IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Simpson v. Mair and WIC Radio Ltd.,***
2004 BCSC 754

Date: 20040604
Docket: C996052
Registry: Vancouver

Between:

Kari Simpson

Plaintiff

And:

Rafe Mair and
WIC Radio Ltd.

Defendants

And:

The Citizens Research Institute Society

Defendant by Counterclaim

Before: The Honourable Madam Justice Koenigsberg

Reasons for Judgment

Counsel for the Plaintiff	Lianne W. Potter
Counsel for the Defendants and The Defendant by Counterclaim	Daniel W. Burnett Heather E. Machonachie
Date and Place of Trial:	October 6-10, 13-17, 20 and 24, 2003 and December 8-10, 2003 Vancouver, B.C.

INTRODUCTION

[1] This action is brought in defamation. It concerns the broadcast of an editorial on Monday, October 25, 1999, as part of the Rafe Mair radio show. The defendant, Rafe Mair, ("Mair") is the author of the editorial and the host of the Rafe Mair radio show. He read the October 25, 1999 editorial aloud, over the air, at the beginning of his radio show.

[2] The evidence establishing the following was not disputed. The defendant, WIC Radio Ltd. ("WIC"), is a licensed broadcaster directly or indirectly, through its parent company of the radio station known as CKNW. WIC was the owner and operator of the CKNW radio station in the period from 1997 to 1999. WIC contracted with Mair, for Mair to host the Rafe Mair show and to prepare and

present his editorial on the Rafe Mair show. In its own document, entitled "Journalistic Objectives and Guidelines", WIC acknowledged that it is responsible for what Mair, as its host, says on his show, stating:

> Open-line hosts must remember that the company is fully accountable for anything that is broadcast on its stations and therefore must conduct themselves in a professional and responsible manner at all times.

[3] Further, WIC retained an over-writing authority to set parameters and guidelines in respect of the Rafe Mair show. As a matter of routine procedure, the producers for the Rafe Mair show were provided with a copy of the editorial about one hour before its broadcast. WIC Radio advertised the broadcast of the editorial in the lead-up to the Rafe Mair show on October 25, 1999.

[4] There is no issue that the editorial was published and broadcast on October 25, 1999 as alleged, and that it referred to the plaintiff as alleged. The plaintiff is mentioned by name in the editorial. The editorial, as broadcast, was identified by both Mair and WIC in testimony. The transcript of the editorial, as broadcast on October 25, was marked as an Exhibit. An audiotape of the editorial, as broadcast and recorded at the time the broadcast was heard, was commented on and marked as an exhibit at trial. The editorial was also published on the Rafe Mair personal website www.rafemair.com and was available to its subscribers. The online version of the editorial was also marked as an exhibit.

[5] The Rafe Mair show was broadcast by WIC and its affiliates throughout British Columbia and the Yukon. In October of 1999, the Rafe Mair show had a sizeable following. Surveys used by WIC and its management of the radio station indicate an average audience of 130,000 would listen to the 15-minute segment found at the commencement of the Rafe Mair show. The editorial was broadcast during that 15-minute segment. The portion of the editorial complained of and alleged to be defamatory is extracted as Schedule "A" to the Amended Statement of Claim. That Schedule "A" is appended to these Reasons for Judgment as Appendix A.

[6] It is the plaintiff's position that the words found in Schedule "A" were defamatory according to their ordinary and natural meaning. Certain paragraphs of the editorial are set out below in italics after the ordinary and natural meaning ascribed to them in the Plaintiff's Amended Statement of Claim. The excerpts are taken from the Amended Statement of Claim, which accounts for discrepancies between this and the transcript of the editorial:

> (a) The implication that the plaintiff advocated keeping gay people out of Surrey's public schools;
>
> > *The latest business in Surrey is a disgrace. That parents would start taking children out of school because the teacher is gay is beyond my comprehension.*
> >
> > Paragraph 1 of Schedule "A"
> >
> > In addition, the general tenor of the whole of Schedule "A".
>
> (b) The implication that the plaintiff was hostile toward gay people to the point she would condone violence toward gay people;

> *Before Kari was on my colleague Bill Good's show last Friday I listened to the tape of the parents meeting the night before where Kari harangued the crowd. It took me back to my childhood when with my parents we would listen to bigots, who with increasing shrillness, would harangue his crowds. For Kari's homosexual one could easily substitute Jew. I could see Governor George Wallace of Alabama standing on the steps of a school house shouting to the crowds that no nigras would get into Alabama schools as long as he was governor. It could have been blacks as easily as gays last Thursday night.*
>
> Paragraph 3 of Schedule "A"

(c) The implication that the plaintiff preaches hatred against gay people;

> *Now I'm not suggesting that Kari was proposing or supporting any kind of holocaust or violence but neither really in the speeches when you think about it and look back were Hitler or Wallace or Orval Faubus, or Ross Barnett, they were simply declaring their hostility to a minority, let the mob do as they wished.*
>
> Paragraph 4 of Schedule A

(d) The implication that the plaintiff would employ tactics against gay people similar to the tactics employed by Hitler and other bigots, such as former State Governor George Wallace, Governor Ross Barnett and Governor Orval Faubus;

> *Don't make any mistake on this score – there is no distinction between condemning the rights of Blacks or Jews and condemning the civil rights of homosexuals. Whether she realizes it or not, Kari has, by her actions, placed herself alongside skinheads and the Klu Klux Klan. I'm not talking about the violent aspects of those groups but the philosophical parallels to other examples of intolerance.*
>
> Paragraph 6 Schedule A

(e) The implication that the plaintiff is a dangerous bigot apt to cause harm to gay people;

1. *"The latest business in Surrey is a disgrace. That parents would start taking children out of school because the teacher is gay is beyond my comprehension.*

2. *Everyone that I know had a gay teacher somewhere along the line – I had two that I know of. One was a man and he was a good teacher, no more nor less than that but his sexual preferences had no impact whatever on either of us. The other, even though she is long dead I will simply call Miss L. Miss L. was my music teacher in grades III and IV and she was superb. I learned to read music at that young age thanks to her. What is fascinating about Miss L. was that in those days, the early forties, she was living in an open lesbian relationship – unheard of and more than*

just a bit courageous – and was bringing up a young boy who eventually became a distinguished professional, having a happy married life and family. I didn't know Miss L. was a lesbian then, although I did by the time I was in junior high school and I can tell you she is one of three or four teachers I had who had a profoundly positive effect on my learning. I tell you this because I don't think there are very many of you listening who didn't have a gay teacher somewhere whether you know it or not.

3. *Before Kari was on my colleague Bill Good's show last Friday I listened to the tape of the parents meeting the night before where Kari harangued the crowd. It took me back to my childhood when with my parents we would listen to bigots, who with increasing shrillness, would harangue his crowds. For Kari's homosexual one could easily substitute Jew. I could see Governor George Wallace of Alabama standing on the steps of a school house shouting to the crowds that no nigras would get into Alabama schools as long as he was governor. It could have been blacks as easily as gays last Thursday night.*

4. *Now I'm not suggesting that Kari was proposing or supporting any kind of holocaust or violence but neither really in the speeches when you think about it and look back were Hitler or Wallace or Orval Faubus, or Ross Barnett, they were simply declaring their hostility to a minority, let the mob do as they wished.*

5. *As I listened to Kari Simpson I wondered about her – but I also wondered what was the matter with those parents. And Bill Good said it all on Friday when he said he would far rather have a competent gay teaching his kids than a vicious gay basher.*

6. *Don't make any mistake on this score – there is no distinction between condemning the rights of Blacks or Jews and condemning the civil rights of homosexuals. Whether she realizes it or not, Kari has, by her actions, placed herself alongside skinheads and the Klu Klux Klan. I'm not talking about the violent aspects of those groups but the philosophical parallels to other examples of intolerance.*

7. *What's next on the agenda in Surrey – will there be a 1999 version of the Scopes Trial in Tennessee in the 20s where after the legal fight of the century between William Jennings Bryce and Clarence Darrow, John Scopes was found guilty of teaching evolution? Or will it get even nastier with someone, suitably impressed with the wisdom of Kari Simpson's rantings, deciding to take the law into his own hands and do God's work.*

8. *We live under the law, my friends, and under our law which*

guarantees all our rights whatever our race, creed, sex, marital status or sexual preference. And the tactics of the bigots are the same no matter what is the object of their venom.

9. *Kari Simpson is, thank God, permitted in our free society to say what she wishes. But the other side of the free speech coin is a public decent enough to know a mean-spirited, power mad, rabble rousing and yes, dangerous bigot, when they see one."*

(All Schedule A)

[7] No further innuendo is alleged.

[8] The context of this case was the public debate over the introduction of materials dealing with homosexuality into public schools. The materials were said to relate to teaching tolerance of homosexuals and the teaching of tolerance generally.

[9] The debate raged around whether the government's rationale for introducing the subject in public school curricula was to teach tolerance of homosexuality and others or, as opponents of such a requirement characterized it, as promotion of a homosexual lifestyle.

[10] Kari Simpson ("Simpson") was a leading public figure in that debate before October 25, 1999 and Mair's editorial. She had a significant public profile before the alleged defamation. I find she had a public reputation as a leader of those opposed to schools teaching acceptance of a gay lifestyle. Simpson's reputation was earned as a result of her very public actions and words.

[11] Simpson was in the media on the opposing side of gay rights issues that arose from the three books controversy in Surrey. That matter revolved around Elva Prepchuk's removal of her child from a gay teacher's class because that teacher was using gay lifestyle materials, specifically, the three books which caused the controversy in the Surrey School District. Simpson also opposed curriculum promoting education of issues surrounding homosexuality and was a speaker opposing same sex marriage legislation. Her reputation was fairly characterized by Mair at trial as the person who was associated by the media with the anti-gay side.

[12] One of the most high profile issues attracting media attention involving Simpson and the group for whom she was the primary spokesperson, the Citizens Research Institute, which entity is the defendant by counterclaim, was the Declaration of Family Rights. That was a document made available to parents as a tool to prevent exposing their children to any curricula aimed at promoting tolerance of homosexual lifestyle in public schools.

[13] Simpson admitted at trial that she helped write the Declaration. In her evidence she acknowledged that upon its publication, "all hell broke loose". I find Simpson's public speeches around the subject of the Declaration make it clear that she promoted the use of the Declaration by parents as a means for them to assert parental rights in relation to what educational material their children would be exposed to. The Declaration allowed the parents to assert that their children should be exempted from participation in sessions which would expose

their children to any teaching which "portrays the lifestyle of gays ... as one which is normal, acceptable or must be tolerated". She stated on more than one public occasion that the wording of the Declaration was deliberately provocative. She faxed Mair a copy of her cover article in B.C. Report, titled "The Most Dangerous Woman in British Columbia", to rely on as an accurate account of her campaign. Of course, the article was citing her as dangerous to the curriculum promoting tolerance of a gay lifestyle as appropriate for children.

[14] Mair was and is a well-known editorialist and talk show host who, for over 20 years, has editorialized on a wide range of political and social issues. Prior to the October 25th editorial, Mair had spoken out in the editorial segment of his talk show, several times, criticizing Simpson in increasingly strong language.

[15] Mair spoke out expressing his perception that Simpson was leading a movement of intolerance and bigotry toward gay people. There is no issue that the language that he employed was often harsh and provocative. There were several articles, some in mainstream media, which had characterized Simpson or her organization as "anti-gay", "intolerant", "bigots", and "homophobic", but none in language as provocative as that used by Mair. There is also no question that Simpson's primary message in all of the speeches and interviews which she gave on the subject of inclusion in the public schools of curricula relating to tolerance and information about homosexuality and a homosexual lifestyle was aimed at promoting use of democratic means to achieve changes in government policy. She urged her listeners to vote, to write, and to speak out about their values and views.

The Legal Issues

[16] The legal issues for determination by this court are the following:

(1) Were the statements made by Rafe Mair capable of bearing a defamatory meaning?

(2) Do the defences of fair comment, qualified privilege or justification to the extent pleaded apply?

(3) Has malice sufficient to defeat the pleaded defences of fair comment or qualified privilege been proven?

(4) Is the defendant WIC liable for defamation?

CONCLUSION

1. The statements complained of in the context of the editorial as a whole are defamatory.

2. The defence of a fair comment applies and is a full defence to the defamatory statements. Neither the defence of qualified privilege nor justification applies in this case to defeat liability for the defamation.

3. Mair was actuated in part by malice in making the defamatory statements. However, the malice was not the dominant motive for the defamation and does not defeat the defence of fair comment.

4. WIC is not liable, in these circumstances, for Mair's defamation.

LEGAL ANALYSIS

Are the words spoken defamatory?

[17] This is primarily a question of law.

[18] The plaintiff has the burden of establishing that the statements were made; that the statements referred to the plaintiff; and that the statements were published by the defendant. The evidence is overwhelming that the plaintiff met that burden and the defence did not submit otherwise.

[19] The alleged defamatory meanings as set out in para. 5 of the Statement of Claim are what the plaintiff relies on to say that she has been defamed and for what the defendant is liable. The plaintiff elaborated those specific alleged defamatory meanings as set out in the introduction to these reasons. They are as follows:

(a) The plaintiff advocated or was generally in favour of parents taking their children out of school because the children's teacher was gay.

(b) The plaintiff advocated keeping gay people out of Surrey's public schools.

(c) The plaintiff was hostile toward gay people to the point that she would condone violence toward gay people.

(d) The plaintiff had condemned the civil rights of gay people ... and preaches hatred against gay people.

(e) The plaintiff rants against gay people in a way that would influence someone to take the law into his own hands and do harm to gay people.

(f) The plaintiff would employ tactics against gay people similar to the tactics employed by Hitler and other bigots.

(g) The plaintiff is a dangerous bigot apt to cause harm to gay people.

[20] The parties agree that the law requires that allegedly defamatory statements must be viewed objectively and from the point of view of what a reasonable and right thinking reader or listener would have understood from the words read or spoken. (See Brown, *The Law of Defamation in Canada,* (2nd Loose leaf Ed. (Toronto: Carswell, 1994), at 5-5 to 5-16 and 5-62 to 5-64).

[21] In order for words to be capable of having a defamatory meaning, the words must "tend to lower the plaintiff in the estimation of right thinking members of society generally" or tend to "expose him to hatred, contempt or ridicule".

[22] The ordinary and natural meaning of the words guides the determination whether the statements are capable of bearing a defamatory meaning. It is not necessary to prove that the words would be understood in a defamatory sense by everyone who hears them or that the words had an actual effect on the person's reputation, as long as a reasonable person to whom they were published would understand them in a defamatory sense. (See Gatley on *Libel and Slander*, 8th Ed. (London: Sweet & Maxwell, 1981); paras. 31, 32, and 50; pp. 15, 16 and 25 to 26).

[23] It is the plaintiff's position that the words complained of, objectively looked at, and applying the ordinary and natural meaning to the words in their

context, are clearly defamatory. The defendant does not say that the imputations outlined by the plaintiff as arising from the words would not be defamatory, rather, that the defamatory meanings alleged by the plaintiff are not a fair characterization of the paragraphs to which they relate. I set out below the position of the defendants as set out at para. 27 of their written submissions:

> The defamatory meanings alleged by the plaintiff are too much of a stretch. The imputations, quoted above, really break down into two categories: the first relating to taking children out of school or keeping gays out of school (plaintiffs meanings a and b), and the second relating to the preaching or condoning hatred or violence (plaintiffs meanings c through g). It is submitted that the more natural and reasonable meanings to be gleaned from the Editorial are:
>
> (a) that the plaintiff is intolerant of gay people and opposes the teaching of tolerance, for which the plaintiff expressly makes no claim;
>
> (b) that intolerance of homosexuals is philosophically parallel to and can be as ugly as more notorious kinds of intolerance such as bigotry towards black or Jewish people;
>
> (c) that the plaintiff, though herself non-violent, may "unwittingly provoke" hatred or violence.

[24] Further, says the defence, the words that were spoken are plainly editorial opinion which is, in the defendant's submission, relevant to the meaning of the words. Such surrounding circumstances and colour are important in determining what a reasonable person would understand from them. The defendant points out that Mair is a well known editorialist on a well known editorial segment of a show, using his well known colourful language of editorial opinion. The defendant also relies on the following law, emphasizing the importance of considering words spoken in an editorial in that context to determine reasonable meaning.

[25] In ***Brown***, *supra*, the following points regarding editorials are made:

> (a) editorial writers are "well recognized for employing opinion and comment" (***Brown***, 27-318);
>
> (b) radio talk and call-in shows in general are "designed to encourage listener participation and foster the airing of divergent view points and their comments are more likely to be understood as expressions of opinion" (***Brown***, 27-322);
>
> (c) editorial statements are sometimes "loose, figurative or hyperbolic language" which is not to be taken as literal accusation of fact, and to be taken with "a grain of salt" (***Brown***, 27- 317); and
>
> (d) "a person who 'is a well-known professional provocateur who relies on heavy sarcasm to create controversy or convey a message' is expected to phrase his comments in a polemical manner without regard to balance or fairness, and his views will be discounted accordingly" (***Brown***, 27-324).

[26] Further, the defence relies on the case of ***Ross v. New Brunswick Teachers Association***, [2001] N.B.J. No. 198 (C.A.), to support their position that comparison to historical figures does not necessarily imply that both figures have identical attributes.

[27] In this case, the plaintiff relies specifically on the passages in which Mair refers to organizations or people such as Hitler or skinheads who are notorious for their intolerance or bigotry. However, the defence points out that Mair expressly states that he is not saying that Kari Simpson is likewise a violent person or that she advocates the use of violence.

Analysis

[28] Whether words complained of are capable of being defamatory is described in two cases which assist in determining the analysis to be utilized in this case as to whether the defamatory meanings alleged can be made out. The first is ***Leenen v. Canadian Broadcasting Corp.***, [2001] O.J. No. 2229 (Ont. C.A.) at para. 8:

> Having found in law that the words complained of are indeed capable of bearing the meanings alleged by the plaintiff, I have concluded in fact that the words complained of do actually bear those meanings. Recognizing that I am not to select the harshest and most extreme meaning along a spectrum of possible meanings, I have applied the test of a reasonable and fair-minded viewer, rather than one who is looking to question the plaintiff's reputation. In analyzing the actual words used to assess whether harm was occasioned to the plaintiff's reputation, I have focused on what ordinary viewers in Canada would infer the words to mean, given their general experience and knowledge of public affairs.

[29] In applying the "reasonable and fair-minded viewer" test, the following admonition of Lord Devlin is applicable, from ***Rubber Improvement Ltd. v. Daily Telegraph Ltd., Same Associated Newspapers Ltd.***, [1964] A.C. 234 (H.L.), as quoted in ***Lawson v. Burns*** (1974), 56 D.L.R. (3d) 240 (B.C.S.C.) at p. 250:

> ... The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory.... When an imputation is made in a general way, the ordinary man is not likely to distinguish between hints and allegations, suspicion and guilt. It is the broad effect that counts and it is no use submitting to a judge that he ought to dissect the statement before he submits it to the jury.

[30] In taking the editorial as a whole and considering both the allusions and direct comparisons of the plaintiff to such figures and organizations associated in modern minds solely with violent, genocidal and irrational hatred towards others; then suggesting that such a comparison does not mean that the plaintiff is herself violent, does not take away from the reasonable meaning of all of the words that the plaintiff would condone violence. This is particularly so, when the editorial, after comparing Simpson to Hitler, Wallace, Faubus or Barnett specifically said the following: "Now I'm not suggesting that Kari was proposing or supporting any kind of holocaust or violence, but neither, really in the

speeches when you think about it and look back were Hitler or Wallace or Orval Faubus, or Ross Barnett, they were simply declaring their hostility to a minority, let the mob do as they wished."

[31] Taken as a whole and with particular emphasis on the last few sentences of the editorial which stated as follows: "Kari Simpson is, thank God, permitted in our free society to say what she wishes. But the other side of the free speech coin is a public decent enough to know a mean-spirited, power mad, rabble rousing and yes, dangerous bigot, when they see one." Those words, uttered as the final statement of an editorial that referred to Simpson in her public persona as comparable in some ways to Hitler, Wallace, Faubus, Barnett, the KKK and skinheads, according to their ordinary and natural meaning, are capable of a defamatory meaning at law and were clearly defamatory of the plaintiff, in fact.

Defences

[32] The defendant relied almost exclusively on the defence of fair comment. However, the defendants did plead both justification and qualified privilege as well, and I will deal with each of those defences briefly.

Fair Comment

[33] There are at least three essential elements to the defence of fair comment which are said to be requirements:

(1) The words must be comment as opposed to statements of fact;

(2) The comment must be based upon facts that are proven to be true (if they have not been admitted); and

(3) The comment must be on a matter of public interest

(See ***Grassi v. WIC Radio Ltd. (c.o.b. CKNW/98)***, [2000] B.C.J. No. 170 (S.C.) at para. 80).

[34] Fair comment is not available in respect of comment based on statements of fact, unless the defence of justification could also succeed in respect of those statements of fact and their defamatory imputations. Nor is it available to comment so bound up in statements of fact that the allegations are essentially ones of fact (See ***Hunt v. Star Newspaper Company Ltd.***, [1908] 2 K.B. 309 pp. 319 and 320, and ***Wenman v. Pacific Press***, [1991] B.C.J. No. 186 (S.C.) at p. 6).

[35] In Brown, *supra* at p. 676, there is a section which distinguishes between comment and statements of fact in the following manner:

> A comment is generally in the form of a "deduction, inference, conclusion, criticism, judgment, remark [or] observation". As such it is a subjective evaluation and incapable of proof. Its truth or untruth, or justness or unjustness, can never be more than a matter of conjecture or speculation. It differs from a statement of fact, which is a "direct statement concerning or description of a subject of public interest", since this can be weighed, tested, dissected or analyzed and conclusions drawn as to whether it accurately reflects the thing it purports to represent or the statement which the author has made. In other words, there are acceptable and uniform methods whereby its truth or falsity can be determined.

[36] The Supreme Court of Canada stated in ***Manitoba Free Press Co. v. Martin*** (1892), 21 S.C.R. 518 at p. 9 of Quicklaw version), as follows respecting the establishment of the truth of an allegation of fact:

> The conduct of a public man which may be commented on, and from which inferences unfavourable to his character may be fairly deduced, must be something known or admitted or proved, not conduct which the writer chooses to ascribe to him.

[37] The defendants have pleaded that all of the words complained of are comment with the exception of the paragraph dealing with "the gay teacher 'Miss L.'" and the words "before Kari was on my colleague Bill Good's show last Friday I listened to the tape of the parent's meeting the night before where ...".

[38] It is the submission of the plaintiff that substantial portions of the words complained of are in the nature of statement of fact rather than comment. The plaintiff attached as Exhibit A to her submission on this point a transcript of the editorial highlighting the words which the plaintiff says were in the nature of statements of fact rather than comment. Set out below are the parts of the editorial the plaintiff says are statements in the nature of facts or comments so bound up in statements of fact that the allegations are essentially ones of fact.

[39] The plaintiff says that defendants have been unable to prove the truth of the following statements of fact expressly uttered in the editorial. I indicate my findings after each of the statements:

> (a) That "Kari got involved in a recall effort against Paul Ramsey in Prince George - Kari lives in Langley - on the basis that he was soft on the gay issue in the Surrey School System, those two harmless or three harmless books that the School Board and some of the parents had set their hair on fire all about.

[40] In my view, this is an example of a mixed statement of fact and opinion. The fact at issue is the extent to which Kari was involved with or supported a recall effort against Paul Ramsey in Prince George. The underlying facts were that Ms. Simpson did in fact give a speech in Prince George in which recall was mentioned, though that was not the focus of her speech. She was critical of Mr. Ramsey and critical of his initiatives in government that were initiatives aimed at promoting tolerance of homosexuality and a homosexual lifestyle in school curricula. There were several other speeches given by Simpson in other places, such as in Salmon Arm, in which she acknowledged speaking in Prince George and being an initiator of an event which catalyzed or assisted in the recall effort against Mr. Ramsey. Thus, in this particular instance, the statements which could be said to be those of fact or inextricably linked as fact or imputing fact such as "Kari was involved in the recall effort in Prince George" are justified, that is substantially true, or true in pith and substance, and thus the balance of the statements can be referred to as comment.

> (b) That "parents would start taking children out of school because the teacher is a gay".

[41] This statement by Mair is in the context of an issue which arose in the Surrey school system, part of which was the focus of the rally at which Simpson spoke and which was the catalyst for the editorial in question. It revolved

around three books depicting same sex parents of small children, and which were introduced into a kindergarten classroom by a teacher who was openly gay and who was a member of an organization promoting tolerance of gay lifestyle throughout society, and in particular, in schools. The issue of whether parents were taking their children out of school because a teacher is gay or because a gay teacher or any teacher would utilize teaching materials, the purpose of which was to promote tolerance of homosexuality, was a point of difference. The fact was that a parent, Ms. Prepchuk, had asked the School Board to remove her child from a gay teacher's classroom on the basis that he was utilizing the three books. The School Board agreed. There appears to be no issue that the reason given by Ms. Prepchuk to the School Board was the use of the books in her child's classroom. However, in my view, it is a matter of opinion and comment, on that fact, to characterize the issue as one of parents taking their children out of school because the teacher is gay. Thus, again, this is a matter of fact and comment combined and, in my view, particularly in the editorial format and in the context of this very hyperbolic editorial, the statement "that parents would start taking children out of school because the teacher is a gay" would fall into the category of comment based on a fact which was substantially true.

(c) That "Kari harangued the crowd".

[42] Clearly, referring to this style of speech as "haranguing the crowd" is a matter of opinion or comment. It is based on the fact that she spoke at a rally in a particular way. I would have found this statement to be a matter of comment, even if there were no accurate descriptions which could be characterized as haranguing. But, in this case, her voice was both magnified by a megaphone and she used a chanting, interactive manner of speaking which often is utilized in order to engage an audience to action. In my view there is no question that the statement "Kari harangued the crowd" is one of comment.

(d) That "Kari has by her actions placed herself alongside skinheads and the Ku Klux Klan".

[43] This clear comment is placed in the middle of a longer part of the editorial which in my view bears setting out in full. All of that which I will excerpt here was underlined or highlighted by the plaintiff as constituting fact rather than comment or more fact than comment. I set it out in full below and will comment on it thereafter.

> Before Kari was on my colleague Bill Good's show last Friday I listened to the tape of the parents' meeting the night before where Kari harangued the crowd. It took me back to my childhood when with my parents we would listen to bigots who with increasing shrillness would harangue the crowds. For Kari's homosexual one could easily substitute Jew. I could see Governor Wallace -- in my mind's eye I could see Governor Wallace of Alabama standing on the steps of a schoolhouse shouting to the crowds that no Negroes would get into Alabama schools as long as he was governor. It could have been blacks last Thursday night just as easily as gays. Now I'm not suggesting that Kari was proposing or supporting any kind of holocaust or violence but neither really -- in the speeches, when you think about it and look back -- neither did Hitler or Governor Wallace or Orville Fauvis or Ross Barnett. They were simply declaring their hostility to

> a minority. Let the mob do as they wished.
>
> ... my colleague Bill Good said it all on Friday when he said he'd rather have a competent gay teacher teach his kids than a vicious gay-basher. Don't make any mistake on this score. There is no distinction between condemning the rights of blacks or Jews and condemning the civil rights of homosexuals. Whether she realizes it or not, Kari has by her actions placed herself alongside skinheads and the Klu Klux Klan. I'm not talking about the violent aspects of those groups but the philosophical parallels to other examples of intolerance.
>
> ....
>
> Or will it get even nastier with someone suitably impressed with the wisdom of Kari's rantings deciding to take the law into his own hands and do God's work? We all live under the law, my friends, and we live under a law which guarantees everyone rights, whatever their race, creed, sex, marital status or sexual preference, and the tactics of the bigot are the same no matter what the object of their venom happens to be. Kari Simpson is not a violent person.
>
> ....

[44] Throughout the above copied three paragraphs, it is all comment or opinion. The facts in those statements which are clearly facts are: 1) that Kari was on Bill Good's show last Friday; and 2) that she did speak to a rally the night before. These facts were true. There is no other sentence or statement or phrase which would be understood to be a matter of fact, and the language in which it is couched is such that it is clearly opinion.

[45] The final highlighted statement complained of as fact is the following:

> The trouble is people who don't want violence often unwittingly provoke it and Kari Simpson is thank God permitted in our society to say exactly what she wishes, but the other side of the free speech coin is the public decent enough to know a mean-spirited, power mad, rabble rousing and, yes, dangerous bigot when they see one.

[46] There is nothing in this statement which could be understood by any reasonable person to be a matter of fact. It is a matter of opinion or comment.

[47] Thus, the plaintiff's assertion that the statements in the editorial were not proven to be true is ill founded. Most of those sentences or phrases which the plaintiff relies on as matters of fact or statements of fact I have found to be statements of opinion. Those which are stated as fact are sufficiently true or not in dispute as true to support the defence of fair comment.

Was It Based On True Facts

[48] Although I have found that the statements specifically set out in the editorial which are or clearly appear to be statements of fact were either true or substantially true, there is another element to consider in considering whether the opinions as a whole were based on true facts. That is, in part, the editorial may rely on facts well known at the time but unstated. There are three elements involved in such an analysis of this point. First is the extent to which the

facts need to be stated or known. Second is whether the person making the comment was aware of them and to what extent. And third is whether the facts have been proven to be true to the degree required.

[49] The extent to which facts must be stated or known has been discussed in several cases, the leading case is ***Kemsley v. Foot,*** [1952] 1 All E.R. 501 (H.L.). The headnote of that decision summarizes the point as follows:

> Provided there was a substratum of fact stated or indicated in the words complained of which was sufficient to form a basis for the comment it was unnecessary for all the facts on which the comment was based to be stated in order to admit the defence of fair comment; in the present case the comment was on newspapers which were widely read and known...

[50] This point was illustrated in the cases of ***Vander Zalm v. Times Publishers et al*** (1980), 18 B.C.L.R. 210 (C.A.), and ***Ross v. New Brunswick Teachers Association*** (2001), 201 D.L.R. (4th) 75 (N.B.C.A.), which were cases involving cartoons. In those cases none of the factual foundation was "stated" and the defence was upheld based on facts which were known either through media reports or other public records.

[51] In ***Vander Zalm*** the British Columbia Court of Appeal expressed the point this way (at p. 231):

> ... 'the true facts' need not be stated at the time of the expression of the opinion. They may be implied and specified as particulars in the defence...

[52] In this case, the facts were stated as indicated above; however, there was one unstated fact that a document known as the Declaration of Family Rights was widely publicized and understood to be promoted by both Simpson and the defendant organization, Citizens Research Institute Society.

[53] That document and its meaning in the context of this lawsuit was fully explored during the trial. It was set out as one of the particulars in the defence.

[54] The matter of whether Mair knew of the facts, as stated, including the unexpressed fact of the existence and promotion by Simpson of the Declaration of Family Rights was proven by the defence at trial.

[55] The plaintiff points out that not every aspect of the statements of fact was precisely true: for instance, the degree to which Simpson was "involved" in the recall campaign in Prince George. It is necessary to examine the extent to which statements of fact must be precisely proven. First as is set out in Gatley, *supra* at p. 257, it is unnecessary for the person making the comment to be acquainted with the evidence by which the truth of the facts may be proven. The rationale of this rule was stated in ***Speight v. Syme*** (1895), 21 V.L.R. 672 at 680:

> [The defendant] may have taken the ground-work of his comment from report, or he may have copied some other writing; and he will be responsible to the person libelled if his confidence in his informants was misplaced. There would be very few events of public concern on which any man could venture to comment if he were required to prove that of his own knowledge when he wrote he knew them to have happened.

[56] There is a further qualification on precise truth of a factual foundation. The rule is that "the commentator must get his basic facts right" (***London Artists Ltd. v. Littler***, [1969] 2 All E.R. 193 (C.A.) at 198), and "The basic facts are those which go to the pith and substance of the matter...".

[57] This passage was quoted and adopted in ***Ross***, *supra*, at para. 71. As well, in ***Kemsley***, *supra*, the House of Lords pointed out that, where the facts are not stated in full in the publication but are stated more fully in particulars, the failure to prove some of them does not defeat fair comment so long as those proven are a sufficient foundation for a person to hold the views in question.

[58] Lord Porter said of particulars set forth in pleadings at p. 506:

> Twenty facts might be given in the particulars and only one justified, yet if that one fact was sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not have of necessity defeat the respondents' plea.

[59] This expression was adopted by the B.C. Court of Appeal in ***Vander Zalm***, *supra*, at page 231.

[60] Further, in ***Brown***, *supra*, at pp, 15-50 & 15-51, it is noted that the factual foundation must be "substantially true" and not "materially misstated". In ***Ross***, *supra*, the court held that the words were comment, and that the factual underpinning of them was based on facts "either stated in a communication or generally known" and proved to be "substantially true".

[61] In summary on this point then, the defence has established that every element of the factual foundation was either stated or publicly known; that Mair was aware of them all; and that they were all substantially true in the sense that they were true in so far as they go to the pith and substance of the opinion Mair expressed.

Was the editorial on a matter of public interest?

[62] The test, in this regard, was set out by Lord Denning in ***London Artists Ltd. v. Litler***, *supra*, at 198:

> Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make a fair comment.

[63] The scope of public interest is very broad, and the case law in this regard is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews. There can be no doubt that the question of tolerance, discrimination, and the place for discussion of homosexuality in public schools are certainly matters of public interest.

Were Mair's statements honestly held?

[64] Certainly, Mair throughout his testimony emphasized over and over again how honestly he held beliefs consistent with what he said in the editorial.

[65] Mair testified he was deeply concerned about all forms of intolerance. The issue here is what evidence could there be that Mair does not honestly believe what he stated in the editorial.

[66] The plaintiff has not challenged the honesty of Mair's belief. And since honest belief does not require that the belief be reasonable nor fairly stated or right nor held by a majority or even a minority of others, there is no actual basis upon which to challenge that Mair did honestly believe what he said.

Has the plaintiff proved malice?

[67] It is undisputed that malice will defeat pleas of fair comment and qualified privilege. In paragraph 10 of the Amended Statement of Claim, the plaintiff particularized the expressed malice on which she relies to defeat any successful plea of fair comment. There are 7 separate allegations said to support malice, as follows:

> 1. The defendants failed to investigate the facts underlying their defamatory allegations in spite of having been advised that their allegations were wrong, and/or alternatively, ignored information proving that their allegations were wrong;
>
> 2. By his language, tone of voice and characterizations, Mair displayed personal animosity toward the plaintiff and contempt for her character;
>
> 3. Mair's comparisons of the plaintiff to certain notorious and reviled persons such as Hitler, skinheads, and members of the Ku Klux Klan were calculated to excite in the public mind a very strong revulsion toward the plaintiff;
>
> 4. Mair resented the plaintiff personally for having spoken on another open line radio program on an occasion in March 1997 prior to appearing on the Rafe Mair program;
>
> 5. Mair resented the plaintiff for having written a letter to him on or about March 28, 1997, part of which he construed (wrongly) to allege that he was a supporter of pedophilia, and he had been seeking to punish her for that;
>
> 6. The defamatory statements were repetitious of previous malicious and defamatory statements published by the defendants in a similar vein about the plaintiff indicating an ongoing desire by the defendants to do harm to the plaintiff's reputations; and
>
> 7. The defendants declined to correct, retract or apologize after receiving a demand for an apology, and instead they circulated transcripts of the program which defamed the plaintiff and they broadcast comments of Mair on subsequent programs for which Mair expressed no regret and which falsely and maliciously reinforced to the public the impression that the original defamatory statements about the plaintiff were true and justified when in fact, they were not.

[68] I will deal briefly with each of these particulars in turn.

> 1. Failure to investigate facts underlying the defamatory allegations.

[69] In my view, while there was some failure to investigate how precisely true were several of the statements alleged to be fact, this is the weakest of all of

the particulars, in that, the statements which could have been construed as fact or may have been statements of fact were either not material or were substantially true.

2. Mair's language, tone of voice, and characterizations.

[70] There is no question, in my view, that the language, tone of voice and characterizations utilized by Mair in both the editorial in issue and earlier editorials were a display of both personal animosity toward the plaintiff and contempt for her character and her ideas, as well as a desire to harm her reputation.

3. Mair's comparisons of the plaintiff to notorious bigots.

[71] Mair's comparison of the plaintiff to Hitler and other persons identified with actionable discrimination, skinheads and members of the Ku Klux Klan was calculated to excite in the public mind a strong revulsion toward the plaintiff and is evidence of intrinsic malice.

4. Mair resented the plaintiff personally.

[72] That Mair resented the plaintiff personally for having spoken on another open line radio program was denied at trial by Mair and may not have been true. It is very weak evidence as far as demonstrating malice.

5. Mair resented the plaintiff for having written a letter.

[73] That Mair resented the plaintiff for having written a letter which he insisted on construing as alleging that he was a supporter of pedophilia, I find to be have been proved. It was clear on the evidence that Mair resented and maintained his resentment of the plaintiff for having written the letter. His actions in relation to that letter were consistent with his unsupported belief in its meaning, and his continuing resentment up to the date of trial. This resentment provided a further motive for his exhibited malice against the plaintiff.

6. The defamatory statements were repetitious.

[74] That the defamatory statements were repetitious of previous malicious and defamatory statements, I have already dealt with above in relation to the second particular of malice.

7. The defendant declined to correct, retract or apologize.

[75] Finally, that the defendant declined to correct, retract or apologize after receiving a demand for an apology and instead circulated transcripts of the programs and otherwise acted unapologetically, is, in the context of my findings in this matter, neutral in relation to whether Mair was actually motivated by malice or predominantly motivated by malice in publishing this editorial.

[76] Malice, in law, may be intrinsic or extrinsic. ***Brown***, *supra*, as cited in ***Amalgamated Transit Union v. Independent Canadian Transit Union***, [1997] A.J. No. 191 (Q.B.) at para. 74, describes intrinsic and extrinsic malice respectively, as follows:

> Malice may 'be inferred from the terms of the defamatory statements themselves.' Thus, the court will look to the 'mode and style' of the publication, or the language which the defendant 'has chosen to couch

> the communication,' to see if there is unnecessary violence of expression or intemperance in language. Words exhibiting an 'unwholesome virulence' or exaggeration, or which are 'couched in terms stronger than necessary to gain the object in view', or are 'entirely disproportionate to', or 'beyond the absolute exigence' of, or utterly beyond and disproportionate to, the facts or circumstances of the occasion, may give rise to an inference of malice. This is particularly true where the violence or intemperance is the product of deliberation.
>
> ....
>
> (Extrinsic Malice)
>
> In proving actual malice it is appropriate for the plaintiff 'to interrogate as to the steps or precautions taken, the inquiries made, and the information obtained by the defendant before publication.' Evidence of malice may be found in the conduct of the defendant throughout the course of events, both before and after the publication of the defamatory remarks, including the course of the judicial proceedings.

[77] Further *indicia* of malice include evidence of any spite or ill will on the part of the defendant which may have motivated him to speak and from which malice may be inferred; repetition of defamatory remarks is also a relevant factor.

[78] In my view, there is ample evidence of intrinsic malice in this case. "Unwholesome virulence" describes the language of the editorial, with such words and phrases as "menace", "mean spirited", "power mad", "rabble rousing" and "dangerous bigot". What is most offensive about the above-mentioned words "menace" and "dangerous bigot" is that they "bookended" the comparisons with Hitler, the Ku Klux Klan and skinheads, among others. Such language was totally unwarranted given the purpose of the parents' rally and the speech made by Simpson.

[79] The language of the editorial as a whole, demonstrates intrinsic malice along with more minor issues, such as Mair's persistent public offence at Simpson's private letter.

[80] There were earlier editorials which contain some of the virulent language in this editorial but none as overwhelming in its virulence as the editorial complained of.

[81] In determining whether malice can defeat fair comment, the law cautions that the court must be able to find that malice was the dominant motive for the offending editorial.

[82] The New Brunswick Court of Appeal decision in ***Ross***, *supra* at paras. 113-116, malice sufficient to undermine the defence of fair comment was rejected, even though the defendant had admitted to hating Ross' writing, had made "profane and denigrating" remarks about Ross and had showed a very savage cartoon.

[83] The court quoted with approval from Brown, *supra:*

> It is the Defendant's primary or predominant motive in publishing the defamatory remark that is determinative. 'Incidental gratification of

> personal feelings is irrelevant." ...Dislike and ill will may be present but actual malice may be entirely wanting. The fact that a defendant is annoyed, or dislikes the plaintiff, or even contemptuous of him, and takes special delight in offending or embarrassing him, and pleasure in the effect of the publication, or that he was angry and rude, or indignant and resentful, and welcomed the opportunity to expose him, will not defeat a privilege if it is otherwise exercised for a proper purpose.

[84] Having considered all the evidence put forward in oral and written submissions on the issue of malice, although I have not attempted to set out all of the arguments and evidence that was put before the court, and having found that Mair was, in fact, actuated by malice, I am unable to find that that this was his predominant or primary motive in publishing the defamatory editorial. I consider that Mair was on a "campaign" to expose what Mair believed were Simpson's "irresponsible" statements and speeches against the teaching of tolerance of a homosexual lifestyle in public schools. This, together with the overall content of the defamatory editorial, is evidence supporting a finding that the dominant motive for publishing the editorial was Mair's honestly held opinion. That opinion was that the position taken by Simpson publicly in support of a movement to resist the legitimizing of a homosexual lifestyle, whether taught in schools or in relation to society in general, was a campaign which he considered dangerous to values which he espoused. This was and is an issue of public concern about which reasonable debate is important.

[85] Thus, the defence of fair comment cannot be defeated by the malice which I find actuated the specific language used by Mair.

Qualified Privilege

[86] The defendants pleaded qualified privilege. However, although the defence provided the court with written submissions in relation to qualified privilege and took the position that qualified privilege may apply in this case, the defence of fair comment was presented as the full answer.

[87] Thus, I will deal with the defence of qualified privilege briefly.

[88] As with the defence of fair comment, the defendants bear the burden of establishing the defence of qualified privilege. The defence requires that the defendants establish that there was some public or private duty to publish the particular words, but also that the recipient of the words, that is the audience in this case, had a corresponding interest in receiving the information. The duty and interest must be reciprocal. The qualified privilege attaches to the occasion upon which the communication is made, not the communication itself (See ***Moises v. Canadian Newspaper Company (C.O.B. Times Colonist)***, [1996] B.C.J. No. 1205 (C.A.) at para. 19).

[89] The test for qualified privilege is the same for a newspaper or journalist as for any member of the general public. There is no special privilege for the media.

[90] In determining whether or not an occasion is privileged, the court is to consider the value of the material to the public and the subject matter of the material. Factors to be taken into account include the following:

> 1. The nature of the information and the extent to which the subject matter is a matter of public concern;
>
> 2. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind or are being paid for their stories;
>
> 3. Steps taken to verify the information;
>
> 4. The urgency of the matter. News is often a perishable commodity; and
>
> 5. Whether the article or editorial contains the gist of the plaintiff's side of the story.

[91] There are other considerations than these, but, in my view, these are the most relevant to the matter at hand.

[92] The privilege is not absolute but is limited by the following considerations:

> 1. The publication must not be unduly wide. Generally, publication "to the world" is excessive (see ***Moises***, *supra*, at paras. 23 – 31);
>
> 2. The publication must not go beyond what is "germane and reasonably appropriate" to the privileged occasion (***Hill v. Church of Scientology of Toronto***, [1995] S.C.J. No. 64, at paras. 146-147 and paras. 155-156).

[93] The following are my findings of fact relevant to the availability of qualified privilege to the editorial.

[94] I find that the issue of the curriculum changes proposed by the government of the day encouraging tolerance of a homosexual lifestyle was and is a matter of public interest and public concern.

[95] The issue of how to fairly deal with homosexuality as a subject for education in schools is a matter which engages deeply held convictions about fundamental issues of our humanity. These convictions, often in conflict among reasonable people, can only be reconciled through full, fair, serious and calm discussions.

[96] I also find that the plaintiff was very prominent in speaking around the province on behalf of parents who wished to resist teaching about sexuality in general and homosexuality in particular, in elementary schools or lower grades of high schools.

[97] There is a serious issue as to whether Mair as an editorial commentator on an entertainment call-in show had a legitimate interest or duty to publish the editorial. Further, there is a serious issue as to whether the identity of the listeners who, of course were not known, and of no particular concern to him other than that they constitute undoubtedly a changing audience of interested listeners of Mair and his views on the world, had a corresponding interest in hearing the editorial.

[98] The topic of homosexuality and its place in curricula for public schools is, in my view, very much one of interest to the public, but there is a difference between a matter that is of public interest as an essential element of the defence

of qualified privilege and whether, as put forward in this editorial, it was a matter espoused in the public interest.

[99] This distinction is of some importance and was explicated in ***Leenen***, *supra*, at para. 11:

> It had everything to do with sensationalizing an issue, with creating viewer interest through alarm and with providing a podium for its producers' long-held views, capably assisted by the over heated concerns of a disgruntled regulator.... The program could easily have presented important information in a fair and balanced manner and, had it done so, the public interests readily could have been served. By presenting a biased and slanted view, a view which in many respects the CBC knew to be inaccurate or simply untrue, no public interest was served.

[100] In ***Leenen***, the issue revolved around a CBC news program which was not known for its deliberately provocative editorialist style, unlike Mair. It was part of programming which typically involved investigative journalism which would assumably present itself as a fair analysis of a matter of public concern. Here, Mair does not purport to be balanced nor to present a balanced view. He purports to present his view and he does so in a frequently and deliberately provocative manner.

[101] Applying the law of qualified privilege to the facts of this case, the question is: Was the publication of the editorial in the public interest? In my view, the answer to that question is definitely not.

[102] The editorial was slanted, biased and unfair – its effect was to contribute to polarizing the issues. Contrary to contributing to an atmosphere of tolerance, non-violence and serious and fair-minded discourse on an important public issue, the language of the editorial could be said to be promoting hatred and contempt for a point of view in a matter of serious concern.

[103] Mair testified that his sensational and inflammatory language was justified by the importance of the issue of tolerance of homosexuality, combined with his perception of the sensational and inflammatory language used by Simpson opposing his views. What he accomplished was to promote hatred and contempt for those who hold the views expressed by Simpson, in language far more dangerous than that utilized by Simpson. If her language could be said to recklessly or unwittingly provoke violence, his language equally bears that interpretation. In the result, qualified privilege is not available as a defence to this defamation.

Justification

[104] The defence pleaded justification in relation to three alleged reasonable imputations in the editorial. They are set out in paragraph 5 of the Amended Statement of Defence. In short, the "stings" alleged to be justified by truth are:

1) that the plaintiff supported the parent who removed the child from the gay teacher's class;

2) that the plaintiff addressed the crowd in a zealous and haranguing manner; and

3) that the plaintiff's advocacy of intolerance was dangerous in the sense that it could unintentionally incite violence or hatred against gays.

[105] The defendants submitted that the test of the defence of truth or justification is that the defendants must prove the gist or sting of the defamation on a balance of probabilities. Substantial truth is the test. Even if the details of the publication contain inaccuracies, the publication is substantially true if it conveys an accurate impression (See ***Brown***, *supra*, pp. 10-19 to 10-31; 10-49 to 10-50).

[106] If Mair's editorial contained only the "stings" as set out above, on all the evidence the imputations are substantially true and the defence of justification would prevail. However, as set out in these reasons, these imputations are neither the only nor the most defamatory of the plaintiff. Thus, the defence of justification cannot succeed in relation to the editorial as a whole, because several other defamatory imputations were stated and the "sting of them" is not substantially true. Those imputations are the following:

(a) that the plaintiff advocated keeping gay people out of Surrey's public schools;

(b) that the plaintiff was hostile toward gay people to the point that she would condone violence toward gay people;

(c) that the plaintiff preaches hatred toward gay people;

(d) that the plaintiff would employ tactics against gay people similar to the tactics employed by Hitler and other bigots such as former state Governor George Wallace, Governor Ross Barnett and Governor Orville Faubus; and

(e) that the plaintiff is a dangerous bigot apt to cause harm to gay people.

[107] This defence fails.

Liability of the Defendant WIC Radio Ltd.

[108] The plaintiff in this case says the defence of fair comment is not available to WIC, because although Mair testified to his honest belief in the opinions which he expressed, the representative of WIC, Mr. Koenigsfest, did not express a belief one way or the other. The plaintiff relies on the decision of the Supreme Court of Canada in ***Cherneskey v. Armadale Publishers Ltd.***, [1979] 1 S.C.R. 1067, particularly the reasons of Mr. Justice Ritchie at page 15 of the Quicklaw version of that decision:

> In the penultimate paragraph of the same judgment, [***Slim v. Daily Telegraph***] Lord Denning stated:
>
> > On the face of these letters, I think that the comments made by Mr. Herbert and the Daily Telegraph were fair comments on a matter of public interest. They honestly said what they thought.
>
> It must be apparent, as it seems to me, that the sentence last above quoted refers to the honesty of both the writer and the newspaper so

> that this case in my opinion affords no authority for the proposition that comments published in a newspaper need not be honest expressions of the newspaper's opinion in order to support a defence of fair comment so long as the newspaper can show its belief that the comments were an honest expression of the real opinion of the writer.

[109] However, throughout the reasons of each of Martland J. and Ritchie J., there are passages which support the proposition put forward by the defence. That is, where the honest belief of the editorialist or writer is established, the broadcaster having allowed the publication can avail itself of the honest belief of the writer to establish the defence of fair comment.

[110] Just below the quote relied on by the plaintiff, set out above, is the following paragraph:

> If the publication of the libel had been confined to the letter and the writers had been sued, or alternately, if it had originated with the newspaper and its publisher, it would in either case have been necessary to show honest belief in order to sustain the defence of fair comment. The same considerations would thus in my opinion apply to the newspaper and the writers.

[111] And just above the quote relied on by the plaintiff is the following, also at page 15:

> This conclusion which lies at the very heart of this case, is based on an obiter dictum of Lord Denning in the case of Slim v. Daily Telegraph, supra, where, as in the Lyon case, it was found that the newspaper honestly held the views expressed and Lord Denning observed at p. 503:
>
> > ... the right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to "write to the newspaper": and the newspaper should be free to publish his letter. It is often the only way to get things put right. The matter must, of course, be one of public interest. The writer must get his facts right: and he must honestly state his real opinion. But that being done, both he and the newspaper should be clear of any liability. They should not be deterred by fear of libel actions.

[112] And then over at page 16, again in the reasons of Mr. Justice Ritchie:

> It appears to me to follow from this that where, as here, there is no evidence as to the honest belief of the writers of the letter, and the newspaper and its publisher have disavowed any such belief on their part, the defence of fair comment cannot be sustained.
>
> ....
>
> These authorities satisfy me that the newspaper and its editor cannot sustain a defence of fair comment when it has been proved that the

> words used in the letter are not an honest expression of their opinion and there is no evidence as to the honest belief of the writers. In view of this finding, I do not consider it necessary to deal with the other submissions made on behalf of the appellant.

[113] Also writing for the majority was Mr. Justice Martland (and it should be noted that the Chief Justice concurred with the reasons of both Martland J. and Ritchie J.) who, in dealing with the defence of fair comment after referring to the law, said the following at pages 5 and 6:

> In the present case, the corporate defendant is the owner and publisher of The Star-Phoenix, a Saskatoon newspaper in which the words complained of were published, and the respondent, King, is the editor of that newspaper. The evidence of the officer produced for examination for discovery by the respondent company, and that of the respondent, King, make it clear that the letter complained of did not represent the honest expression of their real views.
>
> The writers of the letter were not called to give evidence, and so there is no evidence to prove that the letter was an honest expression of their views. The only evidence we have is that the respondent, King, said, with reference to the writers of the letter, "we figured that was their opinion or their view or their observations".
>
> This is not a sufficient basis to enable the respondents to rely upon the defence of fair comment. There is no evidence to show that the material published, which the jury found to be defamatory, represented the honest opinion of the writers of the letter, or that of the officers of the newspaper which published it. In these circumstances the trial judge was properly entitled to decide not to put the defence of fair comment to the jury.

[114] Thus, the facts in ***Cherneskey*** are unusual and distinguishable from this case. There, only the newspaper company was sued for publishing a letter from two law students. There was no evidence that the letter expressed honestly held opinions of the writers of the letter. And the only evidence relating to the publisher was that they disavowed such opinions. Thus, ***Cherneskey*** cannot be a binding authority for the proposition for which it is put forward by the plaintiff on completely different facts.

[115] Here, WIC expressed no views one way or the other as to its opinion of the content of the editorial. However, Mair proved that he, in fact, had an honest belief in the opinions which he expressed.

[116] The defendant refers to several cases in which fair comment was found to apply to publishers based on a finding of honest belief by the writer alone. Each of the cases cited is consistent with that point, however, none actually considers the issue and resolves the matter in favour of the defence position: See ***Christie v. Westcom Radio Group Ltd.*** (1990), 51 B.C.L.R. (2d) 357 (C.A.); ***Thore v. Mudry***, [1999] B.C.J. No. 1693 (S.C.); and ***Vander Zalm***, *supra.* However, in ***Vander Zalm***, at page 224, there was evidence from an editor of the newspaper that the cartoon in issue represented an honestly held opinion of hers.

[117] Finally on this point, in the face of ambiguous comments, specifically based on the facts in ***Cherneskey***, as the only authority supporting the plaintiff's

position, it is worth noting the words of Lord Denning that:

> The right to fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements.
>
> (see ***Slim v. Daily Telegraph***, [1968] All E.R. 497 (C.A.))

[118] In my view, that admonition is a concern which must be shared by any court considering the limits to fair comment in the public interest.

[119] As pointed out by the defence, in a sentiment with which I agree, the proposition that the management of a company must agree with an editorialist's opinion to rely on fair comment makes no sense. How then could opposing opinions be aired?

[120] In the result, I find that WIC is not liable on the basis that it can avail itself of the defence of fair comment.

COUNTERCLAIM

[121] The counterclaim brought by Mr. Mair against Kari Simpson and the Citizens Research Institute Society ("CRI") of which she is executive director is based upon a statement contained on the CRI website. That statement was as follows:

> It was a phenomenon of sorts watching grown men and women play toady to the homosexuals. Public commentators, not typically blinded by the politically correct vision, fell hook, line and sinker. Rafe Mair, perhaps attempting to make amends for past crimes committed against homosexuals, spouted off nonsensical commentary.

[122] The claim as against Kari Simpson for this alleged defamation is on the basis that she either wrote, published, selected, authorized or participated in the publication of the words. It is admitted by the defendant Citizens Research Institute Society that it did in fact publish these statements.

[123] Further it was acknowledged in argument that the statement as published was defamatory and that, to the extent that the meaning could reasonably be interpreted as Mair having been guilty of either crimes or various serious wrongs committed against homosexuals, it was false. Further, Mr. Garneau, the president of CRI, testified that he was the sole author of the article with the offending statement and that he was the person solely responsible for making the article available for publication on the website. He testified that he did not involve Simpson in any way in this process. He did not submit the article to her nor did he seek her approval. There was no evidence to controvert this testimony and I accept it as true.

[124] It is also the fact that neither Mair nor anyone in his organization knew of the article at the time it was published, which was some time in late June or early July of 1998. The article apparently was on the website until shortly after the Citizens Research Institute Society was notified that it was considered to be libellous of Mair. Upon receiving that notification and the interpretation given it by representatives of Mair, Mr. Garneau on behalf of the Society and as the person who had authored it deleted the offending words from the article and sent an apology to Mair through Mair's lawyer, which lawyer had written the letter advising of the alleged libel.

[125] Upon Mair becoming aware of the CRI article, he publicly took the position that normally he would not have responded or gone after anyone for libel, particularly not a statement of this nature, but because he was being sued by Simpson he was going to take action.

[126] There was no evidence before the court brought by Mair or CRI as to what the readership of the website was. However, inferentially, that article received quite limited circulation as certainly neither Mair nor anyone associated with him was aware of it until they searched the website after being sued by Simpson. Certainly, Mair was aware of CRI throughout the time of its website. In relation to the question of whether Kari Simpson is liable for the libel, the plaintiffs by counterclaim rely on the decision of ***Hill v. Church of Scientology of Toronto***, [1995] 2 S.C.R. 1130 at para. 176:

> It is a well-established principle that all persons who are involved in the commission of a joint tort are jointly and severally liable for the damages caused by that tort. If one person writes a libel, another repeats it, and a third approves what is written, they have all made the defamatory libel.

[127] The evidence adduced in relation to Ms. Simpson's involvement, if any, in the publication of the libel was based on one piece of evidence. That is that she may have seen the article on the website some weeks or months after it was posted.

[128] It is pointed out by Mair that Simpson was the official public spokesperson for CRI and was involved in its day to day operations. It is also pointed out that there is a document, which is a fax dated May of 1998 from the son of Mary Dinesen who was a CRI volunteer day to day operations worker along with Simpson, that he had achieved putting a website online and initiating feedback.

[129] It is also true that neither Ms. Dinesen nor Simpson appeared to be very conversant with how websites worked or how one surfed the net. There was no evidence that Simpson had any role in authorizing what articles were put on the website. And the evidence of Mr. Garneau was that he did not seek her authority nor show her the article in advance.

[130] There is evidence that Simpson, as executive director of the Society, would have encouraged resort to the website from time to time and generally was supportive of the website. That was the extent of the evidence of Simpson's involvement in the publication of this article.

[131] Thus, the issue is whether that extent of involvement qualifies as authorizing, approving, writing or contributing to the publication of the article. The plaintiff by counterclaim submitted that the court should draw an inference that Simpson probably wrote or contributed to the writing of the article because of an unusual phrase used in the article "gobbledy goop". This phrase had been used by Simpson in a speech that she made in Prince George. This is thin evidence indeed that she was the writer.

[132] Further, Mr. Garneau testified that she did not contribute in any way to the writing of the article. I found Mr. Garneau to be an honest witness. I have no hesitation in accepting his evidence that she neither wrote, contributed to, approved or preauthorized the article or its publication. Does the fact, which I do accept, that Simpson saw the article some time after it was published on the website and did not demand that it be changed in some way constitute a sufficient

involvement to justify joint or several liability for the tort of defamation? In my view, the use of the word approval in the case law and texts on this subject generally refers to approval, in the sense of an editor having approval of a publication. That approval is more akin to authorization. That is, the person "approving" knows before publication that an article is going to be published and can change it, veto it or not. There is no evidence in this particular case that Simpson did fulfill that role. I am not prepared to draw the inferences the court was invited to draw in written submissions by the plaintiff by counterclaim, mainly on the basis that they are contradicted by testimony given under oath by a witness who I found credible. In the result, I find that Simpson cannot be found liable for the libel.

[133] Is Citizens Research Institute Society liable for the libel? Essentially, in submissions, CRI took the position that not only was the statement not true, but that there was no defence available to it. Thus, that it is actionable libel was acknowledged by CRI.

[134] The position taken by CRI, however, is that damages should be nominal in this case for the following reasons. First that the libel was inadvertent, that is, Mr. Garneau was careless in how he phrased the offending sentence. He did not intend to say that Mr. Mair had committed criminal acts. I accept that it was inadvertent. Second, that there was no evidence that Mair's reputation was affected in any way by the publication of this article. It was pointed out that there appeared to be little circulation of the article. Mair not only did not know about it, but when he was advised of it after it had been up for approximately a year and a half, he stated that he would not have sued in regard to it, in any event, as it was not his practice to sue in relation to such commentary. And finally, as soon as CRI was advised of the libellous interpretation of the statement, CRI promptly responded by removing the libellous part of the statement and apologizing to Mair.

[135] In relation to the effectiveness of the apology, it was noted by counsel for the plaintiff by counterclaim that there appeared to be no apology posted on the website and thus the apology was not appropriately provided. In my view, while it is true that the most effective form of apology would have been by posting the apology, perhaps immediately following the article, there was and is very little harm done by having only provided the apology to Mair directly. Apparently Mair's lawyer did not provide a copy of the apology or advise Mair of the apology when it was received, and until it was put to him at his Examination for Discovery in October of 2000 he was unaware of it. However, Mair acknowledged when he saw the apology that he was satisfied that it was sincere.

[136] In the circumstances of the nature of the libel, the apparent limited scope of its circulation, Mair's clear intent that he would not have sued in relation to the libel and only did so because Simpson sued him, and most importantly the prompt removal of the offending position and apology in relation to the publication, the damages for such a libel should be nominal. In my view nominal damages should be more than an insult and less than any attempt at any kind of compensation. In the circumstances, damages will be set at $100.

"M.M. Koenigsberg, J."
The Honourable Madam Justice M.M. Koenigsberg

June 7, 2004 - ***Revised Judgment***

Schedule "A" as discussed in paragraph 5 on page 4 was omitted in error. It is now attached.

June 8, 2004 - ***Revised Judgment***

Heather E. Machonachie was omitted as defence counsel. The trial dates were shown as October 6 and December 8-11, 2003. The correct dates are October 6-10, 13-17, 20 and 24, 2003 and December 8-10, 2003.

SCHEDULE "A"

EXCERPTS FROM RAFE MAIR EDITORIAL OCTOBER 25, 1999

1. "The latest business in Surrey is a disgrace. That parents would start taking children out of school because the teacher is gay is beyond my comprehension.

2. Everyone that I know had a gay teacher somewhere along the line - I had two that I know of. One was a man and he was a good teacher, no more nor less than that but his sexual preferences had no impact whatever on either of us. The other, even though she is long dead I will simply call Miss L. Miss L. was my music teacher in grades III and IV and she was superb. I learned to read music at that young age thanks to her. What is fascinating about Miss L. was that in those days, the early forties, she was living in an open lesbian relationship - unheard of and more than just a bit courageous - and was bringing up a young boy who eventually became a distinguished professional, having a happy married life and family. I didn't know Miss L. was a lesbian then, although I did by the time I was in junior high school and I can tell you she is one of three or four teachers I had who had a profoundly positive effect on my learning. I tell you this because I don't think there are very many of you listening who didn't have a gay teacher somewhere whether you know it or not.

3. Before Kari was on my colleague Bill Good's show last Friday I listened to the tape of the parents meeting the night before where Kari harangued the crowd. It took me back to my childhood when with my parents we would listen to bigots, who with increasing shrillness, would harangue his crowds. For Kari's homosexual one could easily substitute Jew. I could see Governor George Wallace of Alabama standing on the steps of a school house shouting to the crowds that no nigras would get into Alabama schools as long as he was governor. It could have been blacks as easily as gays last Thursday night.

4. Now I'm not suggesting that Kari was proposing or supporting any kind of holocaust or violence but neither really in the speeches when you think about it and look back were Hitler or Wallace or Orval Faubus, or Ross Barnett, they were simply declaring their hostility to a minority, let the mob do as they wished.

5. As I listened to Kari Simpson I wondered about her - but I also wondered what was the matter with those parents. And Bill Good said it all on Friday when he said he would far rather have a competent gay teaching his kids than a vicious gay basher.

6. Don't make any mistake on this score - there is no distinction between condemning the rights of Blacks or Jews and condemning the civil rights of homosexuals. Whether she realizes it or not, Kari has, by her actions, placed herself alongside skinheads and the Klu Klux Klan. I'm not talking about the violent aspects of those groups but the philosophical parallels to other examples of intolerance.

7. What's next on the agenda in Surrey - will there be a 1999 version of the Scopes Trial in Tennessee in the 20s where after the legal fight of the century between William Jennings Bryan and Clarence Darrow, John Scopes was found guilty of teaching evolution? Or will it get even nastier with someone, suitably impressed with the wisdom of Kari Simpson's rantings, deciding to take the law into his own hands and do God's work.

8. We live under the law, my friends, and under our law which guarantees all our rights whatever our race, creed, sex, marital status or sexual preference. And the tactics of the bigots are the same no matter what is the object of their venom.

9. Kari Simpson is, thank God, permitted in our free society to say what she wishes. But the other side of the free speech coin is a public decent enough to know a mean-spirited, power mad, rabble rousing and yes, dangerous bigot, when they see one."