

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION**

Citation: *R. v. Byron Prior*, 2008NLTD80

Date: 20080502

Docket: 200701T1240

HER MAJESTY THE QUEEN

V.

BYRON PRIOR

Before: The Honourable Madam Justice Lois R. Hoegg

Place of hearing: St. John's, Newfoundland and Labrador

Held:

Section 301 of the *Criminal Code of Canada* contravenes the *Charter* right to freedom of expression. The section is not saved by section 1, and is therefore unconstitutional.

Appearances:

Elaine Reid for the Crown

Derek Hogan & Sean Montague for Byron Prior

Authorities Cited:

CASES CONSIDERED: *R. v. Lucas*, [1998] S.C.J. No. 28; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130; *R. v. Zundel*, [1992] S.C.C. 731; *R. v. Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 (S.C.C.); *R. v. Stevens* (1995), 96 C.C.C. (3d) 238 (Man.C.A.); *Gleaves v. Deakin and Others*, [1979] 2 All E.R. 497; *R. v. Keegstra* (1991), 61 C.C.C. (3d) 1 (S.C.C.); *R. v. Finnegan*, [1992] A.J. No. 1208 (Alta. Q.B.); *R. v. Lucas*, 1995 CarswellSask 130 (Sask. Q.B.); **R.**

v. Gill, 1996 CarswellOnt 1314 (Gen. Div.); **R. v. Holbrook** (1878), 4 Eng. Q.B.D. 42 (Eng.Q.B.)

STATUTES CONSIDERED: ss. 1 and 2(b) of the *Canadian Charter of Rights and Freedom*; ss. 298, 299 300 and 301 of the *Criminal Code*; *Libel Act*, 1843 (6 & 7 Vict.) c. 96

REASONS FOR JUDGMENT

HOEGG, J.:

INTRODUCTION

[1] The accused Byron Prior is charged with three breaches of section 301 of the *Criminal Code* - publishing defamatory libel.

[2] Section 301 reads:

“Everyone who publishes a defamatory libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.”

[3] Simply put, to convict Mr. Prior the Crown must prove that on the dates and places specified in the Indictment, Byron Prior exhibited matter in public likely to injure the reputation of the complainant by exposing him to hatred, contempt, ridicule or insult.

FACTS

[4] The Crown alleges that at three different times, Mr. Prior distributed flyers and/or wore a placard alleging that the complainant, a public justice figure, had

raped and impregnated the accused's twelve-year-old sister in 1966. A complaint was made, and its investigation by the Royal Newfoundland Constabulary included interviews of the accused's sister, Suzanne Vieira, on two occasions in 2004 and once in 2007. On each of these three occasions Ms. Vieira denied having been sexually assaulted by, or even knowing, the complainant. However, the Crown has no evidence to show that Mr. Prior knows his allegations against the complainant are false. Presumably if the Crown felt it could prove Mr. Prior knowingly published defamatory libel, it would have charged him under section 300.

[5] Section 300 – publishing defamatory libel knowing it to be false – has been declared constitutional (**R. v. Lucas**, [1998] S.C.C. No. 28). Section 300 reads:

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.

THE POSITIONS OF THE CROWN & DEFENCE

[6] Mr. Prior challenges the constitutionality of section 301. He argues that it contravenes his *Charter* right to freedom of expression, and that it is not saved by section 1.

[7] Both Crown and Defence agree that section 301 violates the right to freedom of expression. Although the Supreme Court's decision in **Lucas** concerns section 300, its finding that section 300 contravenes freedom of expression is, in my view, equally applicable to section 301.

[8] The parties' positions diverge at this juncture. The Crown maintains that like section 300, section 301 is saved by section 1 of the *Charter*. Mr. Prior, however, maintains that section 301 is not a reasonable limit on the right to freedom of expression, and therefore is not saved.

THE LAW

[9] The mental element of section 301 is the “intention to publish and defame” (**Lucas**). The offence does not speak to whether the published matter is true or false, or whether it is known by the libeler to be true or false. In this respect, it differs from section 300 of the *Code*. Section 300 requires the Crown to prove that an accused knows the libel he or she is publishing to be false.

[10] In **Lucas** the Supreme Court of Canada found that section 300 contravenes the right to freedom of expression guaranteed by section 2(b) of the *Charter of Rights and Freedoms*, but that it is saved by section 1 because it is a reasonable limit on freedom of expression justified in our free and democratic society. The court applied the section 1 saving test established in **R. v. Oakes**, [1986] 1 S.C.R. 103, and found section 300 justified. In so doing, the court reasoned in paragraph 48:

“Is the goal of the protection of reputation a pressing and substantial objective in our society? I believe it is. The protection of an individual's reputation from wilful and false attack recognizes both the innate dignity of the individual and the integral link between reputation and the fruitful participation of an individual in Canadian society. Preventing damage to reputation as a result of criminal libel is a legitimate goal of the criminal law.”

In my reading of **Lucas**, an accused's knowledge of the falsity of the libel is significant to the court's decision.

ISSUE

[11] The issue for this Court is whether section 301 of the *Code* is saved by section 1 of the *Charter*.

ANALYSIS

[12] The onus of justifying section 301's limit on freedom of expression rests with the party seeking to uphold the section, and the standard for the justification is the balance of probabilities (**Oakes**). In that case, former Chief Justice Dickson set out the approach a court must take in determining whether a law that violates the *Charter* can be saved by section 1:

1. Is the limit on the right prescribed by law?
2. Is the objective for which the legislation was enacted sufficiently pressing and important to override a *Charter* freedom?
and,
3. Is there proportionality between the effects of the measures which limit the *Charter* freedom and the important legislative objective? To answer this third question, the court must consider whether there is a rational connection between the legislative objective and the means chosen to achieve it, whether the means chosen minimally impairs the *Charter* right, and whether the deleterious effects of the restriction outweigh its salutary effects.

Is Section 301 a limit prescribed by law?

[13] Mr. Prior and the Crown both say that Section 301 constitutes a limit prescribed by law. I agree, for the following reasons. Section 301 has been in the *Criminal Code* for over one hundred years, and accordingly cannot be said to be arbitrary or to take people by surprise. The section, along with the necessarily implicated definitions found in sections 298 and 299 of the *Code*, uses common words capable of interpretation, thereby providing "an intelligible standard according to which the judiciary must do its work" (**Lucas**). The section is therefore not defeated by vagueness (**Irwin Toy v. Quebec (Attorney General)**, [1989] 1 S.C.R. 297).

Is the objective of Section 301 sufficiently pressing and substantial to override a *Charter* freedom?

[14] The Crown says that the objective of section 301, like section 300, is to protect personal reputation. It relies on paragraph 48 of **Lucas** to support its position that protection of reputation is so pressing and important as to override freedom of expression. Mr. Prior acknowledges that protection of reputation from willful and false attack is a pressing and substantial objective in our society, but argues that protecting an individual's reputation from truthful attack is not a pressing and substantial objective. Because section 301 can prevent the publishing of defamatory but truthful matter, the section cannot stand. Mr. Prior's argument is essentially that suppression of truth is simply too great a cost to pay to protect reputation. Mr. Prior cites the **Lucas** case and **R. v. Zundel**, [1992] S.C.C. 731 in support of his argument.

[15] The following passages from these cases inform the issue by underscoring the importance of the pursuit of truth to our society. The court stated at paragraph 90 of **Lucas**:

The core values of freedom of expression were held to include the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process. (My emphasis)

[16] In **Zundel**, McLachlin, J. said at paragraph 22:

The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfillment. (My emphasis) That purpose extends to the protection of minority beliefs which the majority regards as wrong or false: *Irwin Toy*, supra, at p. 968 [S.C.R.]. Tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view. As Holmes J. stated over 60 years ago, the fact that the particular content of a person's speech might "excite

popular prejudice” is no reason to deny it protection for “if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought - - not free thought for those who agree with us but freedom for the thought that we hate”: *Schwimmer v. United States*, 279 U.S. 644 (1929), at p. 654. Thus the guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority’s perception of “truth” or “public interest” from smothering the minority’s perception. The view of the majority has no need of constitutional protection; it is tolerated in any event. Viewed thus, a law which forbids expression of a minority or “false” view on pain of criminal prosecution and imprisonment, on its face, offends the purpose of the guarantee of free expression.

[17] The next step is to determine the objective of section 301 and its importance relative to freedom of expression. Is the objective of section 301 the same as the objective of section 300, ie. protection of reputation? Can two sections of the *Code* have the same objective if they are differently worded, or if the *mens rea* requirements differ, ie. if one section (300) requires knowledge of falsity and the other (301) does not? If so, is it necessary or justifiable to have two sections of the *Criminal Code* with the same objective? Is the objective so important that it overrides the right to freedom of expression?

[18] It is well established that the objective of a law is determined by judging the objective of those who drafted and enacted it at the time it was proclaimed (**R. v. Big M Drug Mart Ltd.** (1995), 18 D.L.R. (4th) 321 at 335 (S.C.C.)). This principle was reinforced in **Zundel**, where McLachlin, J. stated at p. 761 that a court “cannot assign objectives, nor invent new ones according to the perceived current utility of the impugned provision” when deciding the objective of legislation.

[19] It is therefore necessary to review the history of the crime of defamatory libel. For the history of sections 300 and 301, I rely on the Supreme Court’s decision in **Lucas**, the Manitoba Court of Appeal case **R. v. Stevens** (1995), 96 C.C.C. (3d) 238 (Man. C.A.), the House of Lords case **Gleaves v. Deakin and Others**, [1979] 2 All E.R. 497, *Crankshaw’s Criminal Code of Canada* and the

English *Libel Act*, 1843 (6 & 7 Vict.) c. 96, which is also known as *Lord Campbell's Act*. This statute modified and codified criminal libel law in England in 1843. It also introduced a new offence of aggravated defamatory libel (section 4). The new offence of aggravated defamatory libel has evolved to what is now section 300 of the *Code*, which requires the accused to have knowledge of falsity of the libel he or she publishes.

[20] On the other hand, the forerunner to section 301 was section 5 of *Lord Campbell's Act*, simple defamatory libel. Both paragraphs 4 and 5 of this Act were incorporated into Canadian criminal law in 1874 (*An Act respecting the Crime of Libel*, S.C. 1874, c.38), became part of the first Canadian *Criminal Code* in 1892 and evolved over time and through various revisions into sections 300 and 301 as found today in the *Code*.

[21] I accept Chief Justice Scott's and Mr. Justice Twaddle's historical reviews of criminal libel law as described in **Stevens**, and note that Mr. Justice Twaddle's extensive work was quoted with approval by the Supreme Court of Canada in **Lucas**.

[22] Although the objective of section 300 (aggravated defamatory libel) may be the protection of reputation, I am not convinced that the original objective of section 301 (simple defamatory libel) was the same. I am inclined to the view that the objective of the crime of simple defamatory libel was to prevent breaches of the peace. I am mindful of the Supreme Court's statements in paragraphs 40 to 47 of the **Lucas** judgment which seem to indicate that the objective of criminal libel law at the time *Lord Campbell's Act* was proclaimed was to protect reputation. However, the Supreme Court was considering this issue in the specific context of section 300 (section 4 of *Lord Campbell's Act*) which clearly was enacted for that purpose. To my mind it is clear from Twaddle J.A.'s meticulous research, including his examination of the parliamentary debates relating to the enactment of the *Libel Act* as well as other legal literature, that prior to the *Libel Act*, the interest of the state, manifested in the offence of criminal libel, was to prevent the dissemination of libelous material in order to prevent breaches of the peace. This was on the theory that men would seek revenge by resorting to violence if their

honour was libeled. Whether the “libel” was true or false was irrelevant. This theory continued to manifest itself in cases through the nineteenth century, as acknowledged by the court in their reference to **R. v. Holbrook** (1878), 4 Eng. Q.B.D. 42 (Eng. Q. B.).

[23] In determining the objective of the offence of defamatory libel, the Supreme Court referenced the preamble to *Lord Campbell’s Act* which states that the codified law of defamatory libel is to protect reputation. In visiting the history of the law, the Supreme Court judgment in **Lucas** reads at paragraphs 41 to 43:

The provisions pertaining to defamatory libel date back to the earliest versions of the *Code*, which codified the existing English law. The law in England had existed for several centuries. A brief historical inquiry is therefore necessary to discover the objective of those laws and the intention of the Canadian Parliament in adopting them.

This analysis was undertaken in some detail by the Manitoba Court of Appeal in *Stevens, supra*, especially in the reasons of Twaddle J.A. at pp. 286-94. He found that while the offence was originally enacted as a means of preventing duels fought in defence of the honour of defamed parties, and thus preventing breaches of the public peace, this initial purpose had long since been eclipsed by another objective: that of protecting personal reputation.

This conclusion was based in large part on the fact that the ‘modern’ Canadian offence of defamatory libel is derived from a law first adopted by Parliament in 1874 (*An Act respecting the Crime of Libel*, S.C. 1874, c. 38), which was merely an adoption of the law of England as it existed at the time of Confederation. By that time, the original English offence of defamatory libel had been supplanted by an 1843 statute often referred to as *Lord Campbell’s Act*. Its preamble asserted that the purpose of the Act was “For the better Protection of private Character”. The comments of Lord Campbell himself, quoted at p. 105 of the report of the select House of Lords committee which formulated the recommendations that were ultimately reflected in *Lord Campbell’s Act*, are revealing:

On Principle, I think that Defamation is a crime like Theft or Battery of the Person; It is doing an Injury to a Member of Society, who is entitled to the Protection of the Law, and the Person who perpetrates that Injury ought to be punished as an Example to others to prevent a repetition of the Offence.

[24] It is clear that the court found that the objective of the offence of aggravated defamatory libel, at the time it was enacted in 1843, was protection of reputation. However, the court did not appear to specifically turn its mind to the offence of simple defamatory libel which, unlike aggravated defamatory libel, was not a new offence introduced in *Lord Campbell's Act*.

[25] In order to review the objective of the offence of simple defamatory libel, it seems to me that it is necessary to consider its history prior to the *Libel Act*. To my mind, if Canada adopts English law as codified by the *Libel Act*, it adopts the history that comes with it. When one considers the differences between sections 4 and 5 of the 1843 Act, and the differences between sections 300 and 301 today, it becomes clear that while both sections address reputation, the sections are different and may have different purposes.

[26] There is no doubt that the purpose of the new offence of aggravated defamatory libel (equivalent to section 300) was “for the better protection of private character” as the Supreme Court of Canada found. Despite the preamble to *Lord Campbell's Act*, it appears to me that the purpose of the bare offence of criminal libel, which existed prior to 1843 and is the forerunner of section 301, was to prevent the provocation of breaches of the peace. This is essentially acknowledged by the court in the above referenced paragraphs of the **Lucas** judgment.

[27] The **Stevens** case is also helpful. Chief Justice Scott delivered the court’s judgment. He said at 247:

In 1843, as a result of a report of a committee of the House of Lords, the *Libel Act, 1843* (U.K.), c. 96 (*Lord Campbell's Act*) was passed. The preamble to *Lord Campbell's Act* described its purpose as being: “For the better Protection of private Character, and for more effectually securing the Liberty of the Press, and for better preventing Abuses in exercising the said Liberty”.

It has been accepted ever since that one of the principal objects of this legislation was to provide a measure of protection to the press, who frequently appeared as defendants in criminal libel proceedings. Proceedings for defamatory libel were at times commenced by the Crown at the urging of prominent persons seeking public vindication, or by way of private prosecution. Yet, prior to *Lord Campbell's Act*, truth could not be pled successfully. Truth, while always a defence to a civil action for libel, was not a defence to a criminal charge of libel since the essence of the offence continued to be that publication was likely to cause a breach of the peace. Hence, it was a crime "that the state had an interest in repressing", the maxim being "the greater the truth, the greater the libel": see W. Odgers, *An Outline of the Law of Libel* (London: MacMillan & Co. Ltd. 1897), at p. 181. The Act's most significant change, therefore, was to make truth a defence provided the defendant could prove both that the statement was true and "that it was for the public benefit that the said matters charged should be published". **This benefit provided a compensating public advantage to any risk of a breach of the peace.** (My emphasis) In fact, this change was also of benefit to the victim. Since evidence of truth was now admissible, the public would be left in no doubt as to the falseness of the publication should there be a conviction.

[28] And Mr. Justice Twaddle said at p. 295:

Having regard to the history of the offence as I have outlined it and particularly to the proceedings before the select committee, I am of the view that *Lord Campbell's Act* might be viewed as the watershed which divides the days when the law's objective was the maintenance of peace and those when the law's objective was primarily the protection of reputation. And in particular, the objective of s. 4 of *Lord Campbell's Act* was the protection of reputation from willful and false attack.

[29] Several of the Lords writing in the **Gleaves** case also maintain that the purpose of bare defamatory libel was to maintain the peace. In particular, Lord Diplock stated at page 498:

The original justification for the emergence of the common law offence of defamatory libel in a more primitive age was the prevention of disorder, to use the words of art of the European Convention, which describes the various grounds on which public authority may interfere to restrict or penalise freedom of expression.

The reason for creating the offence was to provide the victim with the means of securing the punishment of his defamer by peaceful process of the law instead of resorting to personal violence to obtain revenge.

[30] And, Lord Scarman said at p. 508:

It is, however, not every libel that warrants a criminal prosecution. To warrant prosecution the libel must be sufficiently serious to require the intervention of the Crown in the public interest. The requirement has developed from the common law principle that a criminal libel was one of the tendency of which was to provoke a breach of the peace. As Blackstone put it (quoted by Wien J. in *Goldsmith v. Pressdram*): ... in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the whole that the law considers’.

[31] It appears to me that the Supreme Court’s decision that protection of reputation was the objective of criminal libel law is more appropriately confined to section 300 of the *Code*.

[32] There are other reasons why I question whether the objective of section 301 is to protect reputation. The wording of section 301 is different from section 300, and the *mens rea* requirements of the sections are substantially different. The sections catch different types of offenders. To me, it naturally follows that their purposes or objectives must be different.

[33] 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. In this regard I rely on **Hill v. Church of Scientology of Toronto**, [1995] 2 S.C.R.

1130, wherein the court stated at paragraph 108 that “a democratic society, therefore, has an interest in insuring that its members can enjoy and protect their good reputation **so long as it is merited**”. (My emphasis) 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.

[34] I would therefore find that section 301’s objective is to prevent breaches of the peace. Is this objective so pressing and substantial as to justify its salvation by section 1 of the *Charter*? I do not think so. In my view, the *Criminal Code* provides other means of preventing breaches of the peace, should a breach of the peace occur as a result of the publication of a libel. It could just as easily be said that looking at somebody the wrong way could provoke a breach of the peace. It would surely not be asserted that looking at someone the wrong way is behaviour that ought to be criminalized on the chance it could provoke a breach of the peace. In citing this example, I do not mean to equate it with the publication of the defamatory matter at issue in this case. I simply mean to illustrate that the causes of breaches of the peace are many, and are often lawful, and the remedy is surely not to criminalize the causative conduct. Regardless of what may cause a breach of the peace, if the peace is breached, there are criminal law remedies available to protect society’s interest in maintaining order, provided the elements of the particular offence charged and the requisite *mens rea* are proved.

[35] If I am wrong in concluding that the objective of section 301 of the *Code* is to prevent breaches of the peace and not to protect reputation, I would have to find that the objectives of section 300 and 301 diverge into protection of reputation from willful and false attacks and protection of reputation from any attack regardless of its truth, respectively. I would go on to find that the objective of protecting reputation from any attack regardless of its truth is not so pressing and important as to override the *Charter* right to freedom of expression. Further, it was not asserted that there is, nor does there appear to me to be, a pressing social disorder problem instigated by the publication of libel.

[36] Accordingly, I would find that neither the objective of preventing breaches of the peace nor the protection of reputation from any attack regardless of its truth

to be sufficiently pressing and important so as to override the *Charter* right to freedom of expression and thereby warrant its salvation by section 1 of the *Charter*.

Is there proportionality between the effects of the measures limiting the right and achieving the important objective?

[37] If I am wrong in striking section 301 on the basis that the objective of preventing breaches of the peace is not pressing and substantial, I would go on to strike section 301 on the third part, ie. the proportionality aspect of the **Oakes** test. To my mind, there is little to no rational connection between the legislative objective of preventing breaches of the peace and the publication of libel.

[38] If I am wrong and it is determined that the objective of section 301 is to protect reputation, I would also strike section 301 on the proportionality aspect of the **Oakes** test. 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 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 decisions in both **R. v. Keegstra** (1991), 61 C.C.C. (3d) 1 (S.C.C.), and **Zundel**, and is entirely at odds with modern views of *mens rea* in criminal law. The criminalization of publication of libel, without knowledge of its falsity, conflicts with what has been described as a core value of our society: the search for, and the promotion of, truth. For the same reason, I believe the deleterious effects of the restriction to the right imposed by section 301 far outweigh any salutary effects it may have. I cannot say it better than Lord Diplock in **Gleaves**:

The examination of the legal characteristics of the criminal offence of defamatory libel as it survives today, which has been rendered necessary in order to dispose of this appeal, has left me with the conviction that this particular offence has retained anomalies which involve serious departures from accepted principles on which the modern criminal law of England is based and are difficult to reconcile with

international obligation which this country has undertaken by becoming a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[39] It appears that this could leave the complainant upset over the accused's ability to continue to publish statements which insult and ridicule him. Because the Crown is not in a position to advance evidence probative of Mr. Prior's knowledge of the falsity of his defamatory statements, Mr. Prior cannot be criminally prosecuted. However, there is a civil remedy to which the complainant may resort. This is not to say that because there is a civil remedy there need not be a criminal remedy. Civil and criminal remedies have different purposes and are not interchangeable, as the Supreme Court of Canada in **Lucas** found. It is simply to say that the complainant has resort to civil remedy in such a case as this, the same way that a wronged party seeks an injunction or sues for damages.

[40] Three other Canadian superior courts have found section 301 of the *Criminal Code* unconstitutional. The Crown argues that none of these cases is binding on this Court, and that the reasons for each of the decisions do not bear scrutiny. Those cases are **R. v. Finnegan**, [1992] A.J. No. 1208 (Alta. Q.B.) wherein Mr. Justice MacKenzie found that section 301 failed the proportionality aspect of the **Oakes** test; **R. v. Lucas**, 1995 CarswellSask 130 (Sask. Q.B.) wherein Mr. Justice Hranbinsky found section 301 unconstitutional because truthful comments could result in conviction; and **R. v. Gill**, 1996 CarswellOnt 1314 (Gen. Div.) wherein Mr. Justice Lally came to essentially the same conclusion as Mr. Justice Hranbinsky.

[41] I have analyzed the constitutional issue of whether section 301 is saved by section 1 of the *Charter* by inquiring into and determining section 301's original objective. I then determined that the objective was not so pressing and important as to override freedom of expression. The **Lucas** (Trial Division), **Gill** and **Finnegan** courts came to the same result for different reasons. It is clear to me, however, that each of the three above-noted courts found section 301 unconstitutional because the section is offensive to modern day notions of justice. In that regard, I rely on these cases for their conclusions.

CONCLUSION

[42] In summary I find that it is not justified, in our free and democratic society, for the Crown to use the heavy hammer of the criminal law against a subject for publishing defamatory libel when the Crown is not able to show that that subject knows that his statements are false. As the case law aptly establishes, the expression of truthful, unpopular or even false statements deserve protection unless expressed in a violent manner.

[43] In the result, section 301 of the *Code* violates the *Charter* guarantee of freedom of expression, and is not saved by section 1. It is therefore unconstitutional.

LOIS R. HOEGG

Justice