportionality stages.

3. R v Gill[33]

In this case, the two accused wrote up "wanted" posters about six prison guards, claiming that the guards were involved in a murder, were suspected to be in a gang, and had a history of "sadistic violence" and "socio-pathic tendencies."[34] They were charged under section 301 for criminally defaming the guards. The accused brought a challenge under section 2(b) in which the Canadian Civil Liberties Association intervened. After considering these submissions, the Court concluded in brief reasons that section 301 does not minimally impair free expression.[35] The Court adopted Justice Twaddle's comments in *Stevens* that limiting the publication of true facts is very difficult to justify. Accordingly, the Court declared the offence to be of no force and effect.

4. R v Prior[36]

This decision provides the most recent and most thorough analysis of

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31 *R v Lucas*, [1995] 129 Sask R 53, 31 CRR (2d) 92 (Sask QB) [Lucas QB].
32 See *R v Lucas* (1996), 137 Sask R 312, 104 CCC (3d) 550 (Sask CA).
33 (1996), 29 OR (3d) 250, 35 CRR (2d) 369 (Ont Ct J (Gen Div)) [*Gill*].
34 *Ibid* at para 1.
35 *Ibid* at paras 22–24.
36 *Prior*, *supra* note 10.

section 301 found in the cases. The accused put out flyers accusing a "public justice figure" of raping his sister decades earlier and making her pregnant.[37] When police interviewed her, she denied even knowing that person. Yet, there was also no evidence that Mr. Prior knew his claims were false. The Court analyzed the legislative history in the UK and found that the objective of section 301 is different from 300. It departed from the Supreme Court's conclusion that the purpose of criminal defamation is to protect reputation by saying that that is only true of section 300. Instead, the objective for the purposes of *Charter* analysis is to prevent breaches of the peace. The Court mapped the idea of a true-but-defamatory statement onto existing notions of defamation:

> As well, it seems to me that if the objective of a law is to protect reputation, knowledge of the libel's falsity must be an essential element of an offence which criminalizes the publication of the libel. For if a libel be true, the reputation at stake is not a reputation at all. I think it is fair to assume that it is presumed in the phrase "protection of reputation" that the reputation is good, at least to the point that it would suffer some damage from a libel. To my mind a reputation rests on truth. It should not be isolated from the truth and does not deserve protection from the truth.... To my mind, it would be wrong to suppress truth to protect sensibilities or an unmerited reputation. To do so would be inimical to the values our society holds dear.[38]

Having made that finding, the Court took the rare step of invalidating the offence at the first stage of the *Oakes* analysis. The Court noted that "looking at somebody the wrong way could provoke a breach of the peace" and that the criminal law can respond to an altercation itself rather than the comments that cause it.[39] That further lead the Court to find no rational connection between keeping the peace and criminalizing libels. Alternatively, the Court found that the objective would be "protecting reputation from any attack regardless of truth," which is also not pressing and substantial.[40]

The Court goes on to consider minimal impairment:

> To my mind, subjecting people to criminal charges for publishing the truth does much more than minimally impair their *Charter* right to freedom of expression. The notion that a citizen could be convicted of a criminal offence for publishing

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37 *Ibid* at para 4.
38 *Ibid* at para 33.
39 *Ibid* at para 34.
40 *Ibid* at para 35.

> the truth, or for mistakenly publishing a falsehood, or for publishing a falsehood while believing it to be true, flies in the face of the Supreme Court of Canada.[41]

Relying on *R v Zundel*[42] and *Keegstra*,[43] which are discussed later in this paper, the Court found that the offence clashes with a core value - the search for the truth. Ultimately, the Court stated that the reason that the other lower courts have struck down section 301 is that it is "offensive to modern day notions of justice."[44]

Prior is interesting in that it offers the most developed treatment of section 301 and also the harshest. The Court firmly concludes that the offence fails every single stage of the Oakes test. While it shares the proportionality and minimal impairment concerns of the other decisions, it is the only one to reject that there is a pressing and substantial objective. As this paper discusses later, that historical analysis may or may not be correct, but it raises an additional wrinkle in defending the section from a *Charter* challenge.

IV. Section 301 is Invalid on Free Expression Grounds

This paper now turns to a detailed analysis of the constitutional validity of section 301. It outlines the analysis that an appellate court would need to undertake if a person accused of publishing a defamatory libel were to challenge the offence itself as violating their freedom of expression. To briefly contextualize, the steps under a *Charter* analysis are as follows:[45] at the outset, the individual must show that the law violates a right found in the *Charter*, based on the particular nature of that right. If that person succeeds, then the state would have the opportunity to save the law by showing that it is a reasonable limit on the right under section 1 of the *Charter*. Following the framework in *R v Oakes*,[46] this analysis would proceed in four steps. First, the state would need to show that the law seeks to achieve an objective which is pressing and substantial. Second, it must establish that there is a rational connection between that objective and the

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41 *Ibid* at para 38.
42 [1992] 2 SCR 731, 95 DLR (4th) 202 [*Zundel*].
43 *Supra* note 23.
44 *Prior*, *supra* note 10 at para 41.
45 See *R v Oakes*, [1986] 1 SCR 103 at 346–49, 26 DLR (4th) 200.
46 *Ibid*.

measures the law uses. Third, the state must show that the right is restricted no more than necessary to fulfill its purpose. Finally, it would have to prove that the beneficial effects of the law (in terms of that objective) outweigh the harmful effects (in terms of the *Charter* right). Only if the prosecution were to satisfy the court on all four steps would the challenged law be allowed to stand.

A. Engaging Freedom of Expression

The first step to establish a *Charter* violation would be to show that section 301 engages the right to freedom of expression. This would not be at all difficult. First, one must show that the targeted activity conveys or attempts to convey meaning. As explained in *Keegstra* and *Irwin Toy v Quebec (Attorney General)*, that very broad test can include almost anything aside from physical violence itself.[47] Statements which make a claim of some kind about an individual are clearly expressive activity. Next, we ask if the expressive activity is limited by the state, either purposefully or in effect. The defamatory statements captured in section 301 are restricted intentionally by the state through the threat of criminal prosecution. The state is targeting certain expressions because of their content — in the words of *Irwin Toy*, the "mischief consist[s] in the meaning."[48] This accords with the jurisprudence, as the more narrowly tailored section 300 has been found to engage section 2(b) by the *Lucas* Court and a majority of the *Stevens* Court.[49]

The contrary reasoning of Justices Huband and Philp in *Stevens*, that defamatory statements fall outside of free expression altogether, was questionable as a departure from the Supreme Court's reasoning in *Keegstra.* The Supreme Court of Canada has been clear that the content does not matter for prima facie protection.[50] As well, their view that the speech is of no value whatsoever surely does not extend to the broader section 301 offence. It captures more speech. The lesser defamatory libel offence, then, clearly breaches the right and the main contention would be whether or not that can be justified as a reasonable limit.

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47 *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 969–70, 58 DLR (4th) 577 [*Irwin Toy*]; *Keegstra*, *supra* note 23 at 732.

48 *Ibid* at 976.

49 *Lucas* SCC, *supra* note 12 at para 28; *Stevens*, *supra* note 20 at paras 37, 161 ("abundantly clear that the section offends the guarantee…").

50 See Justice Twaddle's strong criticism of that approach in *Stevens*, *supra* note 20 at paras 147–61.

B. Pressing and Substantial Objective

In justifying a reasonable limit on a *Charter* right, the state must first show that it is a limit prescribed by law. While speech offences are sometimes challenged for being too vague to qualify as such a limit, the state must only offer "an intelligible standard according to which the judiciary must do its work."[51]Given that section 300 passed this step using substantially the same test, this hurdle is easily cleared.[52]

Next, the state must articulate a pressing and substantial objective. While a challenged law rarely fails at this stage, it provides useful framing to the broader analysis because the state must commit to a yardstick against which the infringement can be measured.

This stage poses two issues for section 301. For one, the debate about breaches of the peace versus protection of reputation would need to be settled. If the sole objective were preventing breaches of the peace arising from defamatory statements, the law would be very unlikely to survive. The archaic goal of stopping duels between honourable men seems to have little relevance in a 21st century society. It does not appear to be a sufficiently pressing social problem today to justify limiting constitutional rights, if it ever was. As well, that would create serious issues further in the analysis, because Parliament never tailored the offence to only those situations that are likely to cause breaches of the peace. It makes no real distinction between fighting words and otherwise embarrassing insults. A court would be very skeptical that society must criminalize statements which might lead to violence, rather than violence itself.

The state would, therefore, rather argue, as in other defamatory libel cases, that reputation was always part of the objective. It would particularly wish to follow *Stevens* in arguing that that goal had been there from the beginning, so as to avoid accusations that it is shifting the purpose. While courts permit some change of emphasis in a law, they do not allow the state to invent a new legislative purpose that did not arise when the law was passed.[53] This issue draws on a historical debate about the intention of English lawmakers in the mid-1800s, which played out in the section 300 case law. *Lucas*[54] and *Stevens*[55] established that section 300 includes

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51 *Irwin Toy*, *supra* note 48 at 983.

52 *Lucas* SCC, *supra* note 12 at paras 35–39.

53 *R v Butler*, [1992] 1 SCR 452 at 494–96, 89 DLR (4th) 449.

54 *Lucas* SCC, *supra* note 12.

55 *Supra* note 20.

reputational protection, and it stands to reason that their historical analysis extends to the variation of that offence found in section 301. The provisions are part of the same scheme in the *Criminal Code*, directly adjacent to one another, and have similar origins in England. However, this is debatable — the Court in *Prior* considered that reasoning explicitly and found that the purposes of sections 300 and 301 are not the same.[56] Given limited space, this paper cannot fully explore that controversy, except to say that this historical debate poses some risk to the offence's constitutionality at the outset and would be a live issue.

Assuming for the sake of argument that the objective is reputational protection, the other difficulty at the objective phase is how one characterizes that aim. Because falsity is not required, one could adopt the harsh framing from *Prior*, that the objective is "protecting reputation from any attack regardless of its truth."[57] That puts the state in a difficult position. The objective then would look more like preventing people from saying negative things about one another, which makes it seem broad and difficult to sustain. However, it seems that this issue can be more cleanly dealt with at the minimum impairment stage of the analysis. The inclusion of true statements seems to reflect more on a certain subset of situations that the offence captures than it does the overall legislative objective.

The fairer framing is that the objective is "protecting individuals from public statements which seriously harm their reputation," and that the offence, as drafted, captures some true statements that relate to that purpose. That objective is likely defensible, given that reputation is recognized by the law as a significant personal interest worthy of protection. Courts clearly appreciate reputation that way — for instance describing it as "highly sought after, prized and cherished by most."[58] The facts in many criminal defamation cases are somewhat sympathetic for the victim and include statements that we would not want someone to make about us. Further, the state may be able to argue that defamation is a particularly common and harmful thing in the social media era, making protection more necessary than ever. Given that cases rarely fail the pressing and substantial objective phase, it is likely that the offence can pass this stage of constitutional analysis.

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56 *Prior*, *supra* note 10.

57 *Prior*, *supra* note 10 at para 35.

58 *Lucas* SCC, *supra* note 12 at para 94.

C. Rational Connection

Next, the state would need to establish a rational connection between the legislative measure and the objective of Parliament. That is generally a low threshold to meet and requires simply that there be a logical reason to believe that the means chosen are connected to the aim.[59] As with section 300, this step would be easy for the state to satisfy. If the aim is to protect people from a certain kind of harmful speech, then making that speech criminal obviously is a rational mechanism to do so. Criminalizing defamatory libels is the most straightforward way of trying to deter and punish speakers who forward them.

D. Minimal Impairment

In the third stage, courts ask whether the right is limited as little as possible to achieve the goal. The state's chosen means need not be the absolute least impairing option conceivable, but they must "impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account."[60] The question would be whether the state could protect individuals from reputational harm in a way that is less harmful to free expression. The main counterfactuals to consider are whether the offence could instead have: (1) used alternatives to a criminal offence, or (2) excluded all speech which is true.

The first potential line of attack on minimal impairment would be the choice of criminal law as a tool. One could suggest it would be less impairing to use a civil remedy. The argument goes: the state chose criminal law and imprisonment — the heaviest tool available to it — rather than relying on the civil courts to address defamation. The state could have left it as a common law matter or used something like a statutory tort if it felt that more needed to be done to protect reputations. This argument was made about section 300 in *Lucas* and was ineffective.[61] The Court had no issue with criminal and civil options coexisting because they serve distinct purposes.[62] This also parallels an unsuccessful argument from *Keegstra*. There, it was argued that the hate speech offences were not minimally impairing because the state

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59 *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at para 40 [*JTI-MacDonald*].

60 *R v Sharpe*, 2001 SCC 2, at paras 96–97 [emphasis in original].

61 *Lucas* SCC, *supra* note 12.

62 *Ibid* at paras 69–76.

used criminal law instead of something less punitive, such as a human rights tribunal. While Chief Justice McLachlin's dissent agreed, Justice Dickson's majority decision held that the state need not use the least impairing option and that the criminal and human rights routes could be complementary.[63] The state could rely on the same reasoning for defamation. It could also add that suing for defamation may be beyond the means of many victims and so criminal enforcement is needed to protect their interests. Altogether, the Crown would have little difficulty defending section 301 from this line of argument.

The more fundamental issue for minimal impairment, and for section 301 as a whole, is how it handles truth and falsity. As discussed earlier, the key difference from section 300 is that falsity and the accused's subjective knowledge of falsity are not elements of this offence. Rather, there is the defence of truth, which requires an accused to show that the statement was (a) true and (b) in the public benefit. Accordingly, it allows for a conviction with a true statement that is deemed not for the public benefit because of the content or how it was expressed. Virtually no reported case law is available showing how this defence is applied, so this analysis is largely informed by the plain meaning of the words and by commentary found in the report of the Law Reform Commission.[64] This defence may engage Section 11(d) of the *Charter* as well, seeing as it puts the onus on the accused rather than the Crown.[65] However, that is beyond the scope of this paper.

This provision makes criminal defamation clearly more expansive than civil defamation. In civil cases, truth is an absolute defence, and courts have said that "[w]hat is true cannot be defamatory."[66] One cannot be successfully sued for damages if one can establish that what they said was correct. This applies regardless of how much the statement harms the plaintiff's

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63 *Keegstra*, *supra* note 23 at 784–85, 860–62.

64 Law Reform Commission, *Defamatory Libel, supra* note 19.

65 In *Keegstra*, *supra* note 23, the Court upheld a truth defence to hate speech despite it placing a burden on the accused to show truth on a balance of probabilities. The Court was satisfied because the *mens rea* for hate speech confined it to very blameworthy statements; also, it is difficult for the Crown to disprove alleged socio-political facts. However, neither of these conditions hold for criminal defamation. The *mens rea* of intention to defame appears less morally grave than intention to foment hate against minorities. The disputed facts will involve the life of a particular individual rather than society at large, making it easier for the Crown to disprove them. Accordingly, the truth defence appears vulnerable to challenge under Section 11(d).

66 *Courchene v Marlborough Hotel Co Ltd et al* (1971), 20 DLR (3d) 109 at 112, 1971 CarswellMan 100 (Man QB).

reputation, and Canadian common law seems to have no notion of a defamatory-and-true remark. The Law Reform Commission's view was that criminal law should never be broader than the corresponding tort law.[67] That said, this is not a constitutional principle as much as it is a policy argument.

By way of international comparison, this approach to truth is also more expansive than in American constitutional law. In *Garrison v State of Louisiana*, the Supreme Court of the United States delivered a leading decision on criminal defamation under the First Amendment.[68] It held that a statement that is true, or believed to be true, cannot be criminalized even if it is made with actual malice.[69] Malice is an even more blameworthy *mens rea* than intention to defame, involving ill will or hatred. Still, the Court recognized that even a hateful attack which the speaker honestly believes is true contributes to the search for the truth. In essence, American case law finds that true or honestly believed statements can never be criminalized, even on a stricter mental state than section 301 uses.

What is important for *Charter* purposes is that truth adds value to expression. When a court takes into account the value of expression under section 1, it will need to consider that true statements are especially deserving of protection. As Chief Justice McLachlin explained in *Keegstra*, one of the three fundamental philosophies underlying section 2(b) is the search for the truth in an open marketplace of ideas.[70] Notably, this is distinct from the political process rationale. The truth is not just important in politics and statecraft, but human inquiry more broadly. And free expression is not only for speakers, but also for listeners. Courts have recognized that section 2(b) protects the rights of people to become better informed through the speech of others.[71]

These principles apply to an individualized context as follows. It is deeply different to criminalize somebody for making up lies about their neighbour than to criminalize them for saying unkind things that are factual. The character of fellow citizens is a matter which people have great interest in and curiosity about. People are preoccupied with reputation in

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67 Law Reform Commission, *Defamatory Libel*, *supra* note 19 at 40.

68 *Supra* note 4.

69 *Ibid* at 71–75, 78.

70 *Supra* note 23 at 803–04.

71 *Edmonton Journal (The) v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1339–40, 64 DLR (4th) 577 [*Edmonton Journal*].

the first place because they want to accurately gauge how to think about other people. A good reputation carries weight because it comes from an interpretation of the best information available about an individual. A reputation, therefore, needs to include the bad as well as the good. If somebody has a sterling record but has done something which would tarnish it if others found out, then it serves the search for the truth for that fact to be known. If an esteemed banker privately belongs to a white nationalist party, our understanding of who they are and how to interact with them is deepened by learning this fact rather than having it suppressed.

This is not simply some hypothetical epistemic ideal. People use reputational information to make consequential decisions constantly in their day-to-day lives. Reputation can guide who we make a loan to, hire for a job, or trust our children with. For the state to criminalize truthful statements about individuals is, in effect, to collude with those individuals in unduly polishing their images. It lends legal power to their desire to suppress negative commentary about themselves. It leaves listeners who would have preferred to know the negative information worse off. However, much society and the law may value reputation, surely this does not justify a right to a curated reputation in which the state forcefully conceals the blemishes. As the Court in *Prior* wrote, "[f]or if a libel be true, the reputation at stake is not a reputation at all.... a reputation rests on truth. It should not be isolated from the truth and does not deserve protection from the truth."[72] Here, an accused would have a very strong argument that a law which stops one from speaking the truth about other people has impaired free expression much more than necessary.

Previous case law on truth and falsity supports this conclusion. The *Lucas*[73] and *Stevens*[74] decisions on section 300 rely heavily on falsity at the minimal impairment and proportionality stages. It is unlikely that their conclusions would be the same had that element not been included. Key to their findings was that the value of the speech captured was very low because it consisted of malicious lies. Once an offence expands to cover some set of true statements, the reasoning is rendered less compelling.

The natural objection is that this argument treats transparency as a free-for-all. The state may legitimately reply that not every private fact needs to be public knowledge simply because it would be informative to someone

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72 *Prior*, *supra* note 10 at para 33.

73 *Lucas* SCC, *supra* note 12.

74 *Supra* note 20.

else. In fact, there is a valid role for government in protecting people from stigmatizing disclosures of true-but-private information about themselves. In one of the section 301 cases, the Crown gave the example of publishing the names of women who have had abortions.[75] That fact is true, but not in the public benefit to publish, and the state needs to protect her from stigma. In the *Stevens* decision, Justice Twaddle similarly suggested that this drafting exists to cover embarrassing disclosures like a mother who has had a child out of wedlock.[76] Situations such as these, the state could argue, are why an absolute defence for truth would undermine the objectives of section 301.

Yet, this abortion scenario seems more akin to a privacy interest. It concerns the idea that some information, like a medical history, should remain private and not be disclosed. These facts would be protected because they are private, not because they are reputationally negative. While a breach of privacy may lead to a worsened reputation, the two interests are not commonly understood to be one and the same. We would tend to think of a privacy interest in terms of how the information was obtained and what level of confidentiality attached to it, whereas reputation is a matter of how much damage a statement did, regardless of where it came from. Minimal impairment is measured against the objective of the law — in this case, protecting reputation. To the extent that true statements are captured for the sake of protecting confidential information, they may simply be tangential to the objective. If so, then it could not be said that the legislative purpose is lost without them. In that case, there would be no justification for not selecting the less-impairing option: an absolute defence for true statements.

Altogether, this renders it likely that section 301 is not minimally impairing. The offence appears far more impairing of free expression than it needs to be because it includes true statements in a way that even civil defamation does not. Given that free expression is grounded in the search for the truth, it would be quite difficult for the state to justify this. Indeed, this point has doomed the section in past challenges such as *Prior*[77] or *Lucas*.[78]

In terms of the remedy, there is one way that the offence could fail minimal impairment and not be invalidated. A court could read in an

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75 *Gill*, *supra* note 34 at para 20.
76 *Stevens*, *supra* note 20 at para 199.
77 *Supra* note 10.
78 *Lucas* QB, *supra* note 32.

absolute defence of truth by striking out the requirement that the statement be in the public benefit, as follows:

> 311 No person shall be deemed to publish a defamatory libel where he proves ~~that the publication of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published and~~ that the matter itself was true.

Perhaps then, the offence could be reconciled with freedom of expression and stand as a less stringent version of section 300.[79] In this scenario, the section 301 offence would cover false defamatory statements, while the aggravated version would cover knowingly false defamatory statements. Both offences would criminalize only statements that the Crown can prove to be untrue, and the difference would lie in the level of *mens rea* required. There would still be a place for section 301: to specifically cover false statements that the accused wrongly believes to be true or does not know the truth value of. Such a modification could cure the minimal impairment problem, but the offence would still need to pass the final stage.

E. Proportionality

Finally, a court would consider whether the benefits of the legislation in terms of its objective outweigh the harms to *Charter* rights. This does not necessarily require a precise empirical comparison, but it does ask us to weigh the various impacts of the law against one another and arrive at a net conclusion.[80] It is important to weigh the particular values as they are engaged in this context, rather than in sweeping, abstract terms.[81]

1. Benefits of the Legislation

Weighing in the legislation's favour is the protection of individual reputation in the usual criminal law fashion. For one, the law may deter people from speaking ill of one another in harmful and public ways. On the specific deterrence level, this can serve to stop a particular individual from continuing to harass their target. For instance, in the slut-shaming cases that Taylor and Pritchard describe, the criminal law may be a powerful tool to make a jilted lover stop spreading sexist rumors about their partner.[82] This

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79 In that case, the burdens in this defence would remain open to challenge under section 11(d). See n 57.

80 *JTI-MacDonald*, *supra* note 53 at paras 45–46.

81 *Edmonton Journal*, *supra* note 72 at 1353–56.

82 Taylor & Pritchard, *supra* note 5.

can protect those individuals from severe embarrassment, social stigma, and practical consequences like job loss. On the general deterrence level, it encourages people in society generally to avoid making seriously negative claims about one another. For true statements, the public benefit test effectively asks one who possesses harmful information about another to use it responsibly. The speaker must avoid sharing their true facts with the world in circumstances where it is gratuitous and does nothing but harm another person. Many of the statements that are criminalized because of this caveat are surely unpleasant attacks that may be better suppressed.

While the criminal law does not provide damages, this offence also has the benefit of vindicating victims. People whose reputations have been damaged on purpose can see the authorities take action against the speaker. Like in civil court, this could give the victim the benefit of a court affirming publicly that the defamatory matter was untrue. However, given that it need not be false, courts may choose not to decide on the truth value of the statement, or they may indeed convict an accused while also acknowledging that their statement was true. At best, then, criminal adjudication offers an indirect way for victims to quash falsehoods. Still, there is value in publicly denouncing such conduct in either case. Like in *Keegstra*, it matters for proportionality that criminal law can send a signal to society that certain conduct is unacceptable.[83] It signals that the community does not accept defamatory libels and that they are condemned authoritatively as being wrong. There is a salutary effect in denouncing those who would (as many accused have) resort to calling their opponents child molesters, criminals, sociopaths, and so forth.

2. Harms of the Legislation

On the other side of the ledger, we must consider the value of the expression captured, the potential chilling effects, and the particular issue of criticism of public officials.

First, as raised under the minimal impairment discussion earlier in this paper, the value of the expression captured under section 301 is likely much higher than in *Lucas*. Many of the arguments made earlier can also apply to proportionality analysis — the harms flowing from suppressing or deterring true statements are greater than for false statements. The offence deprives listeners of relevant, factual information about people that they may prefer to know. It gives them a less complete picture of their neighbours,

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[83] *Keegstra*, *supra* note 23 at 787.

employees, public officeholders, and so on. But further, the offence would also criminalize situations in which the accused makes a mistake about the truth or has a reasonable belief that their statement is true. Note that this problem remains even if a court were to read in a falsity element as suggested earlier, because one can say something that is untrue without knowing that it is untrue. Under current law, the accused need only intend to defame the target.

In criminalizing defamatory statements, the offence creates a serious potential chilling effect. It says that when somebody makes negative remarks about another person, they could well find themselves having to defend doing so in court. Even if falsity were required, a speaker would still need to be very careful about verifying things that they say, lest they accidentally stray into falsehood and face conviction. As with hate speech, this creates an ambiguous field of illegal speech and leaves citizens guessing whether their conduct puts them on the wrong side of the line. Faced with the complexity of determining whether their remark constitutes a "grave insult" or whether it is in the "public benefit" to say it, a law-abiding person may well err on the safe side and stay silent.

Further, it is important to acknowledge that even lies have value in this analysis. Chief Justice McLachlin, writing for the Court in *Zundel*, explains how even knowingly false statements serve a purpose:

> Exaggeration — even clear falsification — may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g., 'cruelty to animals is increasing and must be stopped'. A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus. An artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie.[84]

This is on display in the many criminal defamation cases that arise where someone with a legitimate grievance makes a poor choice of words in expressing it. For instance, when an individual feels mistreated by the police, they may go on to call them corrupt. The police officer may not be corrupt in the literal sense of taking bribes, but there is a kernel of socially valuable critique in the sentiment being communicated. Even recalling the facts of *Lucas* is instructive. The Lucases, feeling that a police officer had

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84 *Zundel*, *supra* note 43 at 16.

allowed child sexual abuse to persist by not acting on information in his possession, wrote "[d]id [the police officer] help/ontake part in the rape & sodomy of an 8 year old."[85] Though on a literal reading this is a falsehood, it comes in the course of making an important underlying claim that was later vindicated: when a justice system official failed to act, he put a child at serious risk. This is exactly the kind of public debate section 2(b) exists to safeguard, and the alleged failures of the police are an important matter for listeners to hear about and consider. Every time someone withholds or seriously waters down their criticism for fear of criminal prosecution, the sum of harm caused by section 301 grows.

This is doubly true when one considers Chief Justice McLachlin's further point that statements have many meanings. They can contain metaphors and implications, and the listeners may derive a separate value from the point.[86] To say, for instance, that the Prime Minister of the day "trembles in his boots when he deals with foreign leaders" is of course false, but it conveys ideas about foreign policy. Granted, Chief Justice McLachlin's concerns are somewhat tied to the historical fact context in which she wrote. Because *Zundel* was about false news, her analysis may not always carry to other contexts. As she wrote, such analysis is "arguably much less daunting in defamation than under s. 181 of the *Criminal Code*. At issue in defamation is a statement made about a specific living individual. Direct evidence is usually available as to its truth or falsity. Complex social and historical facts are not at stake."[87] It may be, accordingly, that the constitutional value of lies is lower when they are about a living individual. Regardless, that value still exists in an individual setting and must carry some weight in the analysis.

All of this takes on a particular importance where, as Taylor and Pritchard note, many criminal defamation cases involve justice system actors as complainants. While courts do not assess constitutionality on the basis of how an offence happens to be used, they may look to the kind of actual cases that are brought to the extent they highlight the kinds of speech swept up.[88] The chilling effect is particularly troublesome if it is chilling criticism of police and judges — important officials who exercise public power. Free and open debate about how these officials perform their roles is especially

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85 *Lucas* SCC, *supra* note 12 at para 105.

86 *Zundel*, *supra* note 43 at 16–19.

87 *Ibid* at 19.

88 *Ibid* at 17–18; *Keegstra*, *supra* note 23 at 858–59.

valuable because holding them accountable through criticism is essential to a free society. It is a troubling development that one of the main sources of defamatory libel charges is criticizing state actors in too vulgar or hyperbolic of a manner. This is particularly so given that these actors are the insiders of the justice system and seem to be well poised to punish their critics using the very laws which they administer. Police, for instance, can and do charge citizens as a direct reaction to hostile insults they receive.[89] Used in that fashion, the offence has the ability not only to silence a specific critic of official conduct, but also to deprive listeners in the larger public the chance to hear their allegation. In legal terms, none of this is to say that courts would strike down the offence simply because it is sometimes applied in concerning ways. Still, the proportionality analysis would have to consider the fact that potentially valuable criticism of the state falls into the category of speech which is chilled.

Altogether, section 301 is very likely to fail a proportionality analysis. Unlike section 300, the speech captured is much broader and of greater value to the search for the truth. Assuming the offence survived this far, it is difficult to see how the state could show that the protection of some reputations (deserved or not) outweighs suppressing true or good faith criticisms, particularly when a subset of those criticisms goes to the heart of public debate.

V. CONCLUSION

Following from this analysis, section 301 of the *Criminal Code* is unconstitutional on freedom of expression grounds. It faces serious issues from the objective phase to minimal impairment and proportionality. At the least, minimal impairment would suggest that it be read down to only include false statements. Even then, it would struggle greatly to pass the proportionality phase. If fully litigated, the most likely outcome is that appellate courts would follow in the footsteps of those trial decisions that have already struck it down.

Crown counsel should be mindful of this when deciding whether to lay or stay such charges in future cases. From a prosecutorial perspective, the *Charter* vulnerabilities explored in this paper weaken the likelihood of conviction. The risk of stifling criticism of public officials also presents public interest concerns for prosecutors to consider. In situations where

89 See the case studies compiled in Taylor & Pritchard, *supra* note 5.

defamatory libel truly fits the facts, a prosecutor may still want to consider charging the aggravated section 300 offence instead because it sits on a sturdier constitutional foundation.

Though it has stayed below the radar, the defamatory libel offence remains a lingering threat to free expression in Canada. Its existence threatens to deter important civic speech and even the sharing of truths. That it has not chilled expression in this country even further may owe simply to the fact that too few citizens know that it is on the books. The next time Parliament looks to clean up the offences in *Criminal Code*, it ought to forego the easy targets of dueling or witchcraft and prioritize a crime which weakens Canada's basic commitment to free speech. It should take up the forward-looking call made by the Law Reform Commission - over three decades ago - and ask itself whether besmirching someone's honour and reputation should still be a criminal matter in a 21st century liberal democracy. At the least, Parliament should engage with the question of how to limit the criminal law's reach to truly egregious behaviour. If one thing has become apparent in this debate, it is that this centuries-old crime does not draw those lines in the way most Canadians would choose to, if we were to start from scratch today.