The Impact of "CharterValues" and Campbell v. Jones: Is it Now Easier to Establish Qualified Privilege Against Defamation?

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Introduction

The purpose of this case comment is to impel a discourse on whether *Campbell v. Jones*¹ has “loosened the test” on qualified privilege. In the aftermath of the Court of Appeal decision, it might be tempting to suggest that *Campbell v. Jones* means that the defence of qualified privilege is being re-fabricated in light of the advent of the *Charter of Rights and Freedoms*, in order to take an expanded account of “Charter values” such as freedom of expression. This case comment adopts the contrary view, and asserts that what *Campbell* has really done is clarify exactly which type of extraordinary circumstances will found an occasion upon which a court will recognize qualified privilege in relation to a defamatory communication made to the “world at large.” In other words, *Campbell* should be interpreted in a manner consistent with the traditional principles of qualified privilege and the pre-Charter jurisprudence.

In *Campbell*, three twelve-year-old black girls at a Halifax elementary school were subjected to a very invasive and humiliating personal search in full view of windows to which other students had access—over having taken a ten-dollar bill. During the search, there were egregious, multiple violations of rights, and almost immediately thereafter, a storm of controversy erupted in a community notoriously beset by long-term systemic discrimination. Soon after, two lawyers retained to help lodge a complaint with the Halifax Police Department over the illegal search alleged in a press conference that race and class were linked to the rights violations, and claimed that the search would not have occurred against white children. The police officer who had conducted the search filed suit for defamation. Overturning the trial court, the Court of Appeal held that the statements were made on an occasion of qualified privilege because, on the facts, the lawyers had a “substantial and compelling” public duty to make honestly and reasonably believed comments to a community suffering from systemic racism.²

¹ *Campbell v. Jones*, supra note 1 at para. 101. The facts of the case are discussed in greater detail below in the context of the jurisprudence on qualified privilege.
In order to appreciate the contribution that *Campbell* has made, it is necessary to establish that qualified privilege does not, strictly speaking, involve a balancing of the general freedom of expression against the reputation of an individual, in contrast to what one court has asserted in a decision subsequent to *Campbell*.\(^3\) In fact, the general freedom of expression is balanced directly against the reputation of the individual only at the point where the court is deciding whether there was defamation. Qualified privilege becomes an issue once defamation has been established. At such a point a court has, in essence, already determined that the harm done to the reputation of the injured plaintiff outweighs the general freedom of expression. The question then becomes whether there was an occasion upon which the defendant guilty of defamation had a public duty or a private interest in making the particular communication to the third party. If so, qualified privilege attaches to that occasion—it does not attach to the communication or to the party making the communication. It is the occasion that defines the scope of the privilege and the scope of the communication that will be protected, and it is this occasion that must be balanced against the reputation of the individual when a court is deciding upon whether to recognize the existence of privilege.

It is only in this context that the contribution of *Campbell* may be properly appreciated. *Campbell* demonstrates that not all occasions are created equal, and also illustrates the conditions under which a court will allow a reputation to be defamed. Thus I begin with a brief canvass of the relevant history and parameters of the common law defence of qualified privilege. After having parsed the historical development and basic elements of the defence, I will demonstrate that qualified privilege attaches to particular occasions of public duty or private interest, and that because of this, it is properly the occasion that must be weighed against the reputation of the individual.\(^4\) Next, this comment will establish that "Charter values" have not altered this and do not necessitate a reconstruction of defamation law. Finally, I will contend that *Campbell* has not made it easier to establish qualified privilege, but that it has made the test clearer by demonstrating the type of extraordinary occasion that must exist before there can be a

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3. The reasoning of the Ontario Superior Court in *Gates v. Standard*, [2004] O.J. No. 1470 (Sup. Ct.) (QL) appeared to involve a balancing of freedom of expression and the protection of reputation at the qualified privilege stage of the analysis. Under the heading of "Qualified Privilege," the court concluded at paragraph 63 that "in the balancing exercise, the Charter value of freedom of expression is to be given no more weight in principle than the protection of the reputation of the individual."

4. While qualified privilege applies equally to occasions in which there are public duties or private interests to discharge, this comment focuses primarily on public duties, as this was the basis of the analysis in *Campbell v. Jones*. 
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public duty to make a communication that may defame a reputation before the "world at large."

I. Qualified privilege: a background

History and basic elements
Qualified privilege is one of three defences available to a party defending an action against defamation. For reasons exogenous to our purposes here, it is usually deployed when the other defences of justification and fair comment are unavailable or have not succeeded.\(^5\) Qualified privilege recognizes that there are occasions in which a party will have a compelling legal, social, or moral duty to make a communication. On such occasions, the common law recognizes a limited immunity from actions for defamation even though the communication made is defamatory.

Defamation was described in the Nova Scotia arbitral decision of ABT Building Products Canada v. C.E.P., Local 434:\(^6\)

A publication is defamatory if it lowers the reputation of the plaintiff in the estimation of persons in a substantial segment of the community, that is, if it has the tendency to or does injure, prejudice or disparage the plaintiff in the eyes of others, or lowers the good opinion, esteem or regard which others have for him, or causes him to be shunned and avoided, or exposes him to hatred, contempt or ridicule.

When determining whether a person has been defamed, the court does not consider the reputation that the defamed person wishes she had, but the reputation she actually had.\(^7\)

A plaintiff seeking to recover damages for defamation must establish three elements: that the impugned words were defamatory, that the words referred to the plaintiff, and that the words were published to a third person.\(^8\)

If a court finds that these three elements are present, there is a finding

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5. The defence of justification is met when the defendant can demonstrate on a balance of probabilities that her communication to a third party was in fact truthful; for more please see: Matthews v. MacMillan, [2003] N.S.J. No. 319 (S.C.) (QL). The defence of fair comment is made out when the defendant can establish on a balance of probabilities that the communication was one of comment and not of fact. The defendant must also establish that the comment was made honestly and in good faith on a matter of public interest and that the comment was not made maliciously. The comment must be an honest expression of opinion on true facts which are known to the person making the comment. For more, see: Raymond E. Brown, The Law of Defamation In Canada, 2d ed. (Toronto: Carswell, 1994) vol. 1 at 1-35 [Brown v. 1].


of defamation, and the question then becomes whether the defendant can successfully establish one of the three defences to defamation.

The basic elements of the test to establish qualified privilege have remained essentially unchanged since the Supreme Court adopted the House of Lords decision Adam v. Ward in its decision Halls v. Mitchell, although the test has been refined by subsequent Canadian case law. In order to establish the existence of qualified privilege, firstly, a defendant must have made a communication in order to discharge a private interest or a public duty. Secondly, the defendant must have made the communication to a party with a corresponding interest in receiving the communication. Thirdly, the communication must not have been made with actual or express malice. Fourthly, the communication must not have exceeded the scope of the privilege recognized by the court. This test must be met on the balance of probabilities.

It is well established that the privilege attaches to the occasion and not to the communication or to the party making the communication. The justification for the privilege can be traced back to the 1834 decision of Toogood v. Spyring in which Baron Parke reasoned: "If fairly warranted by any reasonable occasion or exigency, and honestly made, such (privileged) communications are protected for the common convenience and welfare of society." In the words of Professor Raymond E. Brown:

the law recognizes that it is in the public interest that on occasion persons should be able to receive frank and uninhibited information from particular sources. The purpose of the immunity is not so much to shield the parties involved as it is to promote the public welfare.

11. There is a second branch of qualified privilege which is based upon good faith reporting of judicial or quasi-judicial proceedings, but that is beyond the scope of this comment.
12. Adam, supra note 9 at 328, and further at 348, when Lord Shaw found: "[Privilege] is a term which is applied in two senses. There is a privileged occasion, and there is said to be a privileged communication. The former is correct; the latter, strictly viewed, tends to error. What is meant with regard to a privileged communication is that it was protected as being within the scope of the privilege attaching to the occasion. The occasion is privileged, the communication is protected." Halls, supra note 10; in Botiuk v. Toronto Free Press Publications, Ltd. (1995), 126 D.L.R. (4th) 609 (S.C.C.) at 626, Cory J. said: "Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself." In Lee v. Globe and Mail (2001), 52 O.R. (3d) 652 (S.C.J.) at 657, Swinton J. noted: "Qualified privilege attaches to the occasion on which words were published, rather than to the words themselves or the parties."
13. (1834), 149 E.R. 1044 at 1050.
15. Ibid. at 13-11.
In 2002, the Ontario Court of Appeal confirmed that the public interest should not be viewed "technically or narrowly," and might be personal, social, business, financial, or legal in nature. "The context is important." In *Halls*, the Supreme Court found that a subjective belief in a public duty was not enough to establish the privilege, but that the belief had to be reasonable and based upon the standards of people of ordinary intelligence and moral principles.

It is the importance of the occasion and the duty to make a communication that defines the scope of the privilege that will be recognized. The law is clear that the communication itself must have regard to all of the circumstances of the case and to the nature of the corresponding interests of the recipient of the communication. If the occasion warrants, the courts will tolerate broad scope for the language that has been used as long as the communicator honestly and upon reasonable grounds believed that what she said was true even though it was not. In *Adam v. Ward*, Lord Atkinson said that persons communicating on a privileged occasion were not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty.... He will be protected even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact this was not so.

Even given the broad scope afforded by this interpretation, it is the "circumstances" of the occasion that define the grounds upon which a speech is protected. The Ontario Court of Appeal has confirmed this test, but added that "reckless disregard for the truth" would be considered malice and thus would negate the defence at the third part of the test. The venerable English text *Gatley on Libel and Slander* has often been quoted approvingly and widely in both English and Canadian cases for its position that privileged speech could be "harsh, hasty, untrue, or libellous" as long as it is justified by the circumstances of the case and by the public interest.

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Two Court of Appeal decisions from western Canada may have narrowed this test somewhat. In *Moises v. Canadian Newspaper,*\(^{21}\) the British Columbia Court of Appeal followed a much earlier decision of the Saskatchewan Court of Appeal,\(^{22}\) and found that the timing and urgency of the communication had to be taken into account, as well as whether or not the statement was officiously volunteered, and whether or not the statements were germane and reasonably appropriate to the occasion.

*Moises* also confirmed that the categories of occasions in which the courts can recognize that persons have a public duty or a private interest in making a communication are never closed.\(^{23}\) Some examples of occasions in which courts have found qualified privilege involve the following: the report of a private investigator to a client, a parent’s report to school officials about a teacher’s alleged maltreatment of a child, a report of a father with respect to his son’s failing grades, a report to directors concerning an auditor’s misconduct, a report to a lending institution concerning an applicant for a loan, and a report to a union about the firing of an employee.\(^{24}\)

When a court finds an occasion of qualified privilege, the legal effect of this is to rebut the presumption of malice that otherwise accompanies the publication of defamatory words.\(^{25}\) The occasion of privilege displaces the presumption of malice until the plaintiff can demonstrate on a balance of probabilities that the communication was made with malice.\(^{26}\) The existence of privilege, however, does not change the actionable character of the words.\(^{27}\)

**Qualified privilege & defamatory comments made to the “world at large”**

For years, the 1968 Supreme Court of Canada decision in *Jones v. Bennett*\(^{28}\) was understood to tightly circumscribe the conditions upon which qualified privilege would be recognized in relation to a defamatory communication made to the general public. This case established that the appropriateness of the audience to whom a communication is made is an important factor in determining whether the communication exceeds the scope of the privilege recognized.

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26. *Shaw v. Morgan* (1888), 15 R. 865 at 870 (Ct. of Sess.).
In *Jones*, the defendant Premier of British Columbia had led a successful effort to pass legislation to remove the chairman of the Purchasing Commission. The provincial government justified the legislation on the basis of allegations that the chairman had improperly accepted benefits while on the job. At a party gathering closely following the passing of the legislation, the Premier commented to two reporters that: “I’m not going to talk about the Jones boy (the chairman). I could say a lot, but let me assure you of this; the position taken by the government is the right one.” In actual fact, however, the commission chairman had been acquitted of criminal charges of wrongdoing over two months before the Premier made his public remarks, and the Attorney-General’s subsequent appeal of that decision was struck out as “frivolous and vexatious” over six weeks before the comments.

At trial, the court found the existence of defamation, but that decision was over-turned by the Court of Appeal. At the Supreme Court level, a unanimous court held that the appropriateness of an audience is a critical factor in helping a court determine whether the corresponding interest of the recipient of the communication was met appropriately. The court went on to find that the Premier had knowingly made his remarks to the general public, and that the general public was an inappropriately broad audience to have had the requisite corresponding interest in receiving information about the alleged misconduct of a single civil servant. On this basis, the court restored the finding of the trial judge.

The court did not altogether close the door to recognizing an occasion of qualified privilege when remarks are made to the general public. For the court, Chief Justice Cartwright recognized the continued persuasiveness of the old English House of Lords case *Adam v. Ward*, which was a decision that recognized qualified privilege notwithstanding that defamatory remarks were published to the general public. In *Adam*, the defendant was entitled to comment to the general public because the initial “maker of the charge” had first published his statements to the general public. Therefore, in that case, the recipient third party audience maintained a corresponding interest in receiving the defendant’s communication, even though the communication turned out to be defamatory.

The Supreme Court also rejected the argument that politicians making out-of-legislature statements on their stewardship of government always do so on occasions of qualified privilege, and held that there was no authority.

29. Comments made in provincial legislatures and federal parliament are protected by absolute privilege.

30. It was held that the Premier's knowledge of the presence of two news reporters meant that he knew his comments would be communicated to the general public.
for such privilege. This is consistent with the traditional application of qualified privilege, which attaches itself to occasions and not to the communications or to the communicators.

In Parlett v. Robinson, a politician was successful in raising the defence of qualified privilege concerning defamatory remarks he made to the "world at large." The defendant Member of Parliament was the official spokesperson of his party on the Ministry of the Solicitor General and was also a member of the House of Commons Standing Committee on Justice and Legal Affairs. In the course of his constituency work, the Member came across information that the plaintiff may have been involved in a scheme to sell violin chin rests constructed by prison labour at marked-up rates for profit in the private sector. The Member then diligently took steps to find out additional information from the business, the community, and appropriate government channels. In his meetings with government officials, the defendant Member refused to name names. Eventually, the defendant discovered that the plaintiff had in fact made attempts to sell the chin rests for profit, and the defendant then disclosed this to the Solicitor General and demanded an inquiry. When the Solicitor General refused, the defendant went public with a press conference in which some defamatory comments were made.

The Court of Appeal held that the defamatory remarks were made on an occasion of qualified privilege because the defendant had honestly and upon reasonable grounds believed the comments he had made. Further, the court recognized that the defendant had taken many steps to try to deal with the situation through internal government channels, and only published his remarks to the general public when his efforts were ultimately frustrated. The electorate had a "bona fide interest" in knowing of the matter, and so the decision was consistent with the legal test set out by Jones in the

31. There is some authority for the proposition that a candidate for public office speaking to voters speaks on occasions of qualified privilege, but this proposition has also been contested. In Globe & Mail v. Boland (1960), 22 D.L.R. (2d) 277 at 281-282, it was held that comments made about the fitness of candidates for office during an election were not necessarily made on occasions of qualified privilege, as this would be "harmful to that 'common convenience and welfare of society'". In Globe & Mail, the Supreme Court relied upon the English text Gatley on Libel and Slander, 4th ed., by Richard O'Sullivan (London: Sweet & Maxwell, 1953) at 254, and cited the author's following comments: "[Such a privilege] would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility, and leave them open to others who have no respect for reputation." This case and text were cited approvingly in Hill v. Church of Scientology, supra note 18, which also cited the following cases: Derrickson v. Tomat (1992), 88 D.L.R. (4th) 401 at 408; Westbank Band of Indians v. Tomat (1992), 41 C.P.R. (3d) 396 (B.C.C.A.). See also Douglas v. Tucker, [1952] 1 D.L.R. 657 (S.C.C.). Nevertheless, in Jones, the Supreme Court found that even if candidates for public office did speak on occasions of qualified privilege, it would be an "unwarranted extension" of such a privilege to expand it to include the protection of all out-of-legislature accounts of government stewardship given by politicians not in the process of contesting elections.

Court’s finding. The court expressly distinguished the facts of Jones on the grounds that the defendant in that case had had no occasion for a duty to communicate to the “world at large.”

The court cited two English cases involving politicians receiving or repeating defamatory communications while in the course of their duties as Members of Parliament. While neither case involved publication to the “world at large,” they both involved the duties of politicians to make communications which proved to be defamatory. In both cases, the Members of Parliament dealt with complaints fielded from their constituents by writing letters to the appropriate government persons requesting investigations into alleged misconduct. Both cases were held to be occasions of qualified privilege. In Beech, Geoffrey Lane J. reasoned:

"It will be a sad day when a Member of Parliament has to look over his shoulder before ventilating, to the proper authority, criticisms about the work of a public servant or a professional man who is holding himself out in practice for the benefit of the public which he honestly believes to merit investigation."

In summary, occasions of qualified privilege may arise in the course of politicians carrying out their responsibilities as elected officials, but the fact that a politician is making a communication does not mean that she is doing so on an occasion of qualified privilege. The existence of an occasion of qualified privilege will always be fact-driven and depend upon the circumstances of the occasion.

Scope of the occasion of public duty: communicator does not have to actually advance the public interest in order to establish qualified privilege

There is some danger that the law may become confused on the proper scope of the occasion for public duty, and so I shall deal briefly with this issue before advancing to the impact of Hill and Campbell upon the defence of qualified privilege. In the 2000 decision of Leenen v. Canadian Broadcasting Corporation, the Ontario Superior Court mistakenly stated

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33. Parlett, supra note 32 at para. 35.
35. Beech, supra note 34 at 24.
37. (2000), 48 O.R. (3d) 656 (Sup. Ct.).
the law on the scope of qualified privilege, and the decision was upheld on appeal in 2001 (the decision appeared correct on the facts).  

In Leenen, the trial court found that there was no occasion of qualified privilege where the defendants had broadcast a documentary containing many untrue facts and innuendo. Contrary information was readily available to the defendants, said the court. In other words, the belief of the C.B.C. journalists in the veracity of the information propounded in the documentary was not reasonably held. However, the court went on to find:

This broadcast had a major impact on patients, some of whom stopped their medications independent of their physicians’ advice. Many physicians and patients were greatly inconvenienced due to the extra clinic visits and the additional counselling that was necessary in the aftermath of the fifth estate broadcast. In fact, I think it reasonably could be said that the program was contrary to the public interest because of its real potential for harm by inciting panic amongst patients suffering from high blood pressure.... I have concluded that this broadcast seriously undermined trust and confidence in Canada’s health care system. To suggest that the [Health Protection Branch] was less than diligent, something I have concluded was simply not true, in the mind of a reasonable viewer would create grave concern about the drug regulatory process. Hence, the defence of qualified privilege, on this basis alone, fails.

With due deference to the court, there is no authority for this finding. The fact that a court must establish that there is a public duty or a private interest to be discharged does not mean that the court must also judge whether the content of the communication actually meets the public interest. The result in Leenen seems to suggest that there is a duty upon broadcasters to instil confidence in the public health care system! Even if the strictest case law emanating from Moises and Sapiro is correct, the statements need only be germane and reasonably appropriate to the occasion. Indeed, there may be occasion for qualified privilege in statements that are “harsh, hasty, untrue, and libellous” as long as there is no “reckless disregard for the truth.” To suggest also that the defendant has to advance the public interest is simply inconsistent with the existing law.

In the Law of Defamation in Canada, Professor Brown critiqued the finding of the trial judge in Leenen:

The defence of qualified privilege would be seriously eroded if courts were to examine not only whether the subject matter of the communication gives rise to a privileged occasion but they were to evaluate the efficacy

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39. Leenen, supra note 8 at 697.
40. Brown v. 4, supra note 6 at 13-13 at footnote 35.
of its content on the public to whom it is communicated. If courts were permitted to examine its content for other than purposes of deciding whether the defendant acted maliciously or the plaintiff suffered serious injury, they would be placing themselves in the position of moral and social guardians of the nation’s beliefs and ideas. Nor should they stand as arbiters of what is good or bad or right or wrong for the nation’s public.\textsuperscript{41}

III. \textit{The Impact of “Charter Values” and Campbell v. Jones}

Defamation law in general: balancing freedom of expression with injury of reputation

The 1995 decision in \textit{Hill v. Church of Scientology}\textsuperscript{42} was the first opportunity the Supreme Court had to address the novel argument that the tort of defamation had to be re-evaluated in light of the advent of the \textit{Charter of Rights and Freedoms}, in order to take an expanded account of “Charter values” such as freedom of expression.

The defendant organization raising the novel argument of “Charter values” was an unsympathetic one. The Court held that the defendant had maliciously continued to publicly attack and pursue charges against a Crown prosecutor for improperly using sealed documents in an investigation—even when the defendant knew that not to be true. The court eventually found that the defendant organization had kept a file labelled “Enemy Canada” on the prosecutor from 1977 until at least 1981. For various reasons, the Supreme Court rejected the defences of justification, fair comment, and qualified privilege, and upheld the award of a large sum of damages.

On the issue of having to re-evaluate defamation law in light of the advent of “Charter values,” the Supreme Court concluded that the common law of defamation complies with the underlying values of the \textit{Charter} and held that there is no need to amend or alter it.\textsuperscript{43} In the decision, Justice Cory observed that “[t]here can be no doubt that in libel cases the twin values of reputation and freedom of expression will clash.”\textsuperscript{44} The Supreme Court recognized that both reputation and freedom of expression were worth protecting in a free and democratic society, and noted that “defamatory statements are very tenuously related to the core values which underlie s. 2(b).”\textsuperscript{45} Justice Cory also declared that:

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\textsuperscript{41} \textit{Ibid.} at 13-13, footnote 35.
\textsuperscript{42} \textit{Hill}, supra note 18.
\textsuperscript{43} \textit{Ibid.} at 170.
\textsuperscript{44} \textit{Ibid.} at 158.
\textsuperscript{45} \textit{Ibid.} at 159.
[defamatory statements] are inimical to the search for truth. False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society.\textsuperscript{46}

For our purposes, it is critical to be aware that the Supreme Court engaged in the balancing of the “twin values” of freedom of expression and the protection of reputation in the context of defamation law generally—and not in the context of qualified privilege.

\textit{Qualified privilege: it is the occasion of public duty that matters—not freedom of speech}

\textit{Campbell v. Jones} had a powerful impact upon the law of qualified privilege because it demonstrated that all things flow from the occasion of public duty. While the Nova Scotia Court of Appeal did not “loosen” the test earlier set out by the Supreme Court in \textit{Jones}, it did recognize an extraordinary occasion in which parties had a public duty to make a communication to the “world at large”—even though parts of the communication were defamatory. In other words, the Court did not make the test easier, but it did make it clearer.

This advance in the case law would not have been possible had the Court focused its reasoning on the balancing of freedom of expression with the protection of reputation from defamation. While Roscoe J.A. did make some concluding remarks which hinted that qualified privilege would have to be re-fabricated to take an expanded account of “Charter values” such as freedom of expression, when her decision is viewed in the totality of its reasoning, it is pretty clear that the defendants spoke on an occasion of extraordinary circumstance involving a compelling and immediate public interest. Absent this occasion, the defamatory comments made in the case would not have been protected by qualified privilege regardless of the \textit{Charter}. However, because the Court of Appeal did not expressly shut the door to the “Charter values” position—thus missing out on the finding of the Supreme Court in \textit{Hill}—it is still necessary to observe that the law of qualified privilege has not been properly settled by the courts.

On the facts, \textit{Campbell} involved an occasion of compelling public duties owed not only to the immediate parties involved, but to the broader community at large. It will be recalled that three twelve-year-old black girls at a Halifax elementary school were subjected to a very invasive personal search by a police officer, in front of each other and in view of the windows of the school halls to which other students had access. This

\textsuperscript{46} \textit{Ibid.} at 158.
invasive personal search—which was a strip search according to the test later set out in *R. v. Golden*—was conducted without any connection to an arrest. The three girls were not informed of their right to counsel or of their right to refuse to be searched. The parents and guardian of the three girls were not contacted. In fact, the police officer involved admitted that the search was unconstitutional even before the action made it to court. Most strikingly, the egregious rights violations occurred over a single ten-dollar bill.

Media leaks of the rights violations quickly set off a storm in the Halifax community. Soon after the media leaks, two human rights lawyers were hired to help the girls and their families lodge a complaint with the Halifax Police Department. Immediately after the complaint was filed, the defendant lawyers held a press conference in which one stated that “there’s no doubt whatsoever in my mind that this would not have happened to white children... I do believe that class has a lot to do with this issue also.” The other defendant opined that “this incident would not have occurred so perhaps ‘naturally’ in a different neighbourhood with a different socio-economic and racial mix.”

The massive and multiple violations of the constitutional rights of the three girls occurred in a community notoriously beset by a plague of systemic racism. Details of the illegal search surfaced in the media twenty-seven days before the lawyers hired by the girls’ parents held their press conference. In fact, the illegal search began making headlines across Halifax even before the defendant lawyers were contacted by the girls’ parents. The feeling in the black community was that the illegal search was not just a simple error or oversight, but a massive departure from the standard of care typical for other communities. That the black community was subjected to massive departures from the standard of care more frequently than other communities in Nova Scotia was well documented. In the thirty years prior to *Campbell*, the province had published four government reports on the existence of systemic discrimination in the justice and education systems: the Graham Commission in 1974, the Royal Commission on the Donald Marshall Prosecution in 1989, the Report of the Nova Scotia Advisory Group on Race Relations in 1991, and the B.L.A.C.

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48. *Campbell*, supra note 1 at para. 15.
49. Ibid. at para. 14.
50. The online version of the Halifax newspaper *The Coast* recognized Black History Month in 2004 with a special section that listed a series of racial incidents occurring in Nova Scotia dating back to 1984. In 2001, the initial defamation settlement in favour of the Halifax police officer in *Campbell* was the only listed event (as was the over turn of the trial court decision by the Nova Scotia Court of Appeal in 2002). For more, see: Lezlie Lowe, “Dark Days” *The Coast* (19-26 February 2004), online: Coast Classics <www.coastclassic.ca/issues/190204/feature.html>.
Report on Education in 1994. In 1998, famed Canadian Olympic boxer Kirk Johnson—also black—was wrongfully arrested and his car impounded in an incident ultimately found to constitute discrimination on the part of the police. This prompted the appointment of a Board of Inquiry under the provincial Human Rights Act, and ultimately, the Board ended up making yet more recommendations for changes to the training of Halifax police officers.\textsuperscript{51}

Soon after the police officer was named in the press conference, the police officer brought an action for defamation on the grounds that the search did not go as far as was claimed in the press conference, and on the grounds that the press conference carried the innuendo that the officer had discriminated on the grounds of race, economic, and social status.

In ruling on the issue, the Court of Appeal held that the circumstances of the occasion warranted a finding of qualified privilege. It overturned the decision of the trial court, which had held otherwise, based on the multiple grounds that the trial judge had applied too narrow a test in assessing the circumstances,\textsuperscript{52} had failed to consider adequately the professional and ethical responsibilities of lawyers to speak out on the shortcomings of the justice system, had over-emphasized the timing of the publication as a factor to be considered, and had failed to take account of "Charter values." This comment notes that three out of the four factors listed pertain to occasions of public duty, while the last comes close to being an error in law due to its inconsistency with \textit{Hill} and the traditional principles of qualified privilege. Perhaps a portion of this shortcoming can be explained by the fact that the occasion arose in part because of the grievous nature of the Charter violations that occurred during the illegal strip search. In other words, "Charter values" played a role because of the occasion of duty—not principally or significantly due to freedom of expression. Unfortunately, this position may be difficult to sustain in light of some of the closing language of \textit{Campbell}. However, the extent to which freedom of expression did play a role in the decision in \textit{Campbell}, is the extent to which, strictly speaking, the decision fell off-side the traditional principles of qualified privilege. I believe that this distinction is an important one for reasons to be discussed below.

The language of \textit{Campbell} speaks overwhelmingly to the extraordinary occasion of public duty that arose on its particular facts. Prior to \textit{Campbell}, Canadian courts had been reluctant to find occasions of qualified privilege when communications were made to the "world at large" about non-
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judicial proceedings. When the courts did so, such communications tended to have been made by or in relation to politicians, government officials, or other public figures. This confused some into believing that the privilege extended to such figures on the basis of their status, even though such arguments were expressly rejected in *Jones* and *Hill*. Indeed, this type of erroneous reasoning even showed up in the dissent in *Campbell*: "I do not think it insignificant that the judgment (in the English case *Reynolds*, which found in favour of qualified privilege) concerned press publications about politicians; whereas, both Hill and this case concern the publication of statements made by members of the bar about public officials who were not politicians."^5^ The majority in *Campbell* made it clear that it was not the status of persons charged with the occasion of public duty that mattered, but rather the circumstances of the occasion that drove recognition of the privilege:

> While I agree that not all public statements made by a lawyer are clothed in privilege upon merely the invocation of the duty to improve the administration of justice, a lawyer faced with a patent injustice, such as the violation of her clients' Charter rights by law enforcement officers, has a substantial and compelling duty to ensure such injustice is remedied in an effective and timely manner.\(^4\)

Over and over again, the majority in *Campbell* discussed the fact that the trial court had not sufficiently understood the nature or gravity of the rights violations that occurred. It was this gravity that gave rise to the occasion of qualified privilege. The special relationship of the lawyers in this case to the violations, to the justice system, and to the community gave them a particular public duty to comment to the world at large about the nature of the violations that had occurred. The ethical obligation of lawyers to speak out on occasions of injustice was documented in the "Legal Ethics and Professional Conduct" chapter of *A Handbook for Lawyers in Nova Scotia*.\(^5\)

The unique fact situation of *Campbell* gave the court an opportunity to clarify the law on qualified privilege, and for the most part, the Court of Appeal was successful in doing so. The backdrop of systemic rights violations of the very type committed by the plaintiff was one of the unusual features of *Campbell*, because the case created an occasion for duty that was critical to the immediate parties and yet crucial to the community at large. Another uncommon feature of the case is that allegations of the

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^54. *Campbell*, supra note 1 at para. 56.
illegal strip search had already been published to the “world at large” even prior to the retaining of the defendants. This meant that the “world at large” had a corresponding interest in the issue even before the defamatory comments were made by the defendants. Combined, these factors created an occasion of public duty that was compelling, timely, and urgent. For obvious reasons, it would have rendered the purpose of the privilege nugatory to have required the defendants to wait for the outcome of the trial itself before addressing the public furor that had been created by yet another incident of systemic discrimination. In the absence of some of these facts, the case would not have been appropriate for qualified privilege, regardless of freedom of expression.

In the concluding paragraphs of the decision, the majority appeared uncertain as to whether it had appropriately addressed the test set out by the Supreme Court in Jones in 1968. Perhaps this is why Roscoe J.A. went beyond merely attempting to distinguish Jones on the facts, and went so far as to suggest that perhaps the law was changing as well:

it is important to bear in mind that the Jones v. Bennett decision pre-dated the Charter by over 12 years....56 Here, there was an intertwining of Charter rights: the right to counsel and the right not to be subjected to an unreasonable search, with Charter values: freedom of speech and equality rights. Freedom of speech was being exercised to promote equality rights and to draw attention to violations of Charter rights....57 I would conclude that in all the circumstances of this case, observed with “today’s eyes”, in today’s social conditions, that it is in the public interest that the press conference be found to be an occasion of qualified privilege.58

This comment suggests that the reason that Nova Scotia had been the site of government reports on systemic racism as far back as 1974 is that even with “dated eyes,” that type of rights violation was unacceptable. It is further submitted that on the facts alone, Campbell meets the test set out by the Supreme Court in Jones. In other words, had the same rights violations occurred in 1981, the violations and the broader community interest would have been sufficient to trigger an occasion of public duty based on the law set out in Jones and in earlier cases.

The facts in Jones involved allegations of misconduct by a single civil servant. Prior to the publication of the defamatory comments, the media had not widely commented on the issue in Jones, and so there was no requisite corresponding interest of a recipient audience in the case. Two

56. Campbell, supra note 1 at para. 67.
57. Ibid. at para. 68.
58. Ibid. at para. 71.
months before the defamatory comments had been made, the defendant had to have been aware that the plaintiff had been cleared of criminal wrongdoing. Roughly six weeks before the defamatory comments had been made, the defendant had to have been aware that the attorney-general’s action against the plaintiff had been struck out as “frivolous and vexatious.” Suffice to say, there was no systemic issue of “kickbacks” involving the broader public sector or the communities of British Columbia.

Notwithstanding the moments of uncertainty likely experienced by the majority in *Campbell* in the concluding remarks of the case, the judgment was extremely sound overall and constituted a major advance in the case law. The Court of Appeal did not make it easier to overcome the test set by *Jones v. Bennett*, but clearly demonstrated the type of extraordinary occasion of public duty to make a communication to the world at large. It is submitted that the proper reading of *Campbell* is in the totality of its reasoning, shorn of its brief moment of Charter triumphalism.

The argument that defamation law needs to be amended or altered in light of the advent of “Charter values” has been all but put to rest by the Supreme Court in *Hill*: “In conclusion, in its application to the parties in this action, the common law of defamation complies with the underlying values of the Charter and there is no need to amend or alter it.”59 The court found that reputation was “closely related to the innate worthiness and dignity of the individual.” Reputation therefore was to be balanced with freedom of expression at the defamation stage of the analysis.60 *Prima facie*, reputation and freedom of expression are “twin values” of equal weight, and reputation cannot be trampled upon in the name of the Charter.

The result in *Campbell* does not conflict with this principle. What *Campbell* has done is demonstrate the type of extraordinary occasion that

59. *Hill, supra* note 18 at 170. I am indebted to my peer reviewer at *Dalhousie Law Journal* for pointing out that the immediately foregoing comment is dicta to the extent that it applies to “Charter values” other than freedom of expression. In this connection, my peer reviewer posits that *Hill v. Scientology* has not closed the door entirely to the application of other “Charter values,” such as equality, to defamation law. Strictly speaking, this assessment is correct, but the Supreme Court dicta are highly persuasive when considered in the context of the delicate labyrinth of tests that circumscribe the defence of qualified privilege. For example, could the principle of equality possibly mean reduced emphasis on a communicator’s “honestly and reasonably held belief” in the truth of a defamatory statement? Should defamatory statements no longer have to be germane or reasonably appropriate to an urgent occasion? Surely even the most compelling affirmation of equality cannot carry with it the right to defame an individual reputation with impunity. While in technical terms the principle of equality could be applied to expand juridical readings of urgent occasions at the qualified privilege stage of the analysis (unlike freedom of expression), it would be extraordinarily bad policy to permit such an application to overwhelm the traditional tests of the privilege. Moreover, *Campbell v. Jones* supports the proposition that such an application is unnecessary—even though the Court of Appeal failed to make this clear in its decision.

60. *Hill, supra* note 18 at 160.
must exist before a party will have a public duty to make a communication to the "world at large" that may damage a reputation. It is the occasion and not the communication to which the privilege is attracted. Put differently, it is only the occasion that may tilt the balance in favour of public duty over reputation—not the general freedom of expression.61

This view is consistent with the finding of the House of Lords in Reynolds v. Times Newspapers62—a decision which has been frequently mentioned and canvassed in Canadian defamation cases. In the decision, Lord Nicholls of Birkenhead reasoned: "When the interest is of sufficient importance to outweigh the need to protect reputation, the occasion is regarded as privileged."63 Consistent with Hill, the House of Lords decision indicates that it is the narrow occasion of public duty that attracts privilege, not the blunt edge of the general freedom of expression.

It is contended that on questions of qualified privilege, the approach that balances the occasion of public duty with the protection of reputation is the logical and correct interpretation of the law. Freedom of expression is the individual right of all human beings. It does not spring from particular occasions of public duty, nor allow for only limited pockets in which communication may take place. Freedom of expression does not need a justification—qualified privilege does. Qualified privilege is engaged when the right to freedom of expression has been exceeded and the reputation of an individual has been damaged.

Freedom of expression bears only indirect relation to the doctrine of qualified privilege, and as such, any analysis that includes it as the primary factor to be weighed against the reputation of the individual will necessarily be overly broad and sloppy. Qualified privilege is attracted to specific occasions of public duties that may only be discharged by parties appropriately placed to discharge such duties. On extraordinary occasions, only specific parties will be appropriately positioned to deliver valuable comment to the "world at large" about occurrences that engage the public interest.

The Supreme Court has already been clear that broad Charter rights, including freedom of expression, do not prima facie outweigh the protection of the reputation of the individual. If the makers of subsequent court analysis of qualified privilege should carelessly fall into the habit of resting the justification for the privilege upon the shoulders of the

61. It is important to note as well that the fact that a plaintiff does not establish defamation does not mean that she will be without remedy if a remark is discovered to be untrue. The courts could order a retraction of or an apology for an untrue statement without finding for damages due to defamation.
63. Ibid. at para. 10.
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general freedom of expression—in the increased absence of reasoned analysis focused on specific occasions and duties—then inevitably the courts will become less sensitive to the particular circumstances of duty and become less tolerant of unqualified intrusions upon reputation. In such circumstances, the doctrine will be whittled away by the courts, and it will become vastly more difficult to carry out one's public responsibilities. The loss would be substantial. Defamatory statements may be tenuously related to the core values of freedom of speech, but on specific occasions, they may be fundamental to the search for truth.

**Conclusion**

Read in the totality of its reasoning and notwithstanding its fleeting moments of uncertainty about the potential impact of "Charter values," *Campbell v. Jones* is a clear advance in the case law because it demonstrates an extraordinary set of facts which founded an occasion of public duty for select persons to communicate to the public at large. The unique set of facts in *Campbell* gave the justices of the Court of Appeal the opportunity to clarify areas of the doctrine of qualified privilege which had not been sufficiently engaged before. The brief moments of uncertainty expressed by the judges in their concluding remarks—when they appeared to wonder whether it was enough to distinguish *Jones v. Bennett* on the facts alone—do not detract from the overall strength of the decision. However, the musings about the impact of "Charter values" did leave a bit of room for interpretation. Accordingly, it is hoped that the foregoing analysis has made a compelling case for interpreting *Campbell* along the lines of the traditional principles of qualified privilege. The contrary interpretation—focused broadly upon the freedom of expression and not upon occasions of duty—could lead to the absence of reasoned analysis focused on specific occasions of public duty and that could whittle away the defence of qualified privilege. The Supreme Court has said that freedom of expression does not encompass the right to defame an individual's reputation, and as such, the Charter does not provide a justification for unqualified intrusions upon reputation. Justification for such an intrusion must be established by the occasion of public duty.

It is concluded, firstly, that qualified privilege attaches to particular occasions of public duty or private interest, and that when the defence of qualified privilege is raised, it is properly the occasion that must be weighed against individual reputation. Secondly, the advent of "Charter values" such as freedom of expression has not made it "easier" to defame a reputation, and so do not provide a justification for re-fabricating defamation law or the defence of qualified privilege. Thirdly, when *Campbell* is read in the totality of its analysis and denuded of the uncertainty expressed in
the concluding remarks of the decision, it is clear that the case has not "loosened the test" earlier set out by the Supreme Court in Jones. Rather, the premier contribution of Campbell is that it has clarified exactly which type of extraordinary circumstance will found an occasion of public duty to make a communication to the general public.