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The Public Law Consequences of Private Disputes: Néron v. CBC and the Law of Defamation

Mark J. Freiman*

In Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec, the Supreme Court of Canada returns to the area of defamation, where its previous efforts in Hill v. Church of Scientology of Toronto and Lucas have met with a largely critical academic legal reception as insufficiently protective of expressive freedom.

Néron itself may perhaps be likely to fly somewhat under the radar, having been argued and decided as a matter governed by principles applicable to resolving private disputes rather than as a public law case. This inconspicuousness is all the more likely in English-speaking Canada since the case involves the interpretation and application of the Civil Code of Quebec and of legal principles that have no exact analogue in the common law. The issues Néron raises, however, are anything but parochial, obscure or unimportant. The majority judgment of six of the seven judges sitting on the case arguably sets a new low watermark in the Court’s protection of expressive freedom and the decision itself may well have implications for the common law of defamation as well as for its civil law counterpart.

This paper is confined to the public law implications of Néron and makes no pretence of analyzing its significance in the jurisprudence on delictual and quasi-delictual liability under the Civil Code. Paradoxically,

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5 S.Q. 1991, c. 64.
however, it may be precisely its “private dispute” orientation that explains its public law impact.

A finding of liability for defamation in the context of a broadcast or publication dealing with matters of public importance necessarily involves justifying a limit on the constitutional protection of freedom of expression in a manner that defines an appropriate balance between protecting reputation and expressive freedom. The focus on defamation as a private dispute as the Court adopted in *Scientology* tends to obscure the public law dimensions of the balancing involved. In *Néron*, it arguably leads the Court to adopt a test for determining fault — *professional journalistic standards* — that is ill-suited for the protection of the public interest in expressive freedom. The Court applies that test in a manner that is heavily weighted to a vindication of plaintiff’s rights with little if any discussion of the consequences for expressive freedom. Finally, and perhaps most importantly, by subordinating issues of truth or the public interest to what is in effect a standard of journalistic negligence (including an assessment of the “completeness” of the presentation), the Court takes an approach with significant potential dissuasive or chilling impacts on broadcast journalism.

I. MR. NÉRON WRITES A LETTER TO *LE POINT*

To understand the implications for expressive freedom of the principles of liability enunciated and applied in *Néron*, it is important to understand its factual foundation. It is worthwhile setting out these facts in some detail.

The case involves a broadcast of the public affairs program *Le Point*, aired by the French network of the CBC as a follow-up to a previous report on alleged shortcomings in how the Chambre des notaires du Québec (“CNQ”) dealt with discipline complaints against Quebec notaries and with claims against the CNQ’s Indemnity Fund. In response to the original program, Mr. Néron, on instruction from CNQ, for whom he acted as a communications consultant, sent a handwritten letter to the director of *Le Point*, pointing out five matters in the original program with which he took issue. The ostensible purpose of the letter was to solicit a meeting to discuss an on-air reply by CNQ officials. The five points (reproduced here largely as Mr. Néron phrased them) were as follows:
(a) The introduction to the original broadcast (which was also used as a promo for the broadcast) led viewers to believe that notaries are not to be trusted and that CNQ does not protect the public well.

(b) The conclusion that the Chair of the Office des professions was considering making a request to the Minister of Justice to put the CNQ under trusteeship gave the impression that the Minister was going to make the request and/or that this conclusion was the result of *Le Point’s* investigation.

(c) The death threats against the president of CNQ made by Yvon Thériault, one of the interviewed complainants, were referred to on the program as “nonsense” and Mr. Thériault was portrayed as a person who would be justified in making such threats, in circumstances where the program failed to mention that Mr. Thériault was the brother of the Thériault who was the “Pope” of the Infinite Love Cult and who cut off his spouse’s arm.

(d) The program failed to mention that another complainant, Mr. Lacroix, was reimbursed by CNQ for the money he lost.

(e) The reference to one of the notaries complained against as “a fusty old man” was inappropriate in the context of a notarial profession with a 128-year history of faithful service in Quebec, which included many young members, and in recent years, had a majority of women as newly admitted notaries.6

By the time a CBC journalist contacted Mr. Néron, CNQ had changed its strategy, had refused a CBC offer of a follow-up interview and was characterizing Mr. Néron’s letter as a personal initiative. In his discussions with CBC, Mr. Néron stated the letter was personal and not meant for publication “or to be communicated in any way whatsoever.”

The CBC journalist pointed out to Mr. Néron two errors in his letter. First, the complainant, Yvon Thériault was not related to the infamous cult leader Rock Thériault. Second, the complainant Lacroix had not been compensated by CNQ. Mr. Néron said he would verify his information (which he had received from CNQ) and would get back to the journalist within three days.

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6 The letter, in its entirety is set out at *Néron, supra*, note 1, at paras. 5-6.
Two days later, on January 12, 1995, *Le Point* ran the follow-up broadcast\(^7\) that was the subject matter of Mr. Néron’s action for defamation. The broadcast described itself as a response to the criticism by “one of [CNQ’s] communications advisors … accusing us of having made several errors.” The broadcast then set out the excerpt from Mr. Néron’s letter which characterized the presentation of the complainant, Mr. Yvon Thériault, as “a person who would be justified in making such threats” and which alleged the program’s failure to mention that Yvon Thériault was Rock Thériault’s brother. Yvon Thériault was then shown strenuously denying the kinship, producing his birth certificate, describing how he got Rock Thériault’s baptismal record and alleging that CNQ could have done the same rather than spread “totally unverified information” in such a manner.

*Le Point’s* journalist then characterized Mr. Néron as claiming that “we did not tell the whole truth,” citing the passage from his letter alleging that “Mr. Lacroix was reimbursed by CNQ for the money he lost.” At this point, the journalist referred to an affidavit in which Mr. Lacroix “confirm[ed] he has never received a single penny in compensation from the CNQ” and went on to state that CNQ had not yet decided if it will investigate the case.

The results of this broadcast were profound for CNQ and disastrous for Mr. Néron.

CNQ received a rash of letters from notaries critical of its communication policies.\(^8\) The *Office des professions du Québec* demanded that the CNQ institute a remedial plan or be placed under trusteeship. The committee formed by CNQ to address its problems produced a report especially critical of CNQ’s senior officials and administrators which recommended a series of remedial measures that the trial judge described as “indicative of a deplorable internal situation.”\(^9\) The senior officials all offered to resign. The two notaries mentioned on the broadcasts were struck from the rolls, one for life, the other for 32 years.\(^10\)

All of these impacts were clearly beneficial to the public.\(^11\)

\(^7\) The portions of the transcript of the broadcast that the trial judge considered material are set out in *Néron, supra*, note 1, at paras. 5-6.

\(^8\) *Id.*, at para. 8.

\(^9\) *Id.*, at para. 40.

\(^10\) *Id.*

\(^11\) *Id.*, at para. 40.
As for Mr. Néron, immediately after the follow-up broadcast, CNQ circulated to all notaries, the media and the Minister of Justice a memo alleging that Mr. Néron sent the letter quoted in the January 12th broadcast “on his own initiative, without instructions from or the prior authorization or consent of the Chambre des notaires du Québec.” Shortly thereafter CNQ terminated its contract with Mr. Néron and communicated the termination to the same recipients who had been sent the first memo.

Mr. Néron complained about Le Point’s journalists to the Québec Press Council and to CBC’s Ombudsman. The former abandoned its investigation after Mr. Néron launched his action for defamation. The latter responded more quickly, dismissing four of five grievances but acknowledging one as well-founded.

In essence, the Ombudsman found that by announcing to its audience that it would respond to the criticism in Mr. Néron’s letter and then failing to mention all five of his points but instead only dealing with two errors, Le Point failed “to represent the essence of the complaint without distortion.” The Ombudsman found that this “gave the program the appearance of settling accounts” with the result that the follow-up broadcast “seriously compromised the principle of fairness.”

On the eve of the first anniversary of the January 12 broadcast, Mr. Néron and his company sued CBC and CNQ. CNQ was found liable at trial, and following dismissal of its appeal to the Quebec Court of Appeal, did not appeal further to the Supreme Court of Canada. CBC was found liable at trial, which liability was confirmed by a 2:1 majority in the Quebec Court of Appeal and by a 6:1 majority in the Supreme Court of Canada. As against CBC, damages upheld by the Supreme Court of Canada amounted to $673,153.

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12 Id., at para. 8.
13 Id., at para. 11.
14 Id., at para. 11.
15 Interestingly, the original action also included a claim against the Ombudsman, apparently as a result of his dismissal of four of Mr. Néron’s five complaints.
16 The majority judgment was written by Fish J.A., as he then was, prior to his elevation to the Supreme Court of Canada, and hence the lack of a full panel in the Supreme Court of Canada.
17 The majority judgment of LeBel J. was concurred in by McLachlin C.J. and Iacobucci, Major, Bastarache and Deschamps JJ.
II. DEFAMATION AS A PRIVATE DISPUTE AND THE PUBLIC ISSUE OF EXPRESSION FREEDOM

The law of defamation does not offer a very promising context for the vindication of expressive freedom. Viewed primarily as a balance between the autonomy rights of the speaker (the right to say what one wants) and those of the subject of the speech (the rights to privacy and a good reputation), it does not provide an easy framework within which to vindicate the rights of the third party with a stake in the proceedings, the public. The public’s right to hear what the speaker wants to say may partly be an autonomy right (“I want to know all about the details of Michael Jackson’s life”) but it is also, and perhaps more importantly, a democratic right — namely, the right to make decisions based on access to the widest availability of information, especially on topics that can broadly be described as “political.”

This latter right, the public’s right to information on matters of public interest and importance, which numerous pronouncements by the Supreme Court of Canada (including some quoted in the majority judgment in Néron) have characterized as indispensable to representative democracy is itself subject to being balanced against other societal interests, but the Supreme Court of Canada has insisted that the right to expressive freedom regarding the functioning of public institutions “should only be restricted in the clearest of circumstances.”

What may seem appropriate as a balance between competing autonomy rights in the context of an individual’s claim for redress for damage to his or her reputation is not necessarily an appropriate balance for vindicating society’s right to information about important issues. The more the focus remains in the “private” aspect of an action for defamation, the less likely that the public’s interest in expressive freedom will play a significant role — or be well-served — in the balance.

Viewed from a public law perspective, the underlying issue in Néron is that by attaching liability to the broadcast in issue on the basis of its “unfairness” to the plaintiffs, the majority imposes a burden precisely on expression “regarding the functioning of a public institution,”

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and in effect prescribes additional content that would have to be included in order for the broadcast to avoid being penalized. From that perspective, the issues resemble those raised in Harper, the Court’s other substantive foray in 2004 into the area of expressive freedom, namely the burdens that can properly be placed on “political speech.” The conceptual difficulty in seeing these two cases as addressed to similar issues, and indeed of seeing the full dimension of the public law issues that arise in Néron can be traced back, at least in part, to the approach to defamation taken in Scientology.

III. THE LEGACY OF SCIENTOLOGY

The judgment of the Supreme Court of Canada in Scientology establishes that an action for defamation should be understood as a “private” dispute and not as “government action” for purposes of section 32 of the Charter. To this extent at least, the “Charter will not apply.” This does not immunize the law of defamation from constitutional scrutiny since all law whether public or private, statutory or customary is, pursuant to section 52 of the Constitution Act 1982, subject to the Charter as part of the “supreme law of Canada.” However, because the issue is seen through the prism of a private dispute regarding compensation for an injury, any such Charter analysis is undertaken in the context of the Court’s clear reluctance — demonstrated in its comments in such cases as McKinney v. University of Guelph and reiterated in Scientology — to reopen “settled” areas of law such as the law of torts, to wholesale review.

Scientology does place an explicit duty on the judiciary “to apply and develop the principles of the common law in a manner consistent

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21 Section 2(b) of the Charter is also the subject of Re s. 83.28 of the Criminal Code, [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248, but that case explores the “open court” aspect of s. 2(b).

22 Scientology, supra, note 2, at para. 83. Scientology appears to leave open the possibility of applying a full public law analysis of challenges to specific provisions of the law of defamation as codified by provincial defamation statutes; see Scientology, id., at para. 65.

with the fundamental values enshrined in the *Constitution* (including of course the Charter). This approach should apply equally to “private” legal actions under the *Civil Code* as to “private” actions at common law. But because it understands the issues raised by defamation in the context of a private dispute, in contrast to a challenge against the “public” institution of government, *Scientology* calls for a “flexible” analysis of the balance between the Charter value of expressive freedom and what it deems the correspondingly fundamental value of protection of reputation. The Court therefore rejects the more formalized test it says is appropriate for analyzing challenges where government is involved.

This amounts to an effective presumption against displacing the existing features of law governing private disputes, including defamation claims, where the “challenge” is based on alleged inconsistency with Charter values. This is done expressly on the basis that the parties will have formed their expectations based on existing legal structures. All of this makes the “public” dimension of a right to information extremely hard to conceptualize, let alone to weigh properly in the balancing exercise mandated by *Scientology*.

The importance of this impact will be especially evident where the defendant is not a private individual as was the case in *Scientology*, but as in *Néron*, a journalist or the media. Treating the media as a party to a private dispute whose ground rules presumptively pass constitutional muster puts the public’s stake in the status and content of the broadcast firmly in the background.

**IV. NÉRON AND LIABILITY FOR DEFAMATION UNDER THE CIVIL CODE**

The majority decision in *Néron* follows *Scientology* in treating the defamation case before it as a dispute between private individuals about entitlement to compensation for an injury to reputation caused by the broadcast.

In common law jurisdictions, defamation constitutes a discrete area of substantive law, involving distinctive and highly complex, formalistic principles and presumptions. In Quebec, defamation is, by contrast, not

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24 *Scientology*, supra, note 2, at para. 83.
25 *Id.*, at para. 98.
a substantive area of law in its own right, but rather is governed by the provisions of the Civil Code pertaining to delictual and quasi-delictual liability. As explained by LeBel J., writing for the majority, the relevant provisions are Articles 3 and 35 which establish individuals’ rights to respect for their privacy and their reputation, and most importantly, Article 1457 which provides:

1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another. Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to compensation for the injury, whether it be bodily, moral or material in nature.

Justice LeBel’s judgment on behalf of the majority in Néron takes the form primarily of an explication and elaboration of these principles as they apply to the facts. Justice LeBel does accept the applicability to these facts of the constitutional principle of expressive freedom, which he finds in both section 2(b) of the Charter and the similar section 3 of the Quebec Charter of Human Rights and Freedoms. That latter document, in sections 4 and 5, however, also guarantees reputation and privacy.

For LeBel J. the constitutional issue comes down, not surprisingly, to a question of balancing. In this regard, he cites the judgment written by L’Heureux-Dubé J. and himself in Prud’homme v. Prud’homme:

determining fault] is a contextual question of fact and circumstances … it is important to note that an action in defamation involves two fundamental values: freedom of expression and the right to reputation.28

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26 Section 3 of the Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, provides:
3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.
A focus of the Quebec Charter eases any sensitivity that might result from an assessment of the constitutionality of aspects of the Quebec Civil Code on the basis of provisions of the Canadian Charter of Rights and Freedoms.

27 The Quebec Charter states that:
4. Every person has the right to the safeguard of his dignity, honour and reputation;
5. Every person has a right to respect for his private life.

He also quotes from an earlier decision of his in the Quebec Court of Appeal:

This area of the law of civil liability also requires a particular sensitivity to values that at times conflict with each other, such as the public’s right to information and the freedom of the media to disseminate it, on the one hand, and, on the other, the right to respect for one’s private life and the protection of some of its core components, namely anonymity and privacy. 29

Having stated the need to achieve this balance, the majority contextualizes the concept by citing the observation in Prud’homme that “freedom of expression can be limited by the requirements imposed by other people’s right to the protection of their reputation,” 30 a formulation that suggests not so much a balancing as a justification of limiting expressive freedom to the extent necessary to protect reputation.

The rest of the judgment is directed to an explication of how section 1457 applies to the facts of the case, culminating in the conclusion that, despite the fact that the contents of the January 12 broadcast may have been true and in the public interest, CBC should nevertheless be found liable for damage to Mr. Néron’s reputation.

Since the majority understands protection of reputation as a valid restriction on expressive freedom, the judgment should be understood as including the Court’s conclusion that both the operative principles it identifies for determining liability and the application of these principles to the facts of the case are consistent with protection of expressive freedom under the Quebec and Canadian Charters. The actual steps in this analysis are set out clearly and concisely in the majority judgment.

The basis of liability for defamation in the civil law is the infliction of injury through fault. The truth of remarks that cause damage to a person’s reputation may, as LeBel J. notes, well be a factor in deciding whether the speaker was at fault, but it is not necessarily determinative. 31 Similarly, according to LeBel J., the fact that the remarks were

31 Néron, supra, note 30, at para. 60. This observation in fact echoes the majority decision in Canada (Human Rights Commission) v. Taylor, [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892 which found that since the element of the operative issue for a finding of a “discriminatory prac-
made in the public interest might also be a factor in determining fault, but that too would not be determinative.\textsuperscript{32}

Article 1457 imposes liability where a person causes injury as a result of a failure in his “duty to abide by the rules of conduct which lie upon him according to the circumstances, usage or law.” The focus therefore is on the duty. What is novel and important in \textit{Néron} is the Court’s location of the operative source of the duty (and therefore, the basis upon which the media conduct should be measured) in the concept of “professional standards.” Indeed LeBel J.A., as he then was, had already articulated this standard for liability in \textit{Société Radio-Canada v. Radio Sept-Îles Inc.}:

The liability at issue here is much more like professional liability. The function of the media is to gather process and disseminate information. Their role also includes commentary and interpretation. When gathering information, the media’s liability seems to be essentially professional in nature, and to be based on a test of fault. This of course requires that the courts apply the test of the reasonable person working in the news sector … In sum, the existence of a fault is the general and fundamental requirement in the law of defamation and fault is measured against professional journalistic standards. A journalist is not held to a standard of perfection … On the one hand, if a journalist disseminates erroneous information, this will not be determinative of fault. On the other hand, a journalist will not necessarily be exonerated simply because the information he or she disseminated is true and in the public interest. \textit{If, for other reasons, the journalist has fallen below the standard of a reasonable journalist, it is still open to the courts to find fault.}\textsuperscript{33}

As applied to the facts in \textit{Néron}, this standard leads LeBel J. to conclude that the January 12th broadcast fell below professional standards in three respects.

First, the broadcast contained incomplete information about the content of the letter. In the majority judgment in the Quebec Court of Appeal, this was described as \textit{wrongful pruning}. The essence of the

\textsuperscript{32} \textit{Néron}, id.

\textsuperscript{33} \textit{Société Radio-Canada v. Radio Sept-Îles Inc.}, supra, note 29, at 1820 (emphasis added).
analysis on this point is that viewers of the program would be interested in the contents of Mr. Néron’s letter. They would not know that he had complained about the portrayal of notaries as “fusty old men,” or about the implication that CNQ should be put under trusteeship. They would not know that the letter was intended as a request for a meeting and that it was not meant to be dealt with on air. Nor would they know that although CNQ may not have reimbursed Mr. Lacroix, he had received reimbursement from a third party. Justice LeBel concludes that had all of these matters not been “wrongfully pruned” the errors in the letter would have seemed “somewhat less egregious and Mr. Néron might not have been cast in such a negative light.”

The second basis upon which LeBel J. holds the broadcast to fall below professional standards is the fact that CBC aired the program just two days after Mr. Néron had requested three days to verify the information and then failed to mention Mr. Néron’s request on air. In his dissenting judgment, Binnie J. describes this as essentially a finding of “boorishness” in CBC’s behaviour. Justice LeBel also finds further similar deficiencies in the “tone and tilt” of the broadcast which he finds were “designed to have a maximum impact” on the reputation of Mr. Néron.  

The third basis for LeBel J.’s finding is the report of the CBC Ombudsman which concludes that the mode of presentation “gave the program the appearance of a settling of accounts, something that has no place at the CBC.”

Having thus found the necessary fault to satisfy the requirements of Article 1457, LeBel J. turns to issues of apportionment of damages with no further discussion of expressive freedom or of “balancing” and concludes by confirming both the finding of liability and the $673,153 assessment of damages against CBC.

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34 Supra, note 30, at para. 66.
35 Id., at para. 69.
36 Id., at para. 70.
37 Id., at para. 73.
V. IMPLICATIONS OF THE COURT’S APPLICATION OF THE “PROFESSIONAL STANDARDS” TEST

As has been previously noted, it is implicit in the reasons of the majority that both the test of compliance with professional journalistic standards as the measure for liability and its application to the facts in Néron represent appropriate protection for expressive freedom. It is therefore useful to consider the implications of both these propositions, beginning as does Binnie J. in his dissent with the implications of the application of the “professional standards” test for liability.

Article 1457 provides that a person subject to a duty who fails to abide by that duty “is responsible for any injury caused to another person by such fault.” The majority judgment holds that a failure to abide by professional journalistic standards is the kind of fault contemplated by Article 1457. As such, it imposes a standard for a journalist’s professional duty roughly analogous to the standard of care by which the common law judges the liability of professionals in tort.

At common law, the existence of a duty, breach of the duty and the existence of a loss are prerequisites for liability, but there is no such thing as “liability in the air.” Breach of a duty only leads to an award of damages if it is causally connected to damage suffered. Physicians are under a professional duty of courtesy and respect for their patients. If as a result of a breach of duty, a patient suffers harm — as for instance when a rude and badly behaved physician scares off a patient with the result that the patient does not get required medical attention, or where the physician’s bullying interferes with proper informed consent and a patient suffers a complication of surgery in circumstances where a reasonable person would have withheld consent — the physician is liable. But a boorish physician, despite the fact that his or her conduct falls below professional standards, is not liable if the patient has a catastrophic outcome that is factually unrelated to the physician’s bad behaviour.

Article 1457 appears to impose a similar legal test which makes a person who fails to abide by a duty liable for “any injury he causes by such fault.” (emphasis added)

The majority deals with the issue of causation on the basis of a “causal link between the January 12th broadcast and all that subsequently befell
Mr. Néron. This appears to be a very tenuous connection in light of the wording of Article 1457 which on its face seems to require a finding not that the “broadcast” caused harm but rather that the “fault,” i.e., the breach of journalistic standards, caused the harm complained of. In other words, were it not for the fault identified, would the plaintiffs’ reputations have suffered the damages identified?

Justice Binnie concludes that even if all three aspects of fault identified in the majority judgment were remedied, it would not have helped the plaintiffs’ nor shielded them from the actual sting of the broadcast.

The sting of the broadcast, the aspersion that damaged the plaintiffs’ reputation, was that the CNQ, through its spokesman, was continuing to act in an impetuous and unprofessional manner in response to complaints. Even accepting that the broadcast fell below the standard of desirable journalistic practice, that it could have been more balanced and complete, and that aspects of Le Point’s journalistic behaviour were boorish, none of the higher standards suggested by CBC’s Ombudsman or by the reasons of the majority would have lessened that sting. In the words of Otis J.A. in the Quebec Court of Appeal, adopted by Binnie J. in his dissent:

This lack of fairness does not constitute civil fault. Neither the nature nor the purpose of the report would have changed in any way had the public known the CNQ was unhappy

(i) that the December 15, 1994 broadcast of the first report was repeatedly advertised in advance;
(ii) that viewers may have been left with the impression that the Chairman of the Office des Professions was going to ask that the CNQ be placed in trusteeship; or
(iii) that an inappropriate reference had been made to the Notary Potiron. None of these three minor points would have justified the January 12, 1995 update.39

As a matter of determining delictual liability, the majority’s application of the professional journalistic standards test appears heavily weighted toward the plaintiff. While there may be a number of possibly sound jurisprudential reasons for attenuating the causal connection

38 Id., at para. 58.
39 Id., at para. 109 (emphasis omitted).
between the “fault” and the injury required by Article 1457, these can only make sense from the “private dispute” point of view of validating a plaintiff’s interest in compensation for injury. They require a bracketing of the issue of any restriction on expressive freedom and treating it as, by definition, justified, because of the protection of the plaintiffs’ reputation.

Once one re-conceptualizes the issue as also implicating the public’s rights under the rubric of expressive freedom, it is much more difficult to think of any principles that would in the circumstances justify the chilling effect of a substantial liability award on expressive freedom and on the public’s right to true and accurate information on matters of public interest and importance. It is difficult from this perspective to see how this seemingly Draconian application of the professional standards test, where the causal connection between the fault and the damage to reputation is tenuous if not obscure, represents an appropriate constitutional balance.

As noted by Binnie J. in dissent, in the circumstances of this case, where the “real cause of [the plaintiffs’] suffering was the conduct of their erstwhile client, CNQ,”40 it appears necessarily to follow that a legal rule that awards $673,153 in damages to Mr. Néron and his personal company on the basis of a broadcast which stated true facts, the publication of which was undoubtedly in the public interest, just because the other lesser facts might also have been mentioned but were not, a further context might have been provided but was not, is simply not consistent with the public’s right to know.41

Even on the relaxed and “flexible” approach to balancing set out in Scientology42 it seems difficult to see how imposing liability for expressive activity that is true and is in the public interest impairs the Charter value of expressive freedom in a way that can be offset by the principle of protecting reputation where little if any of the damage to reputation was caused by the fault in issue.

The foregoing discussion identifies concerns with the Court’s application to the specific facts of Néron of the “professional standards” test for determining fault and therefore liability for defamation. It suggests

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40 Id., at paras. 105-106, 111.
41 Id., at para. 111.
that the test itself is at least *capable* of an application that compromises the public’s interests in expressive freedom where there is little, if any, public benefit to balance impairment.

But is this impairment of expressive freedom merely the result of a particular application of the “professional standards” test to defamation matters or is it also in part a consequence of the test itself? An examination of the principles set out in the majority judgment, particularly the identification of “journalistic professional standards” and in particular the standards of “completeness” or its converse *wrongful pruning* as the proper test for liability in defamation, suggests the latter. It is the test itself and not just its specific application in *Néron* that tends to impair the public’s interests in expressive freedom.

**VI. Professional Journalistic Standards**

If one puts aside for a moment the issue of causation, there may appear to be a certain attractiveness to the notion of “the conduct of a reasonable journalist” as the basis for assessing liability for damage to reputation. As noted by the majority, the concept certainly does allow for civil liability for defamation “to fit nicely within the general framework of Article 1457 C.C.Q.” As suggested in Binnie J.’s dissent, however, the problem is that journalistic standards are of limited value when it comes to balancing “the values of a free press and the respect for reputation.”43

Journalistic standards are not appropriate as the balance point between expressive freedom and protection of reputation because they have no necessary connection to either value and are certainly not aimed at locating that balance. While such standards may constitute a *factor* in the balancing exercise, they cannot in themselves define the balance.

A journalist who publishes accurate and complete information and therefore vindicates the public’s interest in terms of a “right to know” may still be offside of professional journalistic standards. Similarly, lapses in courtesy, decorum and taste might all sustain a finding of failure to uphold professional standards. Depending on the facts, they might well even squeak in as the “cause” of damage to reputation. They can, however, also co-exist with an accurate account of publicly important

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43 *Néron*, *supra*, note 30, at para. 108.
information. In such cases, a constitutionally sound test for liability would still need surely to balance whatever damage to important values is caused by the failure to abide by the standards in question against the damage to the values that underlie freedom of expression. Failure to abide by those standards cannot itself be the determination of balance.

Nor is the situation materially different if one were to restrict professional journalistic standards to standards designed to improve the accuracy and reliability of journalistic reports. One of the most important of such principles is the requirement for two sources before publishing a story. This very salutary rule of professional journalistic standards prevents publication of speculation, rumours and guesses that might harm reputations. Where a report turns out to be untrue, this journalistic standard might well be useful for assessing liability under Article 1457. But it is still possible, despite a breach of this standard, for a story published without two reliable sources to be true and in the public interest. Where this happens, breach of the standard could plausibly still be seen as the cause of damage to reputation. But it is not self-evident why the “fault” involved would automatically tip the balance against expressive freedom or justify liability for defamation.

It is for this reason that, as noted by Binnie J., the Ombudsman’s report is of limited value in assessing liability. The report may well be evidence of a breach of standards, but it says nothing about how to weigh that breach against the public’s right to the information that was broadcast (nor, for that matter, about any causal connection between the breach and whatever damage was suffered by the plaintiffs to their reputations).

VII. THE TRUTH, THE WHOLE TRUTH,…

Most problematic from the point of view of expressive freedom, however, is the “professional journalistic standard” primarily relied upon in Néron, that of wrongful pruning. What the other standards hith-

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44 The basis for such a balance is of course a difficult and inevitably controversial question and is discussed more fully below.

45 At common law, the standard would have a far more restricted possible scope. Since good faith or honest belief are not defences, it would be relevant only on the issue of malice going to the issue of damages. The constitutional appropriateness of such common law presumptions is beyond the scope of this paper.
erto discussed have in common is that each is related to values that, it has been suggested, might well properly be balanced against the truth and/or the public interest in an impugned journalistic product, but which cannot themselves represent that balance. In the case of wrongful pruning the issue is that this standard can become either directly or indirectly a means of eliminating truth itself from the balance.

As Binnie J. notes in his dissent, all journalism inevitably involves selectivity. Anyone who has seen raw footage of events or looked through a journalist’s notes will realize that the final shape of a journalistic product is the result of a process of deciding what to put in, what to leave out, and in what order to arrange what finally makes the cut. The majority calls this process in relation to the contents of Mr. Néron’s letter “pruning” and, based in part on the CBC Ombudsman’s report, describes the result in the Le Point broadcast as wrongful pruning.

There is no doubt that editing can cause distortion or worse to the meaning of the underlying material. Editing out the word “not” from the sentence “I am not guilty” is only the most extreme example. Less extreme, but equally deforming is the editing out of qualifications, corrections or clarifications. All such examples constitute unambiguous tampering with the actual or intended meaning of the original. For the most part, however, and except in truly egregious cases, editing is not synonymous with tampering. It is simply an exercise of judgment as to what is newsworthy and important.

Whatever the theoretical difficulties at the margin, there is a difference between the two concepts. The fault relied on by the majority in Néron under the rubric of wrongful pruning is not that the broadcast tells a lie but that it leaves out something; in other words, that the broadcast is incomplete. For Binnie J., the issue in this regard is simple. The broadcast did select what to include and what to exclude. “Desirable journalistic practice” might arguably have dictated a more complete and balanced presentation. But, in the end, the “information that was published was perfectly true,” and “what was not broadcast did not make what was broadcast any less true.”

The adoption of completeness as a relevant standard of journalistic practice for an assessment of liability calls into question the right of

46 Néron, supra, note 30, at para. 104.
47 Id., at para. 83.
journalists to decide what is important and what is not. It puts judges in the editor’s chair and asks them to substitute their view of what the underlying story means for that of the journalist or the publisher. It comes perilously close to the sort of intrusion into the editorial function that in a different context, the U.S. Supreme Court has rejected as a violation of freedom of speech.48

While “fairness” in the sense of completeness may well be an appropriate journalistic standard to which to aspire, it cannot be mandated.49 It is in this way that one can understand the otherwise potentially surprising statement by Otis J.A. that “this lack of fairness (in the omissions in the broadcast) does not constitute civil fault.”50 Using “fairness” or “completeness” as a surrogate for fault negates the relevance of the truth of what is actually published in favour of the reputational benefit of what might have been published. As such, it prejudgets the balance between protection of reputation and freedom of expression in a way that will inevitably discourage criticism. As Binnie J., citing Joseph Pulitzer, puts it, a rule embodying such an imbalance “can only discourage the fulfillment by the media of their mandate in a free and democratic society to afflict the comfortable and comfort to the afflicted,” a mandate he identifies with section 2(b) of the Canadian Charter and section 3 of the Quebec Charter.51

VIII. CHILLING EFFECTS OF RELIANCE ON “PROFESSIONAL STANDARDS OF JOURNALISM”

One of the consequences of the law of defamation, indeed one of its purposes, is to dissuade certain types of speech. Viewed from the per-

48 In Pittsburgh Press Co. v. Human Relations Comm’n, U.S. 376, at 391 (1973), the U.S. Supreme Court affirmed “unequivocally the protection afforded to editorial judgment and to the free expression of views … however controversial.” Similarly, in Miami Herald Publishing Co. v. Tornillo, 418 US 241 at 256 (1974), reaffirming First Amendment protection for editorial judgment, the Court held: “The choice of material to go into a newspaper and decisions made as to limitations on the size and content of that paper, and the treatment of public issues and public officials — whether fair or unfair — articulate the exercise of editorial control and judgment.”

49 “A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues cannot be legislated.” Miami Herald v. Tornillo, id., at 255.

50 Quoted in Néron, supra, note 30, at para. 109.

51 Id., at para. 83.
pective of protection of reputation, this dissuasive function prevents injury to an important personal interest. Viewed from the perspective of expressive freedom, however, this dissuasive function constitutes a “chilling effect” on the kinds of speech it defines as defamatory.\textsuperscript{52} One aspect of this dissuasive effect is simply the risk of a finding of liability for defamation and its attendant consequence of a significant award of damages.

An additional aspect of the chilling effect of a test for liability based on journalistic standards and \textit{wrongful pruning} is to be found in the consequences of that test for the conduct of defamation lawsuits.

In \textit{Scientology} the Court rejected the suggestion that when the alleged defamation involves a public figure, the guarantee of expressive freedom in the Charter requires adoption in Canada of the \textit{New York Times v. Sullivan} test. In \textit{New York Times v. Sullivan}, the U.S. Supreme Court concluded that where the plaintiff was a “public figure” the common law principle that required a defendant to prove the truth of derogatory comments in order to avoid liability, had an undue chilling effect on legitimate debate on issues of public importance. Accordingly, it modified the common law such that the defendant would not be liable unless the plaintiff could demonstrate “actual malice” — that is, that the defendant published the defamatory material knowing it to be false or reckless as to its truth.\textsuperscript{53}

The Court in \textit{Scientology} found that whatever the good intentions that underlay this shift in what needed to be proved and by whom, its practical effect was to sacrifice important protections for reputation without improving protection for expressive freedom.\textsuperscript{54} Central to this assessment was the Court’s negative evaluation of the shift in focus from the “truth of the impugned statement” to a determination of “whether the defendant was negligent.”

\textsuperscript{52} The potential for defamation actions to become means by which to suppress debate or dissuade the media from airing controversial views should be clear when one recalls the underlying facts in \textit{New York Times v. Sullivan}, 376 U.S. 254 (1964). Whatever the merits or the flaws in the Supreme Court of the United States’ reformulation of the test for defamation in actions involving a “public figure,” that reformulation was a response to a defamation action which was successful at trial, alleging defamation in an advertisement in the \textit{New York Times} that condemned police brutality in dealing with anti-segregation Freedom Marches.

\textsuperscript{53} \textit{Supra}, note 42, at para. 122.

\textsuperscript{54} \textit{Id.}, at para. 132.
This is, of course, precisely the focus mandated by the decision in \textit{Néron}.

Although the test in \textit{Néron} is by no means on all fours with the “actual malice” principle in \textit{New York Times v. Sullivan}, a number of the negative consequences of the focus of the \textit{New York Times v. Sullivan} test on journalistic negligence that were noted in \textit{Scientology} are relevant to an understanding of the potential consequences of the similar focus in \textit{Néron} on “journalistic professional standards.”

The Court in \textit{Scientology} concentrates primarily on the consequences of shifting the focus away from truth as it compromises the interests of plaintiffs (who may get no relief despite having lies told about them), but substantially similar considerations arise in a case like \textit{Néron} in terms of compromising the rights both of defendants (who may be found liable despite conveying only truthful information) and of the public (who may not get access to the information).

In addition, however, the Court in \textit{Scientology} notes the importance of the fact that \textit{New York Times v. Sullivan} “necessitates a detailed inquiry into matters of media procedure”\textsuperscript{55} which has proven to have important and overwhelmingly negative consequences. The often microscopic examination in such an inquiry has an inherent chilling effect on the media\textsuperscript{56} since plaintiffs have a clear incentive to keep digging until they find something, and the most promising areas in which to do the digging are precisely the most sensitive areas from the point of view of free speech. It is in the areas of collection, evaluation and editing that almost inevitably there will be something that was done or left undone that would support a conclusion it could have been done differently. As evidenced in \textit{Néron} itself, this focus allows liability to turn on issues of journalistic negligence that have no effect on the truth of, or public interest in, what was actually published.

\textsuperscript{55} \textit{Id.}, at para. 129.

In addition, by making the entire information gathering, editing, ordering and packaging process relevant, the focus on journalistic standards dramatically increases the volume of what is relevant in terms of both documentary and oral discovery. This lengthens trials and dramatically pushes up their cost.\textsuperscript{57}

The upshot, as illustrated by the Westmoreland and Sharon trials of the 1980s, is that defamation actions became wars of attrition in which the economic means of the parties are as important as the strength of their case.\textsuperscript{58}

These factors tend to make the spectre of an action in defamation based on “adherence to journalistic standards” especially effective as a deterrent against criticism of the rich and/or of the powerful. This, along with the significant quantum of damage awarded, forms the economic and practical underpinning of Binnie J.’s comment about the effect of the rule applied by the majority as discouraging the media’s fulfillment of the mandate “to afflict the comfortable and comfort the afflicted.”

IX. RELEVANCE OF \textsc{Néron BEYOND QUEBEC}

The majority judgment in \textsc{Néron} is framed as an interpretation and application of \textsc{Civil Code} principles to the law of defamation in Quebec and puts special emphasis on the distinctiveness of this law and its differences from the common law of defamation. In that respect its impact will be felt primarily in Quebec.

On the other hand, the majority acknowledges that these principles must conform to the values of expressive freedom in both the Quebec and Canadian Charters and finds, albeit essentially in conclusory fashion, that these principles do represent an appropriate balance between these expressive freedom values and the protection of reputation and privacy. As such it is important both inside and outside Quebec.

In one sense, the majority decision represents a sort of “asymmetrical federalism” approach to the protection of expressive freedom. It validates a continuing divergence between the common law and the civil

\textsuperscript{57} \textit{Scientology, supra}, note 42, at paras. 129-30.

\textsuperscript{58} \textit{Supra}, note 56. The underlying subject matter of these cases may illustrate the further proportions that by making defamation a risky and expensive matter to prosecute or to defend, the \textit{Sullivan} test may make them more, rather than less likely, to be used as vehicles to vindicate political positions and/or to deter political criticism.
law as to how the proper constitutional balance is to be maintained with regard to defamation. If, when dealing with statements of fact, truth is a defence at common law but not necessarily in the civil law and if negligence is crucially relevant for liability in the civil law, but only relevant for damages at common law, then expressive freedom under the Charter can countenance radically different outcomes for the same fact situation depending on where the expression takes place. Given the predisposition articulated by the Court in Scientology not to use “Charter values” to upset the operation of private law principles that “have a long history of acceptance in the community,” the conclusion that a different balance in Quebec is more permissible than that which operates in common law jurisdictions may not be surprising. What is surprising is the lack of discussion of that fact or of its implications.

There is no conceptual reason why different legal regimes should not be capable of achieving an acceptable constitutional balance between competing principles like expressive freedom and protection of reputation in different ways. But that sort of flexibility seems stretched close to the breaking point in a case like the present. The Court in Néron articulates a principle for liability based on features (journalistic negligence and a detailed scrutiny of media procedures) that it had explicitly rejected in Scientology as inappropriate for achieving the proper balance. It is surprising that the majority in Néron did not feel it necessary to explain why the negative consequences cited in Scientology as the basis for rejecting negligence as an appropriate standard at common law were not relevant for the civil law standard articulated in Néron. This is especially the case since half the members of the majority in Néron had also sat on Scientology and concurred with Cory J.’s reasons.

X. Wrongful Pruning and the Common Law

As noted, one possible conclusion from Néron is a continuing and perhaps even accelerating divergence between the civil law and the common law in the underlying principles found to constitute an appropriate constitutional balance in the law of defamation as applied to the media. It is also, however, perhaps possible to see the adoption by the majority of a journalistic negligence standard for liability (especially

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59 Supra, note 42, at para. 98.
one that incorporates the notion of *wrongful pruning* as a sign of potential areas of convergence with the common law. This is especially the case because of the implications of the notion of *wrongful pruning* for the concept of truth in defamation law.

For the most part the majority judgment in *Néron* deals with the contents of the broadcast at issue as simply being true. It does at one point, however, somewhat shade the issue by describing them as “true … at least in part.”\[60\] To that extent the majority judgment could be seen as raising the issue of whether truth that is not “the whole truth” is actually truth at all. The point is not developed in any detail in *Néron*, but it potentially has important implications for the issue of truth at common law.

“Justification,” *i.e.*, the truth of what is said, is a complete defence at common law. But is a statement “true” if it leaves out something that the plaintiff believes is essential and would change the negative impact of the communication on him or her? The common law has no easy way to deal with this issue. One way that plaintiffs have attempted to raise this issue of supposed incompleteness is by alleging that the material complained of has a defamatory meaning that depends on the omission in addition to or instead of the literal meaning conveyed by its true components.\[61\] This tactic has met with mixed success and has not as yet been considered by the Supreme Court of Canada. A number of lower court decisions do demonstrate a particular concern regarding the power of the media to distort appearances and damage reputations.\[62\] The adoption by the majority of the Supreme Court of Canada of the concept of *wrongful pruning* as an appropriate balance between freedom of expression and protection of reputation may signal potential approbation for conceptualizing truth as “the whole truth.” If that is the case, then the entire legal machinery for examining media conduct may be finding its way into the defence of justification where, at least in theory, it has not hitherto been relevant.

The concept of “wrongful pruning” also has important potential implications for the common law of defamation where the issue is not

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statements of fact. Where the communication in issue is a statement of opinion, the relevant common law defence is “fair comment,” which is defined as an honest belief, based on true facts on a matter of public interest or importance communicated without malice.63 There are a number of ways to conceptualize this defence, some more protective of expressive freedom than others. One key to the potentially differing impacts is whether the emphasis is on the honesty of the belief or on the “malice” with which it may have been communicated.

At one pole is the interpretation of fair comment by Lord Denning in *Slim v. Daily Telegraph Ltd.* which makes the honesty of the belief the key, not its “reasonableness”:

> If he was an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations: no matter that his opinion was wrong or exaggerated or prejudiced; and no matter that it was badly expressed so that other people read all sorts of innuendoes into it; nevertheless, he has a good defence of fair comment. His honesty is the cardinal test.64

Other cases emphasize the “without malice” component of the text and the fact that evidence of malice can be gleaned from a variety of sources including the circumstances that surround publication. From this point of view, negligence in what was done before the opinion was expressed may not only be relevant, but may in fact negate any “honesty” in the holding of the belief.65

The concept of professional standards and especially as it incorporates the notion of *wrongful pruning* is clearly relevant to this issue and to the meaning of the “fairness” of “fair comment.” If one substitutes the concept of “honest belief” for *truth* then the three issues triangulated by the majority decision in *Néron* — namely, *truth, public interest* and “journalistic standards” — correspond exactly to the three issues of “honest belief based on true facts,” “public interest and importance” and “absence of malice” at play in the defence of fair comment.

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64 [1968] 2 Q.B. 157, at 170 (citations omitted).
Néron interprets Article 1457 of the Civil Code as making truth and public interest only “factors” in the assessment with “journalistic standards” being the determinative factor. Does this mean that the Court would emphasize “malice” over “honest belief” in assessing fair comment at common law? If Néron is indicative of the Court’s view of the correct balance between expressive freedom and protection of reputation where the media are involved (rather than simply as constituting a valid balance based on Article 1457), then it may well predict how the Supreme Court of Canada will interpret the “fairness” of fair comment at common law.

Finally, it is probably noteworthy that on its face, Néron is about a standard of liability in defamation specific to the media. Since members of the general public are not subject to any specific “rules of conduct” within the meaning of Article 1457, the balance articulated in Néron should not apply to them.

The common law has consistently rejected implications that the rules of defamation apply differently to different individuals.66 That is one of the points of Scientology.67 It remains to be seen whether the general approach in Néron presages a greater willingness by the Court to consider the common law principles of defamation in light of the identity of the parties.

XI. PUBLIC LAW CONSEQUENCES OF A PRIVATE DISPUTE

The majority in Néron locates the appropriate constitutional balance for the law of defamation for media defendants in a standard of fault referable to professional journalistic standards, including the concept of wrongful pruning. This balance may well be plausible in the context of resolving the conflicting autonomy claims of plaintiffs and defendants in a dispute over entitlement to compensation for damage to reputation. That is precisely the focus of the law of torts at common law and the law of delictual and quasi-delictual liability in the civil law. As such, it makes sense for LeBel J. to note that making professional journalistic standards the touchstone for fault allows defamation to “fit nicely with

67 At least as it applies to plaintiffs.
the general framework of Article 1457.” The application of this standard for fault in Néron may seem somewhat tilted toward the interests of the plaintiffs with a rather generous interpretation of the connection between the fault as found and any significant aspect of the damage to the plaintiffs’ reputations, but if the matter is simply seen as a contest between the plaintiffs’ right to respect for their reputations and the right of the media to make the plaintiffs look ridiculous, one can understand the logic of the outcome.

The trouble, however, is that there is a third party whose interests need to be considered. As Binnie J. states in dissent, “the proper legal framework with which to consider the present appeal is not simply a bilateral dispute between the CBC and the respondents, but a multilateral dispute involving not only the disputants but the broader Quebec public which has a serious stake in the proper functioning of the CNQ as a vitally important public institution.”

The focus on the “disputants” and on the issue of damage to reputation makes it difficult to see that what is at issue in Néron is not simply the consequences of arguably bad behaviour by the media on the good name of the plaintiffs, but also the risks that the media will run when reporting on issues of public importance that may reflect badly on named individuals.

The full impact of treating defamation as a private dispute may not have been evident in Scientology because the media were not joined as defendants and, perhaps crucially, because the “constitutional challenge” in that case focused on the common law defence of “justification.” In other words, the defendants sought a change in the common law that would allow them to escape liability for telling lies about public figures. In that context, the Court was able to point out that even the U.S. jurisprudence had concluded “there is no constitutional value in false statements of fact.”

The majority decision in Néron makes the impact much clearer. The focus in Néron on defamation as a private dispute allows for the adop-
tion of a standard that explicitly contemplates the possibility of finding liability even where a broadcast is true and in the public interest, and the Court’s application of that standard has precisely that result.

*Scientology* dealt with the deterrent purpose of the law of defamation, but largely in terms of the use of punitive damages and even of injunctions to control defendants who cannot be deterred by ordinary damage awards.\(^1\) Again, the specific facts of that case made it difficult to see any negative consequences for the public interest in deterring such speech. The facts of *Néron* make these consequences much clearer as well since what is being affected is expression that the public has a valid right to hear and information that it has a right to know.

Another way of saying this is that the “private dispute” focus on defamation obscures the nature of the speech being dealt with in *Néron*. The subject matter of the broadcast was not Mr. Néron or his company. It was the behaviour of a public institution, the CNQ, and the implications of that behaviour on the public’s interest in consumer protection when dealing with legal professionals. Mr. Néron’s letter and its allegations were merely illustrations of the basic point of the broadcast, that the CNQ was acting in an irresponsible and unprofessional manner in its treatment of complaints and claims against notaries.

Far from providing a useful, objective standard for balancing the public’s rights under the rubric of expressive freedom with society’s interest in protecting privacy and reputational rights, the concept of journalistic negligence, especially in terms of wrongful pruning involves the Court in an exercise that curbs expressive freedom on the basis of the very editorial decisions that give the expression its “political” content.

That is not to say that, even as a question of public law, there is not a need for a balancing exercise to be undertaken as between the protection of expressive freedom and the protection of individuals from harm by the press. Canadian courts have rightfully been concerned about the power of the media and their ability to inflict harm on the individuals whom they portray in their publications or broadcasts. The law of defamation can provide an important tool in addressing some of the power imbalance between the media and its subjects. The important public law consideration is that the tools used by the Court to address that imbal-

\(^1\) *Scientology, id.*, at paras. 196-203.
ance must also be capable of maintaining an appropriate safeguard to the public’s right to have the media speak clearly and freely in matters of public importance.

XII. A PUBLIC LAW APPROACH TO THE BALANCE

What would a standard for assessing liability in defamation look like that was better suited than professional journalistic standards or wrongful pruning to set the public law balance between expressive freedom and protection against media abuse?

The question is not a simple one. Even in cases involving section 1 of the Charter and the specific considerations and burdens of proof set out in the Oakes test, it has been notoriously difficult to articulate or to apply meaningful objective criteria for striking an appropriate balance between expressive freedom and important competing interests. The task is all the more difficult where the test is the unstructured and “flexible” approach mandated in Scientology for assessing the impact on expressive freedom of elements of the law of defamation.

Unless and until Scientology is ever reconsidered, the public law issue of the balance between expressive freedom and protection from media abuse in the law of defamation will proceed on the basis of something akin to a presumption of constitutionality with respect to the existing elements of the law of defamation. In other words, the Court will presume that the existing elements of the law of defamation are all capable of an interpretation and an application that will respect the principle of expressive freedom and will therefore try to interpret and apply them in a manner that minimizes any negative impact on the values that underlie that principle.

As applied to the issue of a potential public law balance in the context of Néron, this means that the balance would have to be conceptualized in terms of existing substantive law under the Civil Code, namely, Article 1457. In that connection, the necessary shift might be as simple

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73 Scientology, supra, note 70, at paras. 83-85.
as a return to the formula in *Prud’homme* that “fault” must be treated as a contextual question of fact and circumstance, and a reconsideration of the hierarchy created by *Néron* among the three factors — *truth, journalistic negligence* and the *public interest* — that might serve as a measure for the “fault” contemplated by Article 1457 as the basis for liability.

Taking a primarily “private dispute” approach to the issue, the majority in *Néron* makes *professional negligence* the determinative test for fault with *truth* and *public interest* only “factors.” A public law approach might simply change the ordering and make *truth* and *professional negligence* factors by which to assess whether, based on the *public interest*, there is sufficient fault to engage liability.

In some respects, this may seem like so much sleight of hand, as it essentially uses a description of the desired result — *a balance that serves the public interest* — as the test by which to accomplish that result. It clearly leaves open most of the difficult issues raised by the public law dimensions of liability for defamation and leaves most of the *balancing* in individual cases to be resolved in a standard that is still largely subjective.

The main virtue of such an approach is largely a mirror image of these weaknesses. Without solving the central doctrinal or constitutional issues in play, it does allow for a clearer conceptualization of these issues in their public law constitutional dimensions.

As applied to the present case, such an approach might have focused on the public law dimensions of the values being balanced against expressive freedom, namely protection of reputation and protection of privacy. Viewed from a public law perspective, these values, much like freedom of expression itself, are not absolute. Both are most compelling in the truly private areas of people’s lives and progressively lose some of their justification as they come to be applied to matters in the public sphere. It therefore follows that the more “public” the topic of the expression, and especially where it is true, the less compelling the case for penalizing that expression in order to vindicate privacy or reputational concerns.

Wherever such a balance would properly fall, it is not likely that it would have allowed a finding of liability for $673,153 because the CBC did not inform its audience, *inter alia*, that Mr. Néron and CNQ objected to the (true) portrayal of a notary as a “fusty old man.”