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Supreme Court of Canada Widens Defamation Defence

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A recent decision by the Supreme Court of Canada clarifies and widens the scope of what constitutes a "fair comment" in the context of a defamation action. The Court's decision confirms that fair comment will apply in a defamation action even if the person who made the defamatory comment did not honestly believe the opinion expressed by the comment was true, but it is an opinion that a person – however opinionated or prejudiced – could hold.

The Court's decision in *WIC Radio Ltd. v. Simpson* was the Supreme Court's first opportunity to consider the fair comment defence since 1979, and therefore the first since the *Canadian Charter of Rights and Freedoms* came into force. Although the Court was careful to explain that the *Charter* did not apply directly to the lawsuit (because it did not involve government action, but rather two private parties), it once again expressed its desire to ensure that the common law of defamation conformed with what it (once again) referred to as "*Charter* values."

The case itself involved the prominent British Columbia radio "shock jock" Rafe Mair, who criticized a well-known anti-gay activist in B.C. and likened her comments at a recent rally to attitudes of Nazi Germany, the Ku Klux Klan and U.S. segregation-era southern governors. The activist sued, arguing that (among other things) Mair's on-air comments suggested that she condoned violence against gay people. The trial court found that Mair's comments, although opinion, could be understood in this way, and therefore concluded that the comments were defamatory.

Since the plaintiff proved the elements of defamation, it fell to the defendant to establish the defence of fair comment – that is, that the statement was opinion, reasonably held, on the basis of true facts and on a matter of public interest. In this case, the second element was key: whether the opinion stated was "reasonably held." The trial judge concluded that it was, but, on the basis of Mair's testimony at trial, the Court of Appeal concluded he did not actually believe that the plaintiff condoned violence, and therefore the defence of fair comment failed.

The Supreme Court reversed the Court of Appeal, holding that the requirement of "honest belief" in the opinion expressed is an objective, not a subjective, requirement. In other words, the Court concluded that as a matter of law, it is not necessary for a defendant to actually believe the opinion articulated. Rather, what is required for fair comment is that a person, however opinionated or prejudiced, *could* hold that opinion on the basis of the facts. This frees a court from any requirement to inquire into the defendant's subjective thoughts (which unduly constrain free expression and are largely irrelevant to the protection of the plaintiff's reputation). Instead, the purpose of this element of the test is to provide a (small) constraint on the expression of defamatory opinions that have no rational connection to the facts on which they are based. The Court also preserved the right of a plaintiff to defeat the defence of fair comment by proving malice (i.e., that the defendant uttered the defamatory words with the intention of harming the plaintiff).

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This decision is a significant victory for the media – and free expression more generally – and continues the Supreme Court's post-*Hill v. Scientology* trend toward balancing the common law's traditional protection of reputation with the *Charter* values of free expression. Practically, the decision still requires that Canadian commentators get their facts straight. However, the Supreme Court has made it clear that if those facts are set out accurately (or are otherwise expected to be known to the audience) and the statements are obviously an expression of opinion *and* are rationally connected with those facts, even "outrageous" and "ridiculous" remarks will be protected. The Court also reiterated that the determination of whether a statement is "fact" or "comment" is to be generously interpreted to ensure that strong opinion, figurative speech or hyperbolic language is not unduly restricted.

Interestingly, the Court also referred in passing to the numerous strands of case law existing in other common law jurisdictions relating to the "responsible journalism" or media privilege defences. Although it declined to express how the various regimes in the United Kingdom, Australia and New Zealand applied to Canadian law, the Court dropped an unusually strong hint that it would be open to considering all of these regimes and whether they are appropriate for Canadian law (although recognizing that its role as a Court is only to change the common law "incrementally"). The Court will get this opportunity in the coming months, when it hears the appeal from the Ontario Court of Appeal's decision in *Cusson v. Quan*, likely in early 2009. T