

*The Dalton
Camp Award*

2015



The Dalton Camp Award

The 2015 DALTON CAMP AWARD

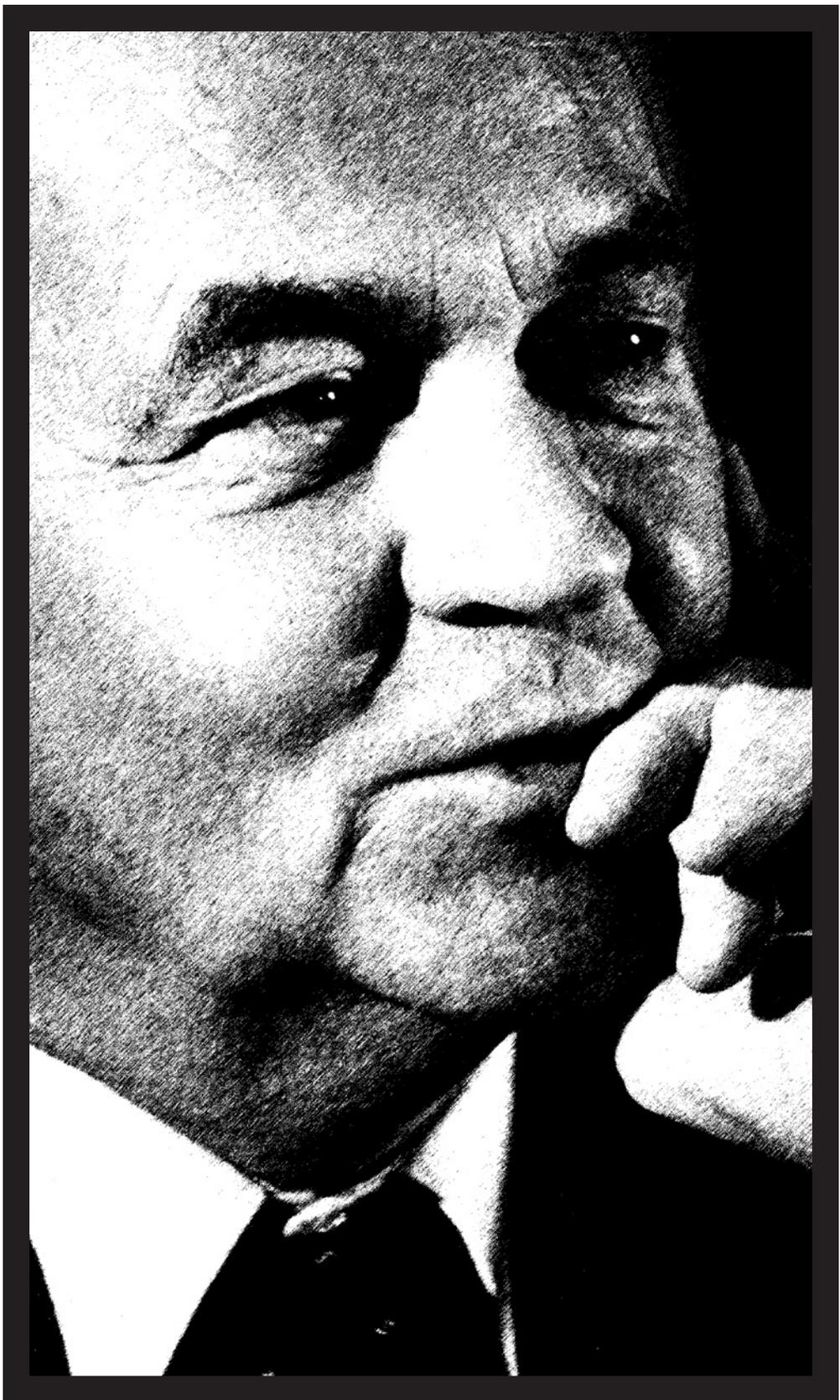
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Presented by Friends of Canadian Broadcasting



FRIENDS OF CANADIAN
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THE DALTON CAMP AWARD

FRIENDS OF CANADIAN BROADCASTING announced the creation of The Dalton Camp Award in December, 2002 to honour the memory of the late Dalton Camp, a distinguished commentator on Canadian public affairs, who passed away earlier that year.

The Dalton Camp Award is available to one Canadian each year, the winner of an essay competition on how the media influence Canadian democracy. The Award consists of a cash prize of \$10,000 as well as a bronze cast medal by the late Canadian sculptress Dora de Pédère-Hunt.

Friends' goal is to encourage Canadians to reflect and express themselves through original essays on the link between democracy and the media.

The Selection Committee is chaired by Jim Byrd; the other members are Pauline Couture and Maggie Siggins.

The 2015 winner is Spencer Keys. Friends of Canadian Broadcasting is pleased to publish his essay herein and on Friends' web site: friends.ca, where details of the 2016 Dalton Camp Award will be available.

Friends wishes to thank *The Globe and Mail*, the *Toronto Star* and *The Walrus* for their cooperation regarding the Dalton Camp Award.

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THE WINNER



Spencer Keys

completed a Bachelors degree in Philosophy and Political Science from the University of British Columbia, where he is currently pursuing a law degree. He is the Editor-in-Chief of the UBC International Law Journal but still harbours dreams of writing for television.



THE MEDAL

The late **DORA DE PÉDÉRY-HUNT** was Canada's foremost medal designer and sculptress. Among her designs are the dollar coin and a cast medal of Norman Bethune presented by Prime Minister Trudeau to Mao Tse-tung in 1973. In 2003, she was awarded the J. Sanford Saltus Award Medal, the American Numismatic Society's prestigious medal for signal achievement in the art of the medal.

THE FREEDOM
TO JEST:
PROTECTING OUR
DEMOCRATIC
RIGHT TO PARODY
AND SATIRE

WINNING ESSAY BY **SPENCER KEYS**

Stephen Colbert has done a better job of educating viewers about campaign finance than traditional news sources.¹ *Daily Show* viewers have been more knowledgeable about facts during presidential campaigns.² And while John Oliver's *Last Week Tonight* is too new to have been subjected to rigorous academic study, it is already drawing praise for its long-form take on complicated subjects.³ One of the least important unifying traits of these three shows is that none of them is Canadian. But given Canada's rich comedic history, should we not be more worried? While *This Hour Has 22 Minutes* and *The Rick Mercer Report* are long-standing fixtures on our cultural landscape, they have never been praised for their intellectual contributions in the style of their American counterparts – the high-water mark was arguably Mercer's petition during the 2000 general election asking Stockwell Day to change his first name to Doris. Is it because we are more genteel? Do our defamation laws help or hurt parody and satire in Canada? And is our democracy better or worse off?

PARODY AND SATIRE'S LEGAL CONTEXT

Satirical news may just be news with a mocking point of view, but arguably satirical news is a live-action adaptation of the editorial cartoon form. In a 1980 defamation case, Chief Justice Nemetz of the British Columbia Court of Appeal approvingly characterized a cartoon as “pictorial parody” using “caricature, analogy and ludicrous juxtaposition [that] sharpens the public view of a contemporary event” in a way that is “normally humorous but may be positively savage”.⁴ To a greater or lesser extent, the law in Canada has recognized the inherent fairness of categorizing editorial cartoons as things not to be interpreted literally,⁵ even when at its most vicious, and satirical news programs are a part of that tradition.

But in doing stories based on original interviews and research, such as *The Daily Show*'s field reports or *Last Week Tonight*'s weekly long-form centrepiece, the line between cartoon and reporting is blurred and opens the performer to defamation claims. Introducing originally-reported facts requires proof that the facts are “substantially true” in order to receive protection under the law, and this may be difficult to do in court – usually years after the statements were made.⁶ Combining facts with commentary, where the audience cannot independently evaluate

the quality of reporting, is even more of a challenge: “fair comment” is a defence which is easier to invoke if the author sticks to publicly available facts.⁷ This difficulty led the Supreme Court of Canada to establish the more expansive “defence of responsible communication” in 2009, but it is still a difficult standard to meet: journalists must seek out and accurately report the subject’s side of a story, or wait to report a story until they have more facts. The savagery of parody and satire does not lend itself to this kind of care, particularly when it lampoons contemporary events.

THE THREAT OF FILING SUIT

Defamation’s legal grey area does not create a legal chill on parody and satire in and of itself. It is the plaintiff’s right to file a defamation claim, even if it is plainly apparent that the allegedly defamatory statements were made in an unserious context, that forces potential humourists to be cautious. Defending a defamation claim carries substantial costs, financially and emotionally, and many organizations, even if insured, do not want the hassle. Critically, as argued by the Ontario Civil Liberties Association:

“[DEFAMATION] IS THE ONLY COMMON LAW TORT (OR CAUSE OF ACTION) WHERE DAMAGES – ACTUAL DAMAGE TO REPUTATION – AND MALICE (MALICE OF DEFAMATION) ARE ASSUMED, AND NEED NOT BE PROVEN IN COURT. THE RESULT IS A PRESUMPTION OF GUILT – REGARDING FALSITY OF THE EXPRESSION, MALICE OF THE DEFENDANT, AND DAMAGES TO THE PLAINTIFF – THAT CAN ONLY BE OVERTURNED IF THE DEFENDANT CAN PROVE ONE OF THE AVAILABLE DEFENCES, WHICH ARE STRICTLY LIMITED AND CODIFIED.”⁸

Even if a full and fair trial would see a defendant exonerated, their presumed liability prevents a judge from throwing out a claim as frivolous. This is particularly pernicious when a defamation claim is made as a strategic lawsuit against public participation (SLAPP), where “suits without substantial merit are brought by private interests to stop citizens from exercising their political rights or to punish them for having done so.”⁹

SLAPPs are frequently used by corporate interests¹⁰ but have also been used by politicians.¹¹ In British Columbia, former premier Bill Vander Zalm initiated one against *Victoria Daily Times* cartoonist Bob Bierman for

a cartoon depicting Vander Zalm plucking the wings off a fly.¹² Bierman had the backing of a newspaper publisher and was exonerated, but what risk do individuals carry? User-generated content spread through social media can have a powerful impact on our political perceptions and can be a persuasive means of communicating. Parody and satire are particularly effective in this space because they succeed in sharpening the public's point of view of an issue with a short, pithy message. While we are aware of numerous cases of SLAPP suits going to trial on matters of defamation, there is no clear sense of how many cease-and-desist letters have been issued against citizens participating in political action, or how many lawsuits have been settled out of court. Are individuals without the resources to defend themselves being silenced out of public view?

INSTITUTIONAL SUPPORT

Even for insured parties, such as television producers, the risk of a SLAPP suit may not be worth poking the bear. As Rebecca Addelman reported in *The Walrus*, "TV producers take the threat of litigation seriously, especially in Canada, where budgets are small and opportunities for work are limited... Some are bigger risk-takers than others, but they all share the same concerns."¹³ The legality of a joke or the insurance payout on a claim may pale in comparison to the emotional cost of the controversy itself, and Canadian television financiers may decide it is not worth taking a stand.

Unfortunately, when it comes to institutionally-supported political comedy in Canada, the source has almost exclusively been the CBC. While the creative capacity of the CBC is significant, a public broadcaster constantly battling government for funding can only go so far. Since 2000-01, public funding for the CBC has risen and fallen but is less than it was at the start of that period.¹⁴ Has that neutered content producers by establishing limits on what they can say or do? While the Jian Ghomeshi scandal has opened windows into the inner workings of the CBC, an unexpected one is on the layers of approval faced by showrunners. Speaking about *This Hour Has 22 Minutes'* comedic handling of the controversy, CBC public affairs spokesperson Chuck Thompson said there was a line the show would not cross, and executive producer Peter McBain added that the CBC is "our broadcaster and they approve or not approve the show in the end".¹⁵

Parliamentary funding and a sexual assault scandal are not remotely equivalent, but the episode demonstrates that production companies are conscious of the CBC's external pressures, and accommodate them. Undoubtedly, antagonizing politicians with control over the public purse strings is one such challenge. While politicians have been known to burnish their reputation by having a sleepover with Rick Mercer, eating Harvey's with Rick Mercer, or jumping naked into lakes with Rick Mercer, they have received a light touch in return.

Even light source material, but with a clear political slant, can be depoliticized once with the CBC: Terry Fallis's *The Best Laid Plans* started as the story of an idealistic Liberal's struggle against Ottawa, but turned into a television series about an unidentified partisan. It is easy to look to past works such as *The Kids in the Hall* and say they were the gold standard for CBC comedy, but the 'Kids' were notable for being political without referencing politicians. They existed purely in a land of absurdity, fantasy, and original characters, unlike Stewart, Oliver, and Colbert.

THE FREEDOM TO JEST

Should the law have a sense of humour? In countries without a robust history of free speech, the answer is yes. South Africa's post-apartheid constitution chose to entrench both freedom of "the press and other media" and "freedom of artistic creativity".¹⁶ South Africans understand, after a period where thoughts and ideas were banned, that there exists in society "a regenerative and often deeply subversive element that is constantly challenging power and formulating different means of expression through new forms".¹⁷ This "subversive tendency", expressed through satire and other forms, is recognized by South African academics as strengthening their still-fragile democracy.¹⁸

Similarly in Turkey, after the 1980 military coup, newspaper editors relied in part on political cartoons to get around the informal system of censorship that developed.¹⁹ In the decades since, press freedoms have been liberalized but cartoonists still risk criminal sanctions if they write about the Kurds or criticize Ataturk.²⁰ Nevertheless, free speech scholars in that country recognize that cartoonists "have had a huge impact on Turkey's odyssey to a true democracy."²¹

Yet in Canada, perhaps as a function of our legal prohibitions on daring opinions, we have allowed a regime to stay in place that allows the wealthy, privileged, and powerful to punish the jesters of our democracy. Professors Haydon Manning and Robert Phiddian argue “cartoonists have the joker’s licence to be boundary riders of the representable in the public sphere. It is in their nature to push the boundaries”;²² what political satirists provide is “one important medium where the spin that is epidemic in public life can be countered, one forum where the shameless can be shamed and open secrets spoken.”²³

So our laws impede parody and satire, but parody and satire are essential democratic tools. The dilemma presented by John Oliver – who both reports and mocks, rather than being content with mockery alone – must be faced, but while television satirists may report, and their content may contain a strong grain of truth, they are also plainly engaged in comment, however extravagant or ridiculous.

Perhaps Canadian law needs a ‘defence of responsible parody and satire’. Oxymoronic as it may seem, courts could adapt the defence of responsible communication to give humourists wide licence with a two-part test: a) was the parody or satire on a matter of public interest? and b) was the parody or satire responsible? The defence of responsible communication has seven holistic factors to determine ‘responsibility’ but for our purposes there should be five:

- the obviousness of the parody or satire,
- the public importance of the subject,
- the urgency of the topic,
- the factual support for the message of the content, and
- the absence of malicious intent.

Developing such a defence would allow comedians – whether on TV or Twitter – to make timely interjections on matters of public importance, with extraordinary leniency for the most ludicrous commentary, but also ensure they do not subject private citizens to their ire, or satirize anyone without a shred of justification. If it were an absolute defence requiring a plaintiff to disprove it, even better.

There are good policy reasons to keep defamation actions in Canadian law: for truly private citizens, a defamatory statement may be the first impression the public has of their character, and nearly impossible to counteract. But just as journalism is an essential element of our democracy, needing protection from both the state and hostile private interests, parody and satire's contribution to political discourse needs recognition and respect. This can only be done through legal reform giving a greater degree of certainty to content producers.

CONCLUSION

Given Canada's rich comedic history, should we be more worried that we do not have an Oliver, Stewart or Colbert? Yes, because beyond oppressive laws and institutional self-censorship, our democracy is missing something with the absence of these voices. And while it is easy to overstate comedy's importance, Canada's comedic tradition demonstrates at least one thing – it is one of the ways we communicate with each other. And, to the extent that it can express ideas, in ways we could not otherwise employ, we should afford it the widest possible protection.

ENDNOTES

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A SMALL
DROP OF INK...
MAKES
THOUSANDS,
PERHAPS
MILLIONS,
THINK.

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