SUPREME COURT OF CANADA

CITATION: WIC Radio Ltd. *v.* Simpson, [2008] 2 S.C.R. 420, 2008 SCC 40

DATE: 20080627
DOCKET: 31608

BETWEEN:

WIC Radio Ltd. and Rafe Mair
Appellants
and
Kari Simpson
Respondent
- and -
Canadian Civil Liberties Association, British Columbia Civil Liberties Association and Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, British Columbia Association of Broadcasters, RTNDA Canada/Association of Electronic Journalists, Canadian Publishers' Council, Magazines Canada, Canadian Association of Journalists and Canadian Journalists for Free Expression (Collectively "Media Coalition")
Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 65)	Binnie J. (McLachlin C.J. and Bastarache, Deschamps, Fish, Abella and Charron JJ. concurring)
PARTIALLY CONCURRING REASONS: (paras. 66 to 107)	LeBel J.
PARTIALLY CONCURRING REASONS: (paras. 108 to 112)	Rothstein J.

WIC Radio Ltd. *v*. Simpson, [2008] 2 S.C.R. 420, 2008 SCC 40

WIC Radio Ltd. and Rafe Mair *Appellants*

v.

Kari Simpson *Respondent*

and

Canadian Civil Liberties Association, British Columbia Civil Liberties Association and Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, British Columbia Association of Broadcasters, RTNDA Canada/The Association of Electronic Journalists, Canadian Publishers' Council, Magazines Canada, Canadian Association of Journalists and Canadian Journalists for Free Expression (Collectively "Media Coalition") *Interveners*

Indexed as: WIC Radio Ltd. *v*. Simpson

Neutral citation: 2008 SCC 40.

File No.: 31608.

2007: December 4; 2008 : June 27.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for british columbia

Torts — Defamation — Defence of fair comment — Elements of defence — Role of honest belief in test for defence — Radio talk show host defaming social activist opposed to positive portrayals of gay lifestyle — Talk show host making comparisons to Hitler, Ku Klux Klan and skinheads — Comparisons implying activist would condone violence toward gay people — Whether fair comment defence available.

M is a well-known and sometimes controversial radio talk show host. The target of one of his editorials was S, a widely known social activist opposed to any positive portrayal of a gay lifestyle. M and S took opposing sides in the debate about whether the purpose of introducing materials dealing with homosexuality into public schools was to teach tolerance of homosexuality or to promote a homosexual lifestyle. In his editorial, M compared S in her public persona to Hitler, the Ku Klux Klan and skinheads. S brought an action against M and WIC Radio, claiming that certain words in the broadcast were defamatory. At trial, M testified that no imputations of condoning violence were intended by him nor in fact made. Rather, M had intended to convey simply that S was an intolerant bigot. The trial judge dismissed the action on the basis that, while statements complained of in the editorial were defamatory, the defence of fair comment applied and provided a complete defence. The Court of Appeal reversed the trial judgment, finding that the defence of fair comment was not available because there was no evidentiary foundation for the imputation that S would condone violence against gay people, nor had M testified that he had an honest belief S would condone violence.

Held: The appeal should be allowed.

Per McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella and Charron JJ.: The trial judgment dismissing the action should be restored. M's expression of opinion, however exaggerated, was protected by the law. M's editorial was defamatory, but the trial judge was correct to allow the defence of fair comment. [4] [56] [64-65]

Although this is a private law case that is not governed directly by the *Canadian Charter of Rights and Freedoms*, the evolution of the common law is to be informed and guided by *Charter* values. The law of fair comment must therefore be developed in a manner consistent not only with the values underlying freedom of expression, including freedom of the media, but also with those underlying the worth and dignity of each individual, including reputation. A court's task is not to prefer one set of values over the other, but rather to attempt a reconciliation. [2]

The traditional elements of the tort of defamation may require modification to provide broader accommodation to the value of freedom of expression. There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a defamation action. Investigative reports get "spiked", it is contended, because, while true, they are based on facts that are difficult to establish according to rules of evidence. When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but in actions launched simply for the purpose of intimidation. "Chilling" false and defamatory speech is not a bad thing in itself, but chilling debate on matters of legitimate public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements. [15]

It is therefore appropriate to modify the "honest belief" element of the fair comment defence so that the test, as modified, consists of the following elements: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognizable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts? Even though the comment satisfies the objective test of honest belief, the defence can be defeated if the plaintiff proves that the defendant was subjectively actuated by express malice. The defendant must prove the four elements of the defence before the onus switches back to the plaintiff to establish malice. [28] [52]

In this case, the public debate about the inclusion in schools of educational material on homosexuality clearly engages the public interest, and the facts giving rise to the dispute between M and S were well known to M's listening audience, and referred to in part in the editorial itself. The third element of the defence is also satisfied since the sting of the libel was a comment and it would have been understood as such by M's listeners. M was a radio personality with opinions on everything, not a reporter of the facts. Moreover, S did not challenge the view that M's imputation, that she would condone violence towards gay people, was a comment not an imputation of fact. With respect to the fourth element, the objective "honest belief" test represents a balance between free expression on matters of public interest and the appropriate protection of reputation against damage that exceeds what is required to fulfill free expression requirements. Here, there was a sufficient nexus between S's public declarations on homosexuality and the defamatory imputation to meet this element. S's use of violent images could support an honest belief on the part of at least some of her listeners that she would condone violence towards gay people even though M denied that he intended to impute any such meaning. The trial judge did not explicitly apply the "objective honest belief" test to the imputation that S "would condone violence". However, having regard to the trial judge's reasons as a whole, and considering both the content of some of S's speeches already mentioned, and the broad latitude allowed by the defence of fair comment, the defamatory

imputation that while S would not engage in violence herself she "would condone violence" by others, is an opinion that could honestly have been expressed on the proved facts by a person prejudiced, exaggerated or obstinate in his views. That is all that the law requires. M's commentary was not actuated by malice in the sense of improper motive and S did not appeal against the trial judge's conclusion that M's fair comment defence was not vitiated by malice. [27] [34] [49] [57] [60] [62-63]

Per LeBel J.: Since the issue was not raised before this Court, the trial judge's finding that the editorial was defamatory should not be interfered with. However, although the threshold for establishing *prima facie* defamation is low, courts should not be too quick to find defamatory meaning, particularly where expressions of opinion are concerned. Triers of fact should be mindful of ensuring that the plaintiff's reputation is actually threatened by the impugned statements before turning to the available defences. The test is whether, in the factual circumstances of the case, the public would think less of the plaintiff as a result of the comment. Relevant factors to be considered in assessing whether a statement is defamatory include: whether the impugned speech is a statement of opinion rather than of fact; how much is publicly known about the plaintiff; the nature of the audience; and the context of the comment. In this case, the impugned statement constituted comment rather than fact. As a result, M's audience would necessarily treat it differently than a statement of fact. In addition, both M and S were public figures involved in an ongoing public debate on the issue of the introduction of materials dealing with gay issues in the classroom. That debate would have informed public opinion. Even those not familiar with the issue would have understood the comment in the context of this debate because M made reference to it in the impugned editorial. Further, M's "sizeable following" would have understood his comments in light of his well-known style, which involves strong opinions sometimes conveyed with colourful and provocative language. M's comments therefore posed no realistic threat to S's reputation and were not *prima facie* defamatory. In any event, the defence of fair comment is applicable. To satisfy the defence, a defendant should only be required to prove that: (a) the statement constituted comment; (b) it had a basis in true facts; and (c) it concerned a matter of public interest. On the facts of this case, there is no dispute that each of these requirements is met. [68-69] [76] [78] [80] [99]

The fair comment defence should not include an element of honest belief. Although this element continues to exist in some common law countries, its influence and utility have been waning such that it no longer offers anything of value in the exercise of balancing the right to comment fairly on matters of public opinion against the right to reputation. The elimination of that element would constitute a formal recognition that it is no longer justifiable, for purposes of the fair comment defence, to judge a person's opinions on an objective basis other than to require that they have some basis in fact. Furthermore, since the requirements of a basis in fact and honest belief address the same issue, an honest belief requirement provides no additional protection to reputation. There is therefore no reason to retain that element. Eliminating it is an incremental change. This Court has the power — indeed the responsibility — to make such changes when the common law falls out of step with its underlying principles and with modern values, and when a test has proven to be unworkable or to serve no useful purpose. [66] [85] [93-94]

If the defendant is successful in establishing the elements of the fair comment defence, the inquiry may turn to malice, which the plaintiff must prove if alleged. Proof of malice may be drawn from the language of the assertion itself or from the circumstances surrounding the publication of the comment. It may involve inferences and evidentiary presumptions. In order to defeat fair comment, malice must be the dominant motive for expressing an opinion. There was no evidence of malice on the facts of this case. [100] [106-107]

Per Rothstein J.: The statements in question were defamatory but the defence of fair comment applies. To satisfy the fair comment defence, there is no requirement to prove objective

honest belief. The defence of fair comment should only require the defendant to prove (a) that the statement constituted comment, (b) that it had a basis in true facts and (c) that it concerned a matter of public interest. These requirements were met in this case. Although the issue of malice is not before the Court, there is agreement with LeBel J.'s discussion in respect of that element. [108-109]

Cases Cited

By Binnie J.

Referred to: *Price v. Chicoutimi Pulp Co.* (1915), 51 S.C.R. 179; *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067; *Sun Life Assurance Co. of Canada v. Dalrymple*, [1965] S.C.R. 302; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Doyle v. Sparrow* (1979), 27 O.R. (2d) 206, leave to appeal refused, [1980] 1 S.C.R. xii; *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609; *Loutchansky v. Times Newspapers Ltd. (Nos. 2-5)*, [2002] 2 W.L.R. 640, [2001] EWCA Civ 1805; *Bonnick v. Morris*, [2003] 1 A.C. 300, [2002] UKPC 31; *Jameel v. Wall Street Journal Europe SPRL*, [2006] 4 All E.R. 1279, [2006] UKHL 44; *Cusson v. Quan* (2007), 231 O.A.C. 277, 2007 ONCA 771, leave to appeal granted, [2008] 1 S.C.R. xii; *Lange v. Australian Broadcasting Corp.* (1997), 145 A.L.R. 96; *Lange v. Atkinson*, [2000] 3 N.Z.L.R. 385; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3; *Ross v. New Brunswick Teachers' Assn.* (2001), 201 D.L.R. (4th) 75, 2001 NBCA 62; *Ontario Equitable Life and Accident Insurance Co. v. Baker*, [1926] S.C.R. 297; *Vander Zalm v. Times Publishers* (1980), 109 D.L.R. (3d) 531, rev'g (1979), 96 D.L.R. (3d) 172; *Barltrop v. Canadian Broadcasting Corp.* (1978), 25 N.S.R. (2d) 637; *Slim v. Daily Telegraph Ltd.*, [1968] 1 All E.R. 497; *R. v. Salituro*, [1991] 3 S.C.R. 654; *McQuire v. Western Morning News Co.*, [1903] 2 K.B. 100; *Howarth v. Barlow*, 99 N.Y.S. 457 (1906); *Merivale v. Carson* (1887), 20 Q.B.D. 275; *Telnikoff v. Matusevitch*, [1991] 3 W.L.R. 952; *Channel Seven Adelaide Pty. Ltd. v. Manock* (2007), 241 A.L.R. 468, [2007] HCA 60; *Mitchell v. Sprott*, [2002] 1 N.Z.L.R. 766; *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Jones v. Skelton*, [1963] 1 W.L.R. 1362; *Color Your World Corp. v. Canadian Broadcasting Corp.* (1998), 38 O.R. (3d) 97; *Scott v. Fulton* (2000), 73 B.C.L.R. (3d) 392, 2000 BCCA 124; *Macdonell v. Robinson* (1885), 12 O.A.R. 270.

By LeBel J.

Referred to: *Sim v. Stretch* (1936), 52 T.L.R. 669; *Vander Zalm v. Times Publishers* (1980), 109 D.L.R. (3d) 531; *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067; *Davis & Sons v. Shepstone* (1886), 11 A.C. 187; *Slim v. Daily Telegraph Ltd.*, [1968] 1 All E.R. 497; *Cheng v. Tse Wai Chun*, [2000] 3 H.K.C.F.A.R. 339; *Soane v. Knight* (1827), M. & M. 74, 173 E.R. 1086; *Merivale v. Carson* (1887), 20 Q.B.D. 275; *Campbell v. Spottiswoode* (1863), 3 B. & S. 769, 122 E.R. 288; *McQuire v. Western Morning News Co.*, [1903] 2 K.B. 100; *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609; *Ross v. New Brunswick Teachers' Assn.* (2001), 201 D.L.R. (4th) 75, 2001 NBCA 62; *Charleston v. News Group Newspapers Ltd.*, [1995] 2 W.L.R. 450; *Loukas v. Young*, [1968] 3 N.S.W.R. 549; *Watt v. Longsdon*, [1930] 1 K.B. 130; *Christie v. Westcom Radio Group Ltd.* (1990), 75 D.L.R. (4th) 546, leave to appeal refused, [1991] 1 S.C.R. vii; *Renouf v. Federal Capital Press of Australia Pty. Ltd.* (1977), 17 A.C.T.R. 35.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 2(*b*).

Defamation Act 1992 (N.Z.), 1992, No. 105, s. 10.

Treaties and Other International Instruments

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, art. 10.

Authors Cited

Brown, Raymond E. *Defamation Law: A Primer*. Toronto: Thomson/Carswell, 2003.

Brown, Raymond E. *The Law of Defamation in Canada*, vols. 2 and 4, 2nd ed., Scarborough, Ont.: Carswell, 1994 (loose-leaf updated 2007, release 4).

Duncan and Neill on Defamation, 2nd ed. by Sir Brian Neill and Richard Rampton. London: Butterworths, 1983.

Gatley on Libel and Slander, 10th ed. by Patrick Milmo and W. V. H. Rogers. London: Sweet & Maxwell, 2004.

Gillooly, Michael. *The Law of Defamation in Australia and New Zealand*. Sydney: The Federation Press, 1998.

Marten, Bevan. "A Fairly Genuine Comment on Honest Opinion in New Zealand" (2005), 36 *V.U.W.L.R.* 127.

McConchie, Roger D., and David A. Potts. *Canadian Libel and Slander Actions*. Toronto: Irwin Law, 2004.

Mitchell, Paul. *The Making of the Modern Law of Defamation*. Oxford: Hart, 2005.

Salmond on the Law of Torts, 17th ed. by R. F. V. Heuston. London: Sweet & Maxwell, 1977.

Stone, Geoffrey R. "Free Speech in the Age of McCarthy: A Cautionary Tale" (2005), 93 *Cal. L. Rev.* 1387.

APPEAL from a judgment of the British Columbia Court of Appeal (Southin, Prowse and Thackray JJ.A.) (2006), 55 B.C.L.R. (4th) 30, [2006] 10 W.W.R. 460, 228 B.C.A.C. 1, 376 W.A.C. 1, [2006] B.C.J. No. 1315 (QL), 2006 CarswellBC 1435, 2006 BCCA 287, reversing a decision of Koenigsberg J. (2004), 31 B.C.L.R. (4th) 285, [2004] B.C.J. No. 1164 (QL), 2004 CarswellBC 1283, 2004 BCSC 754. Appeal allowed.

Daniel W. Burnett and *Paul A. Brackstone*, for the appellants.

Lianne W. Potter, for the respondent.

Jamie Cameron, *Matthew Milne-Smith* and *John McCamus*, for the intervener the Canadian Civil Liberties Association.

Robert D. Holmes and *Christina Godlewska*, for the intervener the British Columbia Civil Liberties Association.

Brian MacLeod Rogers, for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, the British Columbia Association of Broadcasters, RTNDA Canada/The Association of Electronic Journalists, the Canadian Publishers' Council, Magazines Canada, the Canadian Association of Journalists and Canadian Journalists for Free Expression (Collectively "Media Coalition").

The judgment of McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella and Charron JJ. was delivered by

[1] BINNIE J. — This appeal requires the Court to reexamine the defence of fair comment which helps hold the balance in the law of defamation between two fundamental values, namely the respect for individuals and protection of their reputation from unjustified harm on the one hand, and on the other hand, the freedom of expression and debate that is said to be the "very life blood of our freedom and free institutions": *Price v. Chicoutimi Pulp Co.* (1915), 51 S.C.R. 179, at p. 194. Under the present law, if a plaintiff shows the defendant published something harmful to his or her reputation, then both falsity and damage are presumed, and the onus shifts to the defendants to

establish an applicable defence, including the defence of fair comment. In *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, Dickson J., in dissent, identified the elements of the "fair comment" defence as follows:

> (a) the comment must be on a matter of public interest;
>
> (b) the comment must be based on fact;
>
> (c) the comment, though it can include inferences of fact, must be recognisable as comment;
>
> (d) the comment must satisfy the following objective test: could any man honestly express that opinion on the proved facts?
>
> (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice. [Emphasis in original deleted; pp. 1099-1100.]
>
> (citing *Duncan and Neill on Defamation* (1978), at p. 62)

Although on that occasion a majority of the Court insisted on framing the honest belief requirement in subjective terms (the comment must express an opinion honestly held by the speaker), I believe experience has shown that Dickson J.'s "objective" formulation of the "honest belief" test better conforms to the requirements of free expression endorsed as a fundamental value of our society by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. Of course, even if the elements of the "fair comment" defence are established, the plaintiff can still succeed by proving that the defendant was actuated by malice, i.e. for an indirect or improper motive not connected with the purpose for which the defence exists (*Sun Life Assurance Co. of Canada v. Dalrymple*, [1965] S.C.R. 302, at p. 309).

[2] This is a private law case that is not governed directly by the *Charter*. Yet it was common ground in the argument before us that the evolution of the common law is to be informed and guided by *Charter* values. Particular emphasis was placed on the importance of ensuring that the law of fair comment is developed in a manner consistent with the values underlying freedom of

expression. However, the worth and dignity of each individual, including reputation, is an important value underlying the *Charter* and is to be weighed in the balance with freedom of expression, including freedom of the media. The Court's task is not to prefer one over the other by ordering a "hierarchy" of rights (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835), but to attempt a reconciliation. An individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to "chill" freewheeling debate on matters of public interest. As it was put by counsel for the intervener Media Coalition, "No one will really notice if some [media] are silenced; others speaking on safer and more mundane subjects will fill the gap" (Factum, at para. 14).

[3] The issue of balance is raised here in the context of a "shock jock" radio talk show hosted by the appellant Rafe Mair, a well-known and sometimes controversial commentator on matters of public interest in British Columbia. The target of his "editorial" on October 25, 1999 was the respondent Kari Simpson, a widely known social activist. The context was public debate over the introduction of materials dealing with homosexuality into public schools. Mair and Simpson took opposing sides in the debate about whether the purpose of this initiative was to teach tolerance of homosexuality or to promote a homosexual lifestyle. Simpson was a leading public figure in the debate, and the trial judge found that she had a public reputation as a leader of those opposed to any positive portrayal of a gay lifestyle. The nub of Simpson's complaint is the following portion of the Rafe Mair editorial broadcast on October 25, 1999:

> 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 [Orval Faubus] or Ross Barnett. They were simply declaring their hostility to a minority. Let the mob do as they wished.
>
> (The full text of the editorial is attached in the Appendix.)

[4] The courts in British Columbia were divided on the legal outcome. The trial judge dismissed the action on the basis that, while statements complained of in the editorial (in particular the imputation that Simpson "would condone violence toward gay people") were defamatory, nevertheless, the defence of fair comment applied and provided a complete defence ((2004), 31 B.C.L.R. (4th) 285, 2004 BCSC 754, at para. 6). The Court of Appeal reversed ((2006), 55 B.C.L.R. (4th) 30, 2006 BCCA 287). In its view, the defence of fair comment was not available because there was no evidentiary foundation for the imputation that Simpson would condone violence; nor had Mair testified that he had an honest belief that Simpson would condone violence. In my view, with respect, the Court of Appeal unduly favoured protection of Kari Simpson's reputation in a rancourous public debate in which she had involved herself as a major protagonist. The factual basis of the editorial was Simpson's speech. Mair stated in the editorial that he had listened "to the tape of the parents' meeting the night before where Kari harangued the crowd". Simpson had been making speeches in a similar vein for some time. Whatever view one may take of Mair's commentary, the factual basis of the controversy was indicated in the editorial and widely known to his listeners. In the absence of demonstrated malice on his part (which the trial judge concluded was not a dominant motive), his expression of opinion, however exaggerated, was protected by the law. We live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones. I would therefore allow the appeal.

I. Facts

[5] Rafe Mair's radio talk show is carried on station CKNW owned and operated by the

appellant WIC Radio Ltd., which accepts legal responsibility for the broadcast. Mair has a reputation for provoking controversy. With controversy has come a measure of commercial success. His listeners expect to hear extravagant opinions and, according to his counsel, discount them accordingly.

[6] The trial judge found that Kari Simpson was a social activist with "a public reputation as a leader of those opposed to schools teaching acceptance of a gay lifestyle" (para. 10). Simpson had earlier opposed three books placed in Surrey schools which portrayed family units with same-sex parents. She helped write and promote a *Declaration of Family Rights* which asserted that children should not be exposed to any teaching which "portrays the lifestyle of gays . . . as one which is normal, acceptable or must be tolerated" (A.R., at p. 387). The document included a form to be sent by parents to their children's schools as follows:

> . . .
>
> NOTICE IS HEREBY GIVEN:
>
> > . . . that [child's name, date of birth] . . . must not by any teacher or, through the teacher, any other persons or resource materials, or the learning environment, be exposed to and/or involved in any activity or program which:
> >
> > *1. Discusses or portrays the lifestyle of gays, lesbians, bisexual and/or transgendered individuals as one which is normal, acceptable or must be tolerated;*
> > . . .
>
> (*Declaration of Family Rights* (A.R., at p. 387))

It seems that Kari Simpson relished her role as a public figure. At one point Simpson faxed Mair a cover article about herself in *British Columbia Report* magazine entitled "The Most Dangerous Woman in B.C." (November 24, 1997).

[7] The trial judge found that Kari Simpson's reputation was earned as a result of her "very

public actions and words" (para. 10). Further, "[h]er reputation was fairly characterized by Mair at trial as the person who was associated by the media with the anti-gay side" (para. 11). This characterization is supported by various of Kari Simpson's speeches put in evidence at the trial, including the following extracts:

> There is another group within the homosexual community though who is very much politically driven. These people want your children. . . . [W]hen homosexuality takes on all the aspects of a political movement it too becomes a war. . . . And the spoils turn out to be our children. An exaggeration? Well, what are we to think when militant homosexuals seek to lower the age of consensual sexual intercourse between homosexual men and young boys to the age of 14.
>
> (Speech at Fort St. John (April 3, 1997), at p. 17; A.R., at p. 510)

The theme of confrontation recurs in many of Simpson's speeches made exhibits at trial:

> I talk about that because this is a war. It's not going to go away that easy. And usually the first casualty of war is truth, the second casualty is our children. How many here will put their hands up today and say, "I will not let the second casualty be my children."
>
> . . .
>
> It is a war. Quite often people when they first go out they say, "Oh, Kari, somebody said something mean to me," and I go "uh, uh." I said, "War, you shoot, they shoot." Your aim is better. It's really not complicated.
>
> (Speech at Prince George (May 1997), at pp. 17 and 66; A.R., at pp. 595 and 644)

Kari Simpson expressed the view that "tolerance" was driven by "political correctness":

> Is homosexuality normal? No. Does that mean that people shouldn't indulge in it? Quite frankly, that's their right. . . . But it's not normal. It's a little bit like saying smoking is healthy, you know.
>
> Is homosexuality acceptable? In my household, no, absolutely not. It's destructive.
>
> . . .

> The one that really got people was when we knew and we deliberately put [into the *Declaration of Family Rights*] "must be tolerated", because, you see, we're conditioned in this politically correct insanity to believe that we have to tolerate everything, that we're not permitted to discriminate. Well, I think that those words need to be rehabilitated just a little bit.
>
> . . .
>
> Is it up to the state to dictate to me or my children what we must tolerate? I don't think so. Quite frankly, I'm tired of it.
>
> . . .
>
> So I really encourage you please, we need your help. War is not cheap, people, and we're in a war. We're in a war for the identity of this nation, for the identity of our children, for their future.
>
> (Speech at Salmon Arm (May 18, 1999), at pp. 41-43 and 72; A.R., at pp. 691-93 and 722)

[8] The trial judge also emphasized that Simpson championed her views through democratic means, not violence. She encouraged sympathetic members of her audience to exercise influence through pressure on politicians at all levels. She urged her listeners "to vote, to write, and to speak out about their values and views" (para. 15). "As people as voters and tax payers you have enormous power. Do not underestimate the value of a phone call" (A.R., at p. 535). "Our mandate [Citizens Research Institute] is to ensure that the electorate is informed and participating in an informed way in the politics of the province" (A.R., at p. 652). Typical of her speeches is the following exhortation:

> Your phone can do marvelous things back east where they need to be woken up. They think they're so politically savvy back there, but they really haven't got the sport down pat yet. Yes, out here in British Columbia it is a sport. That's why they want to take our guns away. We know how to shoot.
>
> (Speech at Prince George (May 1997), at pp. 68-69; A.R., at pp. 646-47)

[9] Simpson claimed that certain words in the October 25 broadcast were defamatory in their ordinary and natural meaning. Simpson alleged, as well, that the following defamatory

innuendos were conveyed by words in the broadcast: (a) that she had advocated or was in favour of parents taking their children out of school because the children's teacher was gay; (b) that she advocated keeping gay people out of Surrey's public schools; (c) *that she was hostile toward gay people to the point that she would condone violence toward gay people*; (d) that she preaches hatred against gay people; (e) that she rants against gay people in a way that would influence someone to take the law into his own hands and do them harm; (f) that she would employ tactics against gay people similar to those used by Hitler and other bigots, such as former State Governor George Wallace, Governor Ross Barnett and Governor Orval Faubus; and (g) that she is a dangerous bigot apt to cause harm to gay people. At trial, Mair testified that no such imputations of violence were intended by him nor in fact made. He said:

> I didn't say that Kari is — is a violent person or would want violence to happen. I don't think that — I think that would be the furthest thing from her mind. I think she's, in her own mind, at least, a gentle person. I'm not talking really about what Kari is. I'm talking about what the consequences of thinking that you're doing the right thing this way under these circumstances may well be. [A.R., at p. 340]

II. Judicial History

A. *British Columbia Supreme Court (Koenigsberg J.)* ((2004), 31 B.C.L.R. (4th) 285, 2004 BCSC 754)

[10] The trial judge noted Mair's comparisons of Simpson in her public persona to Hitler, Wallace, Faubus, Barnett, the KKK and skinheads. The meaning to be ascribed to these comparisons is that Simpson "would condone violence" (para. 6); this imputation was found to be defamatory. Further, the following words, having regard to the comparisons, were also found to be defamatory:

> 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. [para. 31]

[11] As to the defence of fair comment, the trial judge found that the facts stated in the editorial were true (para. 44). Kari Simpson had spoken on Bill Good's show, and at a rally the night before. On both occasions she was "on message". Other facts of the controversy were well known at the time though unstated in the editorial (e.g. that Simpson was an active promoter of the *Declaration of Family Rights* (para. 52)). The trial judge concluded:

> [T]he 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. [para. 61]

[12] The trial judge found that the editorial was directed to a matter of public interest. The issues underlying the broadcast such as tolerance, discrimination, and the place for discussion of homosexuality in public schools, were matters of widespread controversy. The trial judge found (at paras. 64-66) that there was no basis upon which to challenge that Mair honestly believed what he said. There was some evidence of intrinsic malice:

> 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. [para. 70]

The trial judge also felt that Mair's editorial was a "display of both personal animosity toward the plaintiff . . . as well as a desire to harm her reputation" (para. 70). Nevertheless, she concluded that malice was not the dominant motive for the offending editorial and so did not defeat the defence of fair comment. Accordingly, Simpson's action was dismissed.

B. *British Columbia Court of Appeal (Southin, Prowse and Thackray JJ.A.)* ((2006), 55 B.C.L.R. (4th) 30, 2006 BCCA 287)

[13] The trial judgment was reversed. In the view of Southin J.A., speaking for herself and Thackray J.A., the trial judge had "failed to apply the test of honest belief in the defamatory imputation" (para. 34). The question, she said, was whether to succeed in the defence of fair comment, the defendant must honestly believe in the imputation (i.e. the innuendo that Simpson "would condone violence toward gay people", found by the trier of fact) or "need he only have an honest belief in what he himself subjectively intended by the words which he used?" (para. 37). *Subjectively*, Mair had intended to convey simply that Simpson is an intolerant bigot. If that was all he had said, he would be entitled to succeed because the facts indicate that this was his honest belief. However, Southin J.A. pointed out, the trial judge concluded, in para. 30 of her reasons, that the *objectively* reasonable meaning of Mair's words was that "the plaintiff would condone violence". She held this was an imputation of fact, not comment, and that there was "no evidentiary foundation for a finding that the appellant would condone violence" (para. 43). Prowse J.A. delivered brief concurring reasons. The case was therefore sent back to the trial judge for an assessment of damages.

III. Analysis

[14] In the almost 30 years since *Cherneskey*, courts across the common law world have re-examined the balance between freedom of expression and the protection of private reputation.

[15] The function of the tort of defamation is to vindicate reputation, but many courts have concluded that the traditional elements of that tort may require modification to provide broader accommodation to the value of freedom of expression. There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a

defamation action. Investigative reports get "spiked", the Media Coalition contends, because, while true, they are based on facts that are difficult to establish according to rules of evidence. When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but in actions launched simply for the purpose of intimidation. Of course "chilling" false and defamatory speech is not a bad thing in itself, but chilling debate on matters of *legitimate* public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements.

[16] Canadian courts have frequently pointed to the need to develop the common law in accordance with *Charter* values, including the law of defamation:

> Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values. The *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter*.
>
> (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, *per* Cory J., at para. 92)

See also *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603. Traditionally, the freedom of expression enjoyed by the media has been considered no greater than that of other members of the Canadian community (*Doyle v. Sparrow* (1979), 27 O.R. (2d) 206 (C.A.), *per* MacKinnon A.C.J.O., at p. 208, leave to appeal refused, [1980] 1 S.C.R. xii). Nevertheless, it is worth noting that s. 2(*b*) of the *Charter* specifically refers to "freedom of the press and other media of communication", presumably to underline their importance in our public life.

A. *Imputations of Fact Versus Comment*

[17] The appellants claim that while the trial judge properly treated the imputation that Simpson would condone violence as a comment, the Court of Appeal mischaracterized it as a statement of fact, to which, of course, different defences apply. The reasons of the Court of Appeal are not altogether clear on this point. Southin J.A., after quoting at length from various court decisions, concluded without further discussion:

> Applying these authorities, I come to the conclusion that the learned judge's conclusion, both as judge and jury, as to the defamatory meaning of these words, excludes any further consideration of fair comment because there is no evidentiary foundation for a finding that the appellant would condone violence. [Emphasis added; para. 43.]

Courts do not ordinarily refer to a comment as "a finding", and Southin J.A.'s characterization persuades the appellants that the Court of Appeal wrongly reversed the trial judgment

> on the basis that the statement in question required factual proof and therefore could not be defended as fair comment. They did so without any deference or indication of a palpable or overriding error by the trial judge in her finding that the words were comment. [Factum; para. 80]

Imputations of Fact

[18] The appellants argue that even if the Court of Appeal decided the appeal on the basis that the imputation "would condone violence" is a fact requiring a demonstration of truth, and even if the court was correct to do so, they are, nevertheless, entitled to succeed on the basis of a "responsible journalism" defence, based on developments in other common law jurisdictions. The appellants cite cases in Australia, New Zealand and the United Kingdom on this point.

[19] I do not propose to deal with this argument at length because, in my view, this is a case of comment, not imputation of fact. However, having regard to the full argument placed before us,

I will briefly take note of the contending positions, which will have to await resolution for another appeal.

[20] In *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609, the House of Lords decided that the common law doctrine of qualified privilege has enough "elasticity" (p. 625) to accommodate freedom of the media in a manner consistent with the freedom of expression guaranteed by Article 10 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms*. "[T]here are occasions when the public interest requires that publication to the world at large should be privileged" (p. 617), depending on such matters as the seriousness of the allegation, the nature of the information published, the extent to which the subject matter is a matter of public concern, the source of the information and the steps taken to verify its truth (p. 626). Where it applies, the "public interest defence of responsible journalism" protects the journalist even where he or she got material facts wrong. Later English authority has noted that the effect of the *Reynolds* test is to shift the qualified privilege from the "occasion" to the specific publication: *Loutchansky v. Times Newspapers Ltd. (Nos. 2-5)*, [2002] 2 W.L.R. 640, [2001] EWCA Civ 1805. See also *Bonnick v. Morris*, [2003] 1 A.C. 300, [2002] UKPC 31; *Jameel v. Wall Street Journal Europe SPRL*, [2006] 4 All E.R. 1279, [2006] UKHL 44; *Cusson v. Quan* (2007), 231 O.A.C. 277, 2007 ONCA 771 (leave to appeal granted April 3, 2008, [2008] 1 S.C.R. xii; hearing pending).

[21] Reliance was also placed by the appellants on the decisions of the High Court of Australia which has accepted a more narrow "government or political matters" defence. In *Lange v. Australian Broadcasting Corp.* (1997), 145 A.L.R. 96, at p. 117, it was held that "the reputations of those defamed by widespread publications will be adequately protected by requiring the publisher to prove reasonableness of conduct . . . [or] if the person defamed proves that the publication was actuated by common law malice".

[22] As in England, the Australian adaptation of qualified privilege would put the onus on the media to prove reasonableness of conduct rather than on the plaintiff to prove lack of due diligence or negligence. Moreover, it is argued that this approach would effectively sideline the issue of malice because a finding that the media acted reasonably would potentially foreclose a concurrent finding of malice in respect of the same publication.

[23] Recent New Zealand authority approaches qualified privilege from a different perspective. In *Lange v. Atkinson*, [2000] 3 N.Z.L.R. 385, the New Zealand Court of Appeal disagreed with both the House of Lords in *Reynolds* and the Australian High Court in *Lange*, that a "responsible journalism" or "reasonableness" requirement should be imposed as a condition precedent to an occasion being classified as one of "qualified privilege":

> We are not persuaded that in the New Zealand situation matters such as the steps taken to verify the information, the seeking of comment from the person defamed, and the status or source of the information, should fall within the ambit of the inquiry into whether the occasion is privileged. [para. 38]

A more appropriate control mechanism, in the New Zealand view, is to seek flexibility in the definition of malice, the proof of which lies on the plaintiff. Thus the privilege would be defeated if the plaintiff could show either that the publisher "knew he was not telling the truth or was reckless in that regard" (para. 51), citing *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, at para. 79. In effect, the New Zealand doctrine rests on a public interest doctrine of proof of *irresponsible* journalism.

[24] While the legal position in both Australia and New Zealand was influenced by statutory provisions that have no direct counterpart in Canada, the Canadian law of qualified privilege will necessarily evolve in ways that are consistent with *Charter* values. At issue will be both the scope of the qualified privilege (*Reynolds* is broader) and whether the burden of proof of responsible

journalism should lie on the defendant (*Reynolds*) or irresponsible journalism on the plaintiff (*Lange v. Atkinson*).

[25] Despite the variations of the "responsible journalism" defence urged in argument, the fact is that Mair does not claim to have acted reasonably in relation to the publication of facts subsequently shown to be false. He says he editorialized on facts that were shown to be true. Commentators are allowed broad latitude under the existing law of fair comment. Despite some ambiguity about the basis of the majority decision of the B.C. Court of Appeal, as more fully discussed below, fair comment is the essence of his defence.

B. *Distinguishing Fact From Comment*

[26] The pleaded innuendo that Simpson was so "hostile toward gay people to the point that she would condone violence toward gay people" (trial reasons, at para. 19 (emphasis added; emphasis in original deleted)) is framed as an inference ("would condone violence") from a factual premise, (i.e. was so "hostile toward gay people"). In *Ross v. New Brunswick Teachers' Assn.* (2001), 201 D.L.R. (4th) 75, 2001 NBCA 62, at para. 56, the New Brunswick Court of Appeal correctly took the view that "comment" includes a "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof". Brown's *The Law of Defamation in Canada* (2nd ed. (loose-leaf)) cites ample authority for the proposition that words that may appear to be statements of fact may, in pith and substance, be properly construed as comment. This is particularly so in an editorial context where loose, figurative or hyperbolic language is used (Brown, vol. 4, at p. 27-317) in the context of political debate, commentary, media campaigns and public discourse. See also, R. D. McConchie and D. A. Potts, *Canadian Libel and Slander Actions* (2004), at p. 340.

[27] The respondent on this appeal did not challenge the view that Mair's imputation, that Simpson "would condone violence toward gay people", was a comment not an imputation of fact (Factum, at para. 40). I agree that the "sting" of the libel was a comment and it would have been understood as such by Mair's listeners. "What is comment and what is fact must be determined from the perspective of a 'reasonable viewer or reader'" (*Ross*, *per* Daigle C.J.N.B., at para. 62). Mair was a radio personality with opinions on everything, not a reporter of the facts. The applicable defence was fair comment. On that point, I agree with the trial judge.

C. *The Test for Fair Comment*

[28] For ease of reference, I repeat and endorse the formulation of the test for the fair comment defence set out by Dickson J., dissenting, in *Cherneskey* as follows:

> (a) the comment must be on a matter of public interest;
>
> (b) the comment must be based on fact;
>
> (c) the comment, though it can include inferences of fact, must be recognisable as comment;
>
> (d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on the proved facts?
>
> (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice. [Emphasis added; emphasis in original deleted; pp. 1099-1100.]
>
> (citing *Duncan and Neill on Defamation* (1978), at p. 62)

I note, parenthetically, that *Duncan and Neill* subsequently reformulated proposition (d) to say: "[C]ould any fair-minded man honestly express that opinion on the proved facts?"; *Duncan and Neill on Defamation* (2nd ed. 1983), at p. 63 (emphasis added). In my respectful view, the addition of a qualitative standard such as "fair minded" should be resisted. "Fair-mindedness" often lies in

the eye of the beholder. Political partisans are constantly astonished at the sheer "unfairness" of criticisms made by their opponents. Trenchant criticism which otherwise meets the "honest belief" criterion ought not to be actionable because, in the opinion of a court, it crosses some ill-defined line of "fair-mindedness". The trier of fact is not required to assess whether the comment is a reasonable and proportional response to the stated or understood facts.

D. *The Comment Must Be Based on Fact and Related to a Matter of Public Interest*

[29] The Canadian Civil Liberties Association ("CCLA") argues that to bring the common law of defamation into compliance with the *Charter* requires "a presumption in favour of expressive activity", so that a plaintiff ought to bear the initial onus of establishing that the defendant's defamatory comment (i) is not a comment at all but a fact which must be proven or otherwise justified, or (ii) is not a comment on a question of public interest.

[30] I do not think a shift of onus on these points is required. In the first place, the *Charter* is about "expressive activity" but it also protects the dignity and worth of individuals, whose reputation may be their most valued asset. Plaintiffs must prove defamation to get their case on its feet. At that point, it is the media that seeks to excuse defamatory remarks on the basis that they are "comment" on a "matter of public interest". Ordinary principles of litigation put the burden of proof on the party making the assertion (*Ontario Equitable Life and Accident Insurance Co. v. Baker*, [1926] S.C.R. 297). In any event, the onus on these two issues is relatively easy to discharge. The public interest is a broad concept. The cases establish that the notion of "comment" is generously interpreted. Putting the onus on the defendant in these respects is not too high a price to pay for a defamer to avoid legal liability for an allegation already found to have wronged the plaintiff's reputation.

E. *Existence of a Factual Foundation*

[31] It is true that "[t]he comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made"; Brown, vol. 2, p. 15-36, and *Gatley on Libel and Slander* (10th ed. 2004), at para. 12.12. What is important is that the facts be sufficiently stated or otherwise be known to the listeners that listeners are able to make up their own minds on the merits of Mair's editorial comment. If the factual foundation is unstated or unknown, or turns out to be false, the fair comment defence is not available (*Chicoutimi Pulp*, at p. 194).

[32] On this point, as mentioned, Southin J.A. concluded that there could be no "consideration of fair comment because there is no evidentiary foundation for a finding that the appellant would condone violence" (para. 43). Perhaps Southin J.A. meant that Mair's comment was too remote from the facts to which his listeners understood the comment related, or perhaps she concluded that Mair's factual premise that Kari Simpson was so deeply hostile to the gay community's initiative was unproven. Southin J.A. did not elaborate.

[33] In *Vander Zalm v. Times Publishers* (1979), 96 D.L.R. (3d) 172 (B.C.S.C.), the trial court gave judgment for the plaintiff, but the Court of Appeal, in reversing ((1980), 109 D.L.R. (3d) 531, at p. 536), observed that the trial judge held that the defence failed because the facts pleaded as the basis for the alleged comment "could not . . . fairly lead to the imputation arising from the cartoon" (emphasis added). The Court of Appeal held that on making this finding the judge applied the wrong test; the proper test being whether the comment made by the cartoon met the test of fair comment, which the evidence indicated that it did. The trial judge spoke of facts "fairly" giving rise to the comment, thereby introducing an unwelcome requirement of reasonableness and proportionality. Southin J.A. in the present case more prudently spoke of "no evidentiary foundation" (para. 43 (emphasis added)).

[34] I agree with Southin J.A. that a properly disclosed or sufficiently indicated (or so notorious as to be already understood by the audience) factual foundation is an important objective limit to the fair comment defence, but the general facts giving rise to the dispute between Mair and Simpson were well known to Mair's listening audience, and were referred to in part in the editorial itself. Simpson's involvement in the *Declaration of Family Values* was familiar to Mair's audience. Her repeated invitations to her followers to pick up the phone and call talk shows and politicians assured her views a measure of notoriety (*Barltrop v. Canadian Broadcasting Corp.* (1978), 25 N.S.R. (2d) 637 (C.A.)). The respondent has offered no persuasive reason to justify the Court of Appeal's interference with the trial judge's conclusion that

> 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. [para. 61]

This provides a sufficient launching pad for the defence of fair comment.

F. *The Honest Belief Requirement*

[35] The respondent Simpson relies on this Court's judgment in *Cherneskey*, for the proposition, as stated by Ritchie J., at p. 1081, that

> it is an essential ingredient to the defence of fair comment that it must be the honest expression of the writer's opinion . . . .

Simpson's argument on this point therefore runs as follows. Although the trial judge found Mair had an honest belief in the comment Mair *subjectively* thought he was making (that Simpson is a

bigot), there was no evidence that he honestly believed the innuendo *imputed* to his words by the trial judge (that Simpson "would condone violence toward gay people"). On this view, if Mair had simply sworn that he honestly believed that Simpson condoned violence (leaving aside the debate about the ambiguity of the word "condoned"), he would have had a good defence. However, Mair undermined his own legal position (so goes the argument) by persisting at trial in talking about Simpson's alleged bigotry and intolerance with the result that he was never asked in chief or cross-examination about his honest belief in the pleaded innuendo that Simpson condoned violence. He stuck to his belief that "Kari Simpson is not a violent person". It seems to me that defamation proceedings will have reached a troubling level of technicality if the protection afforded by the defence of fair comment to freedom of expression ("the very lifeblood of our freedom") is made to depend on whether or not the speaker is prepared to swear to an honest belief in something he does not believe he ever said.

(1) Is There Still a Role for Honest Belief?

[36] Concern about the obvious anomalies in such a requirement has prompted the intervener CCLA to urge that "the honest belief requirement be eliminated" altogether (Factum, at para. 7), despite the description in *Cherneskey*, at p. 1082, of honesty of belief as the "cardinal test" of the defence of fair comment (Ritchie J. quoting Lord Denning in *Slim v. Daily Telegraph Ltd.*, [1968] 1 All E.R. 497 (C.A.), at p. 503). I do not think abolition of the requirement of honest belief, however formulated, would be "incremental". In *R. v. Salituro*, [1991] 3 S.C.R. 654, the Court said, at p. 670:

> The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

Nor does the desire to evolve the common law to reflect *Charter* values require such a fundamental

shift, in my opinion.

[37] The common law judges long ago decided that the *gravamen* of the defence of fair comment would not be the reasonableness or proportionality of the comment in relation to the facts (which would, of course, create stronger protection for the person defamed, but would depend in its application on the mental yardstick employed by a particular court) but whether the comment reflected honest belief. The intervener Media Coalition would substitute for honest belief the requirement that the relationship of the comment to the facts merely "be one of relevancy" (transcript, at p. 54). However, there is a world of difference between an attack made without honest belief and an attack whose relevance to the underlying facts may be disputed. By way of illustration, reference may be made to a famous exchange in the 1954 U.S. Senate Army-McCarthy Hearings when Joseph Welch, counsel to the U.S. army, denounced the scandal mongering Senator for a smear of one of Welch's associates:

> ". . . Let us not assassinate this lad further, Senator. You have done enough. Have you no sense of decency, sir, at long last? Have you left no sense of decency?" Welch then rose and walked from the room, which exploded in applause.
>
> (G. R. Stone, "Free Speech in the Age of McCarthy: A Cautionary Tale" (2005), 93 *Cal. L. Rev.* 1387, at p. 1402)

The effect of Welch's dramatic departure would have been very different had he exited with the cry: "Have you left no sense of relevance?"

[38] The relevancy of the comment to the facts has long been part (but only part) of the fair comment test as is shown in paragraph (b) in Dickson J.'s list: see also *McQuire v. Western Morning News Co.*, [1903] 2 K.B. 100 (C.A.), at p. 113. As Gaynor J. put it in *Howarth v. Barlow*, 99 N.Y.S. 457 (App. Div. 1906), at p. 459:

> That such opinions or inferences are farfetched, highstrung, or severely moral, or contrary to other opinions or inferences that seem more reasonable, does not matter so long as there be a basis for them in the acts or words of the person who is the subject of such criticism.

[39] Of course it is true that the comment must have "a basis" in the facts, but a requirement that the comment be "supported by the facts", read strictly, might be thought to set the bar so high as to create the potential for judicial censorship of public opinion. Even the assessment of "relevance" has in the past misled courts into asking whether the facts "warranted" the comment, or whether the comment "fairly" arose out of the facts (*Vander Zalm*), or other such judgmental evaluations. Insistence on a court's view of reasonableness and proportionality was thought to represent too great a curb on free expression, but it was not too much to ask a defamer to profess an honest belief in his or her defamatory comment. If the speaker, however misguided, spoke with integrity, the law would give effect to freedom of expression on matters of public interest.

[40] "Honest belief", of course, requires the existence of a *nexus* or relationship between the comment and the underlying facts. Dickson J. himself stated the test in *Cherneskey* as "could any man honestly express that opinion <u>on the proved facts</u>" (p. 1100 (emphasis added)). His various characterizations of "any man" show the intended broadness of the test, i.e. "however prejudiced he may be, however exaggerated or obstinate his views" (p. 1103, citing *Merivale v. Carson* (1887), 20 Q.B.D. 275 (C.A.), at p. 281). Dickson J. also agreed with the comment in an earlier case that the operative concept was "honest" rather than "'fair' lest some suggestion of reasonableness instead of honesty should be read in" (p. 1104).

[41] There is a further practical objection to the proposal of the CCLA and the Media Coalition to eliminate altogether the honest belief requirement. By way of explanation to a jury of what is meant by the test of whether the comment is based on relevant or true facts, the court would have to warn the jury not to embark on a reasonableness inquiry. An effective way of explaining

to the jury how the necessary connection between the comment and the facts is to be established would be to tell them to ask themselves the question: Could any person honestly express that opinion on the proved facts? We would therefore be back at the point of departure.

(2) The *Cherneskey* Case

[42] Curiously, *Cherneskey* also involved a strange debate over the role and function of "honest belief". In that case, a couple of law students had written a provocative letter to the editor of the Saskatoon *Star-Phoenix* which was found to have libelled a city alderman as a racist. The newspaper published the letter but its publisher testified at trial that he did not agree with its contents. The letter writers were not called to testify. In the absence of any evidence from anybody associated with its publication that the letter represented his, her or its "honest belief", it was held in this Court by a 6-3 majority that the defence of fair comment was not available because the newspaper offered no proof that the defamatory opinions were "honestly held" by the actual writers. Dickson J., dissenting, pointed out with justice that

> Newspapers will not be able to provide a forum for dissemination of ideas if they are limited to publishing opinions with which they agree. . . . The integrity of a newspaper rests not on the publication of letters with which it is in agreement, but rather on the publication of letters expressing ideas to which it is violently opposed. [p. 1097]

[43] The Dickson J. test may be thought to marginalize the "honest belief" requirement, as it is possible to imagine most silly or ridiculous opinions finding a home somewhere in the minds of silly or ridiculous people. However, his dissent was really driven by an appreciation that the originator and the publisher of a defamatory comment play different roles. Nobody expects the newspaper publisher personally to have an honest belief in all of the contradictory opinions expressed on a "letters to the editor" page, much of it inspired by disagreement with something the newspaper itself has said in an editorial. Dickson J. was responding to the need to protect free

expression on matters of public interest in a democratic society.

[44] Nevertheless, it remains true that an effective way to establish that somebody could "honestly express that opinion on the proved facts" is to call the defamer (if available) to establish that he or she *did* indeed express an honest belief. As the philosopher Bertrand Russell once observed with suitable gravity, the existence of a thing is absolute proof of its possibility.

[45] Other complexities of the "honest belief" requirement emerge in the present appeal. Mair's editorial about Kari Simpson clearly defamed her. Attributing to Simpson bigotry of a type associated with Hitler and a couple of notoriously racist Governors in the Southern United States at the height of the desegregation crisis would, I think, tend to lower her in the opinion of right-thinking people (some might call it a "smear"), and the appellants were right to concede the point in this Court. That being the case, it was entirely proper to have Mair go into the witness box to affirm his honest belief in what he had said about her. Yet that was not the end of the issue.

[46] The trial judge found a difference between what Mair subjectively intended to say (Simpson is a bigot) and objectively what he is taken to have said (Simpson would condone violence). The gap between the intended meaning and what the court determined to be the effect Mair's words conveyed to reasonable members of the audience has important implications. On the test of *subjective* honest belief applied by the Court of Appeal, Mair would be robbed of his defence, even though on the public record someone could honestly express the view *imputed* to him that Simpson "would condone violence toward gay people", and thus the objective honest belief test would be met.

[47] It may be noted that such circumstances are not uncommon. In much modern media, personalities such as Rafe Mair are as much entertainers as journalists. The media regularly match

up assailants who attack each other on a set topic. The audience understands that the combatants, like lawyers or a devil's advocate, are arguing a brief. What is important in such a debate on matters of public interest is that all sides of an issue are forcefully presented, although the limitation that the opinions must be ones that could be "honestly express[ed] . . . on the proved facts" provides some boundary to the extent to which private reputations can be trashed in public discourse.

[48] Of course the law must accommodate commentators such as the satirist or the cartoonist who seizes on a point of view, which may be quite peripheral to the public debate, and blows it into an outlandish caricature for public edification or merriment. Their function is not so much to advance public debate as it is to exercise a democratic right to poke fun at those who huff and puff in the public arena. This is well understood by the public to be their function. The key point is that the nature of the forum or the mode of expression is such that the audience can reasonably be expected to understand that, on the basis of the facts as stated or sufficiently indicated to them, or so generally notorious as to be understood by them, the comment is made tongue-in-cheek so as to lead them to discount its "sting" accordingly. In *Cherneskey*, Dickson J. emphasized that "the objective limits of fairness [i.e. fair comment] are very wide" (p. 1109). The accuracy of this observation is born out in *Vander Zalm* where the defendant, a political cartoonist, had drawn a cartoon of the plaintiff, a Cabinet Minister then holding the office of Minister of Human Resources in British Columbia, which appeared on the editorial page of the *Victoria Times*. The cartoon, which was uncaptioned, depicted the plaintiff William Vander Zalm with an evil grin on his face, seated at a table, and engaged in plucking the wings from a fly. Other flies, without wings, were shown moving around on the table. On the plaintiff's lapel were inscribed the words "HUMAN RESOURCES". The Court of Appeal found that both the cartoonist and the *Victoria Times* publisher had satisfied the "honest belief" test.

(3) <u>The Test Is Whether Anyone Could Honestly Have Expressed the Defamatory Comment on the Proven Facts</u>

[49] The test represents a balance between free expression on matters of public interest and the appropriate protection of reputation against damage that exceeds what is required to fulfill free expression requirements. The objective test is now widely used in common law jurisdictions as the "honest belief" component of fair comment, including the United Kingdom: *Telnikoff v. Matusevitch*, [1991] 3 W.L.R. 952 (H.L.), quoting with approval Dickson J.'s dissent, at p. 959. In Australia, the High Court recently affirmed a similar approach; see the observation of Gleeson C.J.:

> The protection from actionability which the common law gives to fair and honest comment on matters of public interest is an important aspect of freedom of speech. In this context, "fair" does not mean objectively reasonable. The defence protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied. The word "fair" refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts.
>
> (*Channel Seven Adelaide Pty. Ltd. v. Manock* (2007), 241 A.L.R. 468, [2007] HCA 60, at para. 3 (emphasis added))

In New Zealand, the objective test at common law has now been replaced by a more subjective test in the *Defamation Act 1992* (N.Z.), 1992, No. 105, s. 10. See generally B. Marten, "A Fairly Genuine Comment on Honest Opinion in New Zealand" (2005), 36 *V.U.W.L.R.* 127; *Mitchell v. Sprott*, [2002] 1 N.Z.L.R. 766 (C.A.).

[50] Admittedly, the "objective" test is not a high threshold for the defendants to meet, but nor is it in the public interest to deny the defence to a piece of devil's advocacy that the writer may have doubts about (but is quite capable of honest belief) which contributes to the debate on a matter of public interest.

[51] Of course, even the latitude allowed by the "objective" honest belief test may be exceeded. "Comment must be relevant to the facts to which it is addressed. It cannot be used as a cloak for mere invective"; *Reynolds*, at p. 615.

(4) "Malice" Does Not Provide an Adequate Substitute for the Honest Belief Component of the Fair Comment Defence

[52] As usual, the debate is about onus:

> It is difficult to know whether malice is an element to be considered independently of the issue of fairness, and thus a matter which the plaintiff must prove to defeat the defence of fair comment, or to be treated as part of the issue of fairness, which the defendant must prove in order to establish that element of the defence. . . . [I]f the issue is treated as one which goes to the question of fairness, the defendant has the burden of showing it was fair. This latter position appears to have gained some acceptance in Ontario.
>
> (Brown, at p. 15-101)

At this point in the analysis, the comment will have been found to be defamatory and the defendant is scrambling for a defence. Interveners supporting the media suggested that "honest belief", however formulated, should be pushed into the analysis of malice, where the plaintiff bears the onus of proof. Such an approach would disproportionately favour the media, in my view. Proof of malice on the part of the media is generally very difficult. The media are well-resourced, secretive about their inner workings and highly protective of their confidential sources. At the same time, as many in the U.S. media have come to learn since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), putting the judicial spotlight on journalistic operations in a malice enquiry (that is now the fulcrum of a libel case against a public figure) may not be in *anyone's* interest. I would therefore affirm the present allocation of proof whereby the defendant must prove the elements of the fair comment defence (including the objective honest belief requirement) before the onus switches back to the plaintiff to defeat the defence by establishing, if it can, malice on the part of the defendant(s).

[53] Some commentators have suggested that proof of honest belief negates the possibility of a finding of malice. This is not necessarily true. If a defendant relies on *objective* honest belief

the defence can still be defeated by proof that *subjective* malice was the dominant motive of the particular comment.

G. *Applying the Law of Fair Comment to the Facts of This Case*

[54] In a lengthy and careful judgment, the trial judge dealt with the issues in an appropriate sequence:

(1) What Is the Defamatory Meaning of the Words Complained of, in Their Full Context?

[55] At common law, the judge is to make a legal determination "whether there is a case or an issue to go to the jury" by deciding if the words are "capable of being a statement of a fact or facts". It is then "for the jury to decide as to what is fact and what is comment" (Court of Appeal reasons, at para. 42, citing *Jones v. Skelton*, [1963] 1 W.L.R. 1362 (P.C.), at pp. 1379-80). As pointed out by the intervener British Columbia Civil Liberties Association, "the judge's role in that test is a response to concerns about freedom of expression" (Factum, at para. 34).

[56] The "full context" is important. While argument in this Court largely focussed on the innuendo that Simpson "would condone violence toward gay people", the broader analysis of the trial judge left no doubt about her view of the "[u]nwholesome virulence" (para. 78) of the editorial taken as a whole. The appellants argue that in assessing meaning, the Court is to consider what reasonable and right-thinking listeners would understand. The Court is to avoid putting the worst possible meaning on the words: *Color Your World Corp. v. Canadian Broadcasting Corp.* (1998), 38 O.R. (3d) 97 (C.A.), at pp. 106-7, and *Scott v. Fulton* (2000), 73 B.C.L.R. (3d) 392, 2000 BCCA 124, at paras. 13-15. However, both courts below found that Mair's editorial about Simpson was defamatory. This is a mixed question of law and fact. There is no reason to interfere with that

conclusion. It is plainly correct.

(2) Do the Words Complained of Relate to a Matter of Public Interest?

[57] The public debate about the inclusion in schools of educational material on homosexuality clearly engages the public interest. As the Ontario Court of Appeal recognized over a century ago in words that apply equally to the case on appeal, "[w]hoever seeks notoriety, or invites public attention, is said to challenge public criticism; and [s]he cannot resort to the law courts, if that criticism be less favorable than [s]he anticipated" (*Macdonell v. Robinson* (1885), 12 O.A.R. 270, at p. 272).

(3) Are the Words and the Defamatory Meaning More Likely to Be Understood, in Context, as Comment Rather Than Fact?

[58] The trial judge, after reviewing the editorial as a whole, concluded:

> 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. [Emphasis added; para. 44.]

For reasons stated earlier, I agree with this conclusion.

(4) Are the Facts Relating to the Comment Substantially True or Privileged?

[59] The law requires the comment be based on a sufficient substratum of facts to anchor the defamatory comment: *Vander Zalm*, Court of Appeal reasons, at p. 536; and *Ross*, at paras. 73, 78 and 83. This is another mechanism to prevent tenuous facts serving as a springboard for defamatory

comment, which, in my view, would be the danger of the "relevance" test proposed by the CCLA. Simpson does not dispute the contents or tone of her speeches in the court record. In my view, as in the view of the trial judge, the factual substratum exists.

(5) Did the Defendants Mair and WIC Radio Ltd. Satisfy the Honest Belief Requirement?

[60] Mair testified as to his subjective honest belief in what he intended to say, but acknowledged that he did *not* honestly believe that Simpson would condone violence. Notwithstanding the absence of a subjective honest belief that Simpson would condone violence, Mair and WIC Radio, like the newspaper publisher in *Cherneskey*, were entitled to rely on the objective test, i.e. could any person honestly have expressed the innuendo that Simpson would condone violence toward gay people on the proven facts? As mentioned earlier, Simpson's public speeches were full of references to "war . . . [where] the spoils turn out to be our children", "militant homosexuals", "[w]ar, you shoot, they shoot" and so on. Simpson's use of violent images could support an honest belief on the part of at least some of her listeners that she "would condone violence toward gay people", even though Mair denied that he intended to impute any such meaning.

[61] The respondent, Simpson, emphasizes the distinction taken by the B.C. Court of Appeal between what Mair thought he was saying (that Simpson was a non-violent person whose loose words inadvertently opened the door to less peaceable individuals to resort to violence) and the specific defamatory imputation that was found to have arisen from the words Mair used (i.e. that Simpson "would condone violence toward gay people"). It makes little sense to deny the defence of fair comment to a speaker whose opinion has been misunderstood, even if carelessness in the use of words is the source of the misunderstanding. The Court of Appeal framed the issue as follows: "Is it the law that to succeed in the defence of fair comment, the defendant must honestly believe

in the imputation, . . . or need he only have an honest belief in what he himself subjectively intended by the words which he used?" (para. 37). In its view, the former requirement applied. I do not think the "either/or" question of the Court of Appeal exhausts the possibilities. On the contrary, I think the proper question is whether the defamatory imputation that Kari Simpson "would condone violence toward gay people" is an opinion that could be held by an honest person in the circumstances.

[62] The trial judge concluded that Mair honestly believed what he thought he had said:

> 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. [Emphasis added; para. 84.]

The trial judge did not explicitly apply the "objective honest belief" test to the imputation that Simpson "would condone violence". In my view, however, having regard to the trial judge's reasons as a whole, and considering both the content of some of Simpson's speeches already mentioned, and the broad latitude allowed by the defence of fair comment, the defamatory imputation that while Simpson would not engage in violence herself she "would condone violence" by others, is an opinion that could honestly have been expressed on the proved facts by a person "prejudiced . . . exaggerated or obstinate [in] his views". That is all that the law requires.

(6) Has the Respondent Proven Sufficient Malice on the Appellants' Part to Defeat the Defence?

[63] The defence is defeated if the commentary was actuated by malice in the sense of improper motive, proof of which lay on the plaintiff. Simpson does not appeal against the trial judge's conclusion that Mair's fair comment defence was not vitiated by malice.

IV. Conclusion

[64] Applying the elements of the fair comment defence set out above, I conclude that the trial judge was correct to allow the defence.

V. Disposition

[65] I would allow the appeal, set aside the judgment of the Court of Appeal and restore the trial judgment dismissing the action, with costs throughout.

The following are the reasons delivered by

[66] LEBEL J. — Although I agree with Binnie J. that the appellants are not liable in defamation, I arrive at this conclusion in a different way. In particular, I am not convinced that Mr. Mair's comments were *prima facie* defamatory. Further, I disagree that the fair comment defence should include an element of honest belief. Rather, to establish fair comment, the defendant should simply have to show that the impugned words constituted comment, that they had a basis in fact and that they concerned a matter of public interest. I accept the facts as they are set out by the majority, and I agree that this case is one of comment rather than of fact. I will therefore proceed directly to an analysis of the defamatory nature of the comment and the requirement of honest belief. I will conclude with a brief review of the existing test for malice, which I endorse and apply.

(1) Whether Mair's Comments Were Defamatory

[67] The issue of whether Mair's comments were in fact *prima facie* defamatory was not

raised on appeal to this Court, and I would therefore not interfere with the trial judge's finding in this regard. However, I disagree with Binnie J.'s observations that the trial judge's conclusion on this point was "plainly correct" (para. 56) and that the editorial "clearly defamed" Ms. Simpson (para. 45). Some discussion on this issue is warranted. Although defamation is not easily defined, one generally accepted test is the one from *Salmond on the Law of Torts* (17th ed. 1977), at pp. 139-40, which is based on the test proposed by Lord Atkin in *Sim v. Stretch* (1936), 52 T.L.R. 669 (H.L.), at p. 671, and was approved by the B.C. Court of Appeal in *Vander Zalm v. Times Publishers* (1980), 109 D.L.R. (3d) 531, at p. 535:

> A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him in the estimation of right-thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem.

[68] This test is often construed as setting a low threshold for establishing *prima facie* defamation. *Gatley on Libel and Slander* (10th ed. 2004) ("*Gatley*"), notes that "it may well be the case that the common law takes a rather generous line on what lowers a person in the estimation of others" (p. 18, footnote 32). Dickson J. made a similar point in *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, in referring to the "low level of the threshold which a statement must pass in order to be defamatory" (p. 1095).

[69] The case law generally bears these opinions out. However, courts should not be too quick to find defamatory meaning — particularly where expressions of opinion are concerned. The test is not whether the words impute negative qualities to the plaintiff, but whether, in the factual circumstances of the case, the public would think less of the plaintiff as a result of the comment. Relevant factors to be considered in assessing whether a statement is defamatory include: whether the impugned speech is a statement of opinion rather than of fact; how much is publicly known about the plaintiff; the nature of the audience; and the context of the comment. I will demonstrate,

based on the first two of these factors in particular, that Mair's comments would likely not have led "right-thinking" members of the public to think less of Simpson.

[70] It should go without saying that people evaluate statements of opinion differently than statements of fact. In discussing what constitutes a statement of fact as opposed to comment, Lord Herschell noted that

> the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.
>
> (*Davis & Sons v. Shepstone* (1886), 11 App. Cas. 187 (P.C.), at p. 190)

[71] Although distinguishing facts from comment may sometimes be difficult, a comment is by its subjective nature generally less capable of damaging someone's reputation than an objective statement of fact, because the public is much more likely to be influenced in its belief by a statement of fact than by a comment. I therefore agree with the following observation by R. E. Brown:

> If the expression of opinion by the defendant on facts which are true are reasonably understood by those to whom they are published as opinions, and nothing else, they say nothing derogatory about the plaintiff which does not already inhere in the facts that have been recited. It is those facts that are damning, either to the plaintiff because the opinion expressed is so consistent with the true facts which are recited and approximate the subjective opinion of those to whom they are published, or to the defendant because they are so inconsistent with the recited facts and with the subjective opinion of those to whom they are published. In the former case, the reputation of the plaintiff is not adversely affected by the publication of the opinion; in the latter case, it is the defendant who is defamed by his or her own foolish words rather than the plaintiff.
>
> (*Defamation Law: A Primer* (2003), at p. 185)

[72] There is no doubt that a comment may be defamatory. It must simply be borne in mind

that just because someone expresses an opinion does not mean that it will be believed and therefore affect its subject's reputation.

[73] This is all the more true in an age when the public is exposed to an astounding quantity and variety of commentaries on issues of public interest, ranging from political debate in the House of Commons, to newspaper editorials, to comedians' satire, to a high school student's blog. It would quite simply be wrong to assume that the public always takes statements of opinion at face value. Rather, members of the public must be presumed to evaluate comments in accordance with their own knowledge and opinions about the speaker and the subject of the comments.

[74] Members of the public will generally have a more solid basis on which to evaluate a comment about a public figure than one about someone who is unknown. Thus, although public figures are certainly more open to criticism than those who avoid the public eye, this does not mean that their reputations are necessarily more vulnerable. In fact, public figures may have greater opportunity to influence their own reputations for the better.

[75] People who voluntarily take part in debates on matters of public interest must expect a reaction from the public. Indeed, public response will often be one of the goals of self-expression. In the context of such debates (and at the risk of mixing metaphors), public figures are expected to have a thick skin and not to be too quick to cry foul when the discussion becomes heated. This is not to say that harm to one's reputation is the necessary price of being a public figure. Rather, it means that what may harm a private individual's reputation may not damage that of a figure about whom more is known and who may have had ample opportunity to express his or her own contrary views.

[76] Turning to the facts of this case, I agree that the impugned statement constituted

comment rather than fact. As a result, Mair's audience would necessarily treat it differently than a statement of fact. In addition, both Mair and Simpson were public figures involved in an ongoing public debate on the issue of the introduction of materials dealing with gay issues in the classroom. That debate would have informed public opinion. Even those not familiar with the issue would have understood the comment in the context of this debate because Mair made reference to it in the impugned editorial. Further, Mair's "sizeable following" (trial reasons (2004), 31 B.C.L.R. (4th) 285, 2004 BCSC 754, at para. 5) would have understood his comments in light of his well-known style, which involves strong opinions sometimes conveyed with colourful and provocative language.

[77] Thus, although associating the respondent's bigotry with Hitler would clearly be defamatory if taken at face value, the test for defamation is a contextual one and relates to what people would think in the circumstances of publication of the comments (*Gatley*, at pp. 108-10). In the context of this particular debate, I do not believe that Mair's audience would have taken his comments at face value. To paraphrase Professor Brown, Simpson's reputation was not adversely affected, either because Mair's opinions were consistent with the facts and approximated the subjective opinions of his listeners, or because Mair's opinion was not consistent with the facts and the subjective opinions of his listeners and only reflected badly on Mair himself.

[78] Triers of fact should be mindful of ensuring that the plaintiff's reputation is actually threatened by the impugned statements before turning to the available defences. I do not mean to imply that damage to reputation must be proved, since actual harm to reputation is not required to establish defamation. However, before a *prima facie* case can be made out, there must be a realistic threat that the statement, in its full context, would reduce a reasonable person's opinion of the plaintiff. In my view, Mair's comments posed no realistic threat to Kari Simpson's reputation, and I would therefore not have found them to be *prima facie* defamatory.

[79] If, however, the traditional test were so narrow as to catch the comments made in Mair's editorial, then in my opinion, it would be unduly restrictive and would need to be expanded to better reflect the values of modern Canadian society. The law of defamation — whose purpose is to protect reputation — exists as a limitation on freedom of expression, which is protected by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. Reputation is an important element of human dignity and must be protected. However, even if a fair comment defence is available, it cannot be consistent with the *Charter* value of freedom of expression to treat spirited statements of opinion in a debate on matters of public interest as being *prima facie* defamatory.

[80] As I mentioned above, since the issue was not raised before us, I would not interfere with the lower courts' finding that the editorial was defamatory. Further, since I agree that the defence of fair comment applies, it is not necessary to the proper disposition of this appeal to resolve this issue. However, I consider it important to state my discomfort with the majority's assessment that the editorial "clearly defamed" Simpson (para. 45).

(2) Honest Belief as an Element of Fair Comment

[81] The majority would retain a requirement of honest belief in the fair comment defence primarily on the basis: (a) that to eliminate it would constitute more than an incremental change to the law (para. 36); and (b) that it provides additional and appropriate protection to reputation beyond that afforded by the malice and "based on fact" inquiries (see para. 49). I disagree with both these propositions.

[82] The first proposition is based on the fact that honest belief is the "cardinal test" of fair comment in Canada (para. 36). This may be so, but a closer examination of fair comment reveals

that it is subjective rather than objective honest belief that is considered the cardinal test of fair comment. Further, in Commonwealth countries such as the U.K., Australia and New Zealand, the requirement of a subjective honest belief exists only as an aspect of the malice inquiry in respect of which the burden of proof is on the plaintiff, not as an actual element of the defence. As for objective honest belief, although Commonwealth countries such as the U.K. and Australia retain an objective element in the defence, they have recognized that in the context of fair comment, there is no longer any justification for judging the reasonableness of the content of opinions. An objective honest belief requirement conflicts with the principle that even unreasonable comments should be protected in a democratic society. Thus, the common law in the U.K., Australia and Canada has gradually moved away from assessing comment in terms of reasonableness.

[83] I also disagree with the second proposition, which assumes that an honest belief requirement provides appropriate protection to reputation beyond that provided by other elements of the fair comment defence (including malice, which is, strictly speaking, not an element of the defence). I will begin by reviewing the U.K. decisions that established subjective honest belief as the "cardinal test" of fair comment. I will then discuss the history and the current role of the objective honest belief requirement. I will conclude by demonstrating that, in any event, an objective honest belief requirement provides little or no additional protection to reputation.

[83a] In *Slim v. Daily Telegraph Ltd.*, [1968] 1 All E.R. 497 (C.A.), Lord Denning stated:

> The important thing is to determine whether or not the writer was actuated by malice. If he was an honest man expressing his genuine opinion on a subject of public interest, . . . he has a good defence of fair comment. His honesty is the cardinal test. [p. 503]

[84] Although it is not entirely clear from *Slim* who has the burden of proving or disproving subjective honest belief, it is settled law in the U.K. that this burden falls to the plaintiff once the elements of fair comment are proved:

> [A] comment which falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view he expressed. Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not *of itself* defeat the defence. However, proof of such motivation may be evidence, sometimes compelling evidence, from which lack of genuine belief in the view expressed may be inferred.
>
> (*Cheng v. Tse Wai Chun* (2000), 3 H.K.C.F.A.R. 339, at pp. 360-61 (emphasis in original), *per* Lord Nicholls, cited in *Gatley*, at p. 310)

[85] Thus, the "cardinal test" of fair comment — at least in the U.K. — is subjective rather than objective honest belief, and it is the plaintiff who bears the burden of proof in the context of the malice inquiry. That being said, my colleague correctly notes that the requirement of an objective honest belief persists in the defence of fair comment in some common law countries, and he concludes that to excise it from Canadian law would constitute more than an incremental change. I disagree. Although this requirement does continue to exist in some common law countries, its influence and utility have been waning such that, in my opinion, it no longer offers anything of value in the exercise of balancing the right to comment fairly on matters of public opinion against the right to reputation. Doing away with it may constitute a significant change to the *form* of the test for fair comment, but the *effect* of doing so would not be to modify the scope of the defence in any significant way. The advantage of eliminating the objective honest belief requirement, on the other hand, is that this would constitute formal recognition of what some common law courts have been saying for decades: that it is no longer justifiable, for purposes of the fair comment defence, to judge a person's opinions on an objective basis other than to require that they have some basis in fact.

[86] In the U.K., fair comment is a "two stage" issue. At the first stage, the defendant establishes that the words are objectively capable of constituting comment. At the second stage, the plaintiff may attempt to prove malice, which will defeat the protection of the defence (*Gatley*, at p.

311). The objective stage incorporates both objective honest belief and relevance to the underlying facts. At one time, fair comment was limited to what was objectively "fair, reasonable and temperate" (*Soane v. Knight* (1827), M. & M. 74, 173 E.R. 1086, at p. 1086, cited in P. Mitchell, *The Making of the Modern Law of Defamation* (2005), at p. 174). Eventually, however, this view was held to be overly restrictive of speech on matters of public interest. In *Merivale v. Carson* (1887), 20 Q.B.D. 275 (C.A.), Lord Esher held that the correct test was whether any "fair man, however prejudiced" could hold the impugned opinion (p. 280). Later, even the word "fair", which gave the defence of fair comment its name, was replaced by the word "honest" to eliminate any residual requirement of reasonableness (see Mitchell, at p. 181. See also Dickson J. dissenting in *Cherneskey*, at p. 1104.) The objective reasonableness of the opinion was held to be of no relevance in limiting fair comment. As early as 1863, the English courts held that the defendant's opinion need not be reasonable. Rather, in addition to subjective honest belief, a jury must simply find that the defendant's "belief was not without foundation" (*Campbell v. Spottiswoode* (1863), 3 B. & S. 769, 122 E.R. 288, at p. 290).

> [I]f the language complained of is such as can be fairly called criticism, the mere circumstance that it is violent, exaggerated, or even in a sense unjust, will not render it unfair. It is at the most evidence that it was not an honest expression of real opinion, but was inspired by malice.
>
> (*Gatley*, at p. 306, citing *McQuire v. Western Morning News Co.*, [1903] 2 K.B. 100 (C.A.), at p. 110.)

[87] This history is reflected in the words of Lord Nicholls in *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609, at p. 615:

> Traditionally one of the ingredients of this defence is that the comment must be fair, fairness being judged by the objective standard of whether any fair-minded person could honestly express the opinion in question. Judges have emphasised the latitude to be applied in interpreting this standard. So much so, that the time has come to recognise that in this context the epithet 'fair' is now meaningless and misleading. Comment must be relevant to the facts to which it is addressed. It cannot be used as a cloak for mere

> invective. But the basis of our public life is that the crank, the enthusiast, may say what he honestly thinks as much as the reasonable person who sits on a jury. The true test is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the person expressing it: see Diplock J. in *Silkin v. Beaverbrook Newspapers Ltd.* [1958] 2 All E.R. 516 at 518, [1958] 1 W.L.R. 743 at 747. [Emphasis added.]

[88] Some Canadian courts have cited this passage from *Reynolds* with approval. For example, in *Ross v. New Brunswick Teachers' Assn.* (2001), 201 D.L.R. (4th) 75, 2001 NBCA 62, the New Brunswick Court of Appeal quoted it and then went on to conclude:

> Therefore, for a comment to be protected by a plea of fair comment, the comment must be relevant to the facts to which it is addressed, but it need not be reasonable nor one with which the trier of fact agrees. It need only be proven to be "fair" or "relevant" in the sense that the comment relates to the proven underlying facts on which the commentator relies and represents an honest expression of the real view of the person making the comment. [Emphasis added; para. 78.]

[89] These passages confirm that little is left of the objective "fairness" requirement other than that a comment must be "relevant to the facts to which it is addressed". However, despite the waning role of the objective honest belief requirement, it seems that British law, like Canadian and Australian law, still requires a trier of fact to ask: "Would any [honest] man, however prejudiced he might be, or however exaggerated or obstinate his views, have written this criticism?" (*Gatley*, at p. 307). Alternately, in the words of Dickson J. in *Cherneskey*, at p. 1100, as endorsed by the majority in this case, "could any man honestly express that opinion on the proved facts?" What, then, does it mean that a person could honestly express that opinion on the proved facts?

[90] If the speaker's prejudices or inclination toward exaggeration and obstinacy are irrelevant, it would similarly be irrelevant to consider the objective reasonableness of the comment aside from the requirement that it have a basis in fact. This is certainly consistent with the shift away from the idea that fairness amounts to reasonableness. For example, in *Cherneskey*, Dickson J. substituted the word "honest" for "fair" in the objective test "lest some suggestion of

reasonableness instead of honesty should be read in" (p. 1104). In this context, then, "honest belief" must refer either to whether someone could express the comment with an honest motive or to whether someone could believe the comment if he or she were being honest with him or herself. In the former case, since a dishonest motive for publication can defeat a fair comment defence in the malice inquiry, it would seem redundant to inquire into the defendant's motives at the honest belief stage of the defence. In the latter case, the "honest belief" label would also be redundant, since what one does not honestly believe, one does not believe at all. This relates to subjective honest belief, albeit to what someone could subjectively believe rather than to what the defendant subjectively believed. I take this to be the sense in which the majority, and the courts generally, use the expression "honest belief".

[91] The requirement that someone be capable of believing the comment in light of the facts does not do away with the problem of assessing the objective reasonableness of the comment. It is not clear how — other than by requiring a simple basis in fact — the limits to what someone could subjectively believe can be determined without resorting to objective reasonableness. Admittedly, the threshold for establishing a factual basis for a comment remains low. However, the threshold for establishing that someone could believe the comment on the basis of the relevant facts is also low. The tests involve similar, if not identical, questions. Where a comment is objectively incapable of belief, this will presumably be because it does not have a basis in fact. If there is any difference between what is capable of belief and what is based in fact, it must relate to what is reasonable for a person to believe, given certain facts. As I mentioned above, common law courts, including those in Canada, have long rejected an approach that involves judging the objective reasonableness of a comment.

[92] The honest belief inquiry adopted by the majority, which is clearly not intended to assess the objective reasonableness of the comment, must therefore be an inquiry into whether the

comment has a basis in fact. Binnie J. acknowledges as much by noting that a jury could be instructed to determine whether comment has a basis in fact by asking whether a person could honestly express the opinion on the proved facts (para. 41). I agree that this is a useful jury instruction regarding the "basis in fact" element. But what, then, is the additional benefit of a distinct element of honest belief? The defence of fair comment would include two elements — basis in fact and honest belief — that address exactly the same issue.

[93] Since the elements address the same issue, honest belief provides no additional protection for reputation. For example, an honest belief test would not protect against a bad faith attack made without honest belief, such as Senator McCarthy's smear campaign of the 1950s. Such attacks would pass the majority's honest belief test so long as they constituted comment that someone could believe. In the context of McCarthyism, someone could very well have believed defamatory allegations relating to communism. If no one could believe the allegations, it must be because they have no basis in fact, and the defamer could not rely on the fair comment defence. Further, even without an honest belief element, a plaintiff who is the victim of a bad faith attack may prevail by demonstrating malice.

[94] Thus, the only justifiable remnant of the former requirement that a fair-minded person be capable of holding the opinion is that the comment must be based on known facts. This is implied in the above-quoted observations of Lord Nicholls from *Reynolds*. In Canada, fair comment includes a based on true facts element that is independent of concerns about whether an honest person could hold the opinion. Thus, I see no reason to retain an objective honest belief element. Eliminating that element is an incremental change. This Court has the power, and indeed the responsibility, to make such changes when the common law falls out of step with its underlying principles and with modern values, and when a test has proven to be unworkable or to serve no useful purpose.

[95] Even though, in principle, I do not consider it appropriate to exclude from fair comment that which no honest person could believe, it is nevertheless true that in practice, such speech will rarely, if ever, be protected as fair comment even without an honest belief requirement. This is because in defamation law, reputation is already protected in three ways from comments that are not "fair" in the sense of being objectively capable of belief on the relevant facts.

[96] First, to the extent that, as discussed above, honest belief and basis in fact amount to the same inquiry, whatever has no basis in fact is not capable of belief, and *vice versa*. However, even if there were some difference between the two concepts, two other aspects of fair comment protect reputation against objectively unbelievable comment.

[97] For a comment to be *prima facie* defamatory, there must be a possibility that its audience will believe it; otherwise, it cannot harm the plaintiff's reputation. The audience is presumed to consist of "ordinary, reasonable, fair-minded" people (*Charleston v. News Group Newspapers Ltd.*, [1995] 2 W.L.R. 450 (H.L.), at p. 454). The test is not whether any person, no matter how unreasonable or unfair, could think less of the plaintiff because of the comment. Therefore, the more disconnected the comment is from its underlying facts, the less likely it is to be defamatory. It follows that comments that are not capable of objective honest belief, given the relevant facts, will rarely be defamatory. For example, in a modern developed society, an imputation that someone practises witchcraft would not be defamatory, because it would not be believed and therefore would not harm the plaintiff's reputation (*Loukas v. Young*, [1968] 3 N.S.W.R. 549 (S.C.)). Thus, the test for *prima facie* defamation, if correctly applied, will exclude from protection many situations involving comments that are not capable of objective honest belief.

[98] Further, it is difficult to imagine any situation in which a comment with a basis in true

facts that would be incapable of belief could be made with a motive that is not predominantly malicious. By definition, the publisher of the comment would not believe the opinions he or she expressed. Why would someone publish a comment that he or she does not believe and that no one else could honestly believe, if not out of malice? The dominant motive could not be for the sake of argument, since no one could believe the comment. Nor could it be a desire to report on issues of public interest, because here again, no one could believe the comment.

[99] I am therefore of the opinion that the only additional protection for reputation afforded by a requirement of objective honest belief is an inappropriate one, in that it places a reasonableness restriction on the opinions a person may legitimately express. The common law courts in this country and in the U.K. have long been uncomfortable with the idea of limiting fair comment to what is reasonable, even in the broadest sense. The time has come to formally acknowledge that such a reasonableness requirement has outlived its purpose and that, in any event, in its present broad form, it provides little or no protection for reputation. In my opinion, therefore, the defence of fair comment should simply require the defendant to prove (a) that the statement constituted comment, (b) that it had a basis in true facts and (c) that it concerned a matter of public interest. On the facts of this case, there is no dispute that each of these requirements is met.

(3) Malice

[100] If the defendant is successful in establishing the elements of the fair comment defence, the inquiry may turn to malice, which the plaintiff must prove if he or she alleges it. I see no reason to alter the existing burden of proof. To require the defendant to prove a lack of malice would amount to presuming malice. A society that seeks to promote healthy debate should require evidence of a malicious motive before restricting the expression of opinions based on true facts that concern matters of public interest. It would protect spirited — but not mean-spirited — speech.

Proof of malice may be intrinsic or extrinsic: that is, it may be drawn from the language of the assertion itself or from the circumstances surrounding the publication of the comment. It may involve inferences and evidentiary presumptions.

[101] I also see no reason to alter the nature of the malice inquiry. In *Cherneskey*, Dickson J. described malice as follows:

> Malice is not limited to spite or ill will, although these are its most obvious instances. Malice includes any indirect motive or ulterior purpose, and will be established if the plaintiff can prove that the defendant was not acting honestly when he published the comment. This will depend on all the circumstances of the case. Where the defendant is the writer or commentator himself, proof that the comment is not the honest expression of his real opinion would be evidence of malice. If the defendant is not the writer or commentator himself, but a subsequent publisher, obviously this is an inappropriate test of malice. Other criteria will be relevant to determine whether he published the comment from spite or ill will, or from any other indirect and dishonest motive. [p. 1099]

[102] I adopt this definition, although I wish to emphasize that while proof that the comment is not the honest expression of the publisher's real opinion may be evidence of malice, it is not determinative. Indeed, there may be non-malicious and valid reasons for publishing views one does not personally hold.

[103] I would not adopt the British malice test (reproduced here for convenience), which is based on honesty of belief rather than the motive for publication.

> [A] comment which falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view he expressed. Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not *of itself* defeat the defence. However, proof of such motivation may be evidence, sometimes compelling evidence, from which lack of genuine belief in the view expressed may be inferred.
>
> (*Cheng v. Tse Wai Chun*, at pp. 360-61 (emphasis in original); see also *Gatley*, at p.

310.)

[104] In the U.K., the motive for publication appears to be relevant only with respect to secondary publishers: malice will not be found where someone publishes the opinions of others without malicious intent (*Gatley*, at pp. 310-11). However, there are good reasons for maintaining a malice test that withholds protection from a comment expressed with a predominantly malicious motive. As Greer L.J. noted in *Watt v. Longsdon*, [1930] 1 K.B. 130 (C.A.), at pp. 154-55, quoted with approval by the B.C. Court of Appeal in *Christie v. Westcom Radio Group Ltd.* (1990), 75 D.L.R. (4th) 546, at p. 554, leave to appeal refused, [1991] 1 S.C.R. vii:

> A man may believe in the truth of a defamatory statement, and yet when he publishes it be reckless whether his belief be well founded or not. His motive for publishing a libel on a privileged occasion may be an improper one, even though he believes the statement to be true. . . . I agree with the statement of the law contained in the late Mr. Blake Odgers' monumental book on libel and slander, which will be found at p. 354 of the 5th edition. . . .: "An angry man may often be led away into exaggerated or unwarrantable expressions; or he may forget where and in whose presence he is speaking, or how and to whom his writing may be published. Clearly this is often but faint evidence of malice; the jury will generally pardon a slight excess of righteous zeal. In some cases, however . . . such excess has secured the plaintiff the verdict . . .".

[105] Similarly, an Australian court has noted that "personal animosity may perfectly well consort with sincerity to produce a comment which is harmful and unfair" (*Renouf v. Federal Capital Press of Australia Pty. Ltd.* (1977), 17 A.C.T.R. 35 (S.C.), at p. 54). Australia maintains essentially the same test of malice as exists in Canada: whether malice was the dominant motive for publication (see M. Gillooly, *The Law of Defamation in Australia and New Zealand* (1998), at pp. 132-33).

[106] The requirement that malice be the *dominant* motive for expressing an opinion in order to defeat fair comment helps maintain a proper balance between protecting freedom of expression and reputation. Arguments between ideologically-opposed participants in a public debate often

breed bitterness, but such debate remains valuable and worthy of protection in a democratic society. However, while it is not appropriate to judge the objective fairness of an opinion, the protection of reputation may justify judging the motive for expressing it. After all, the purpose of the fair comment defence is to protect and encourage free debate on issues of public importance. Opinions published with the primary intention of injuring another person (for example), rather than furthering public debate, are sufficiently far removed from the type of speech the defence was intended to protect that they may justifiably be excluded from the scope of its protection.

[107] The trial judge concluded that malice was not the dominant motivation for publication and, for the above reasons, I would allow the appeal and dismiss the action with costs throughout.

The following are the reasons delivered by

[108] ROTHSTEIN J. — I have had the benefit of reading the reasons of my colleagues Binnie J. and LeBel J. I agree with Binnie J. that the statements in question were defamatory but that the defence of fair comment applies.

[109] However, I disagree that to satisfy the fair comment defence, there is a requirement to prove objective honest belief. On this issue, I am in agreement with the reasons and analysis of LeBel J. The defence of fair comment should only require the defendant to prove (a) that the statement constituted comment, (b) that it had a basis in true facts and (c) that it concerned a matter of public interest; and these requirements were met in this case. Although the issue of malice is not before the Court on this appeal, I also agree with LeBel J.'s discussion in respect of the element of malice.

[110] If objective honest belief means the honest belief of anyone, no matter how "prejudiced

. . . exaggerated or obstinate" in his or her views, I cannot think of an example in which the test of objective honest belief could not be met once it is demonstrated that the comment has a basis in true facts. In my respectful view, the test of objective honest belief adds only an unnecessary complexity to the analysis of fair comment.

[111] I agree with Binnie J. that the trial judge's conclusion that the fair comment defence was not vitiated by malice was not appealed.

[112] Like both Binnie and LeBel JJ., I would allow the appeal with costs throughout and dismiss the action.

APPENDIX

Transcript of CKNW editorial broadcast of October 25, 1999

RAFE MAIR: And a very pleasant Monday, the 25th of October. Around the province of British Columbia on the WIC network I'm Rafe Mair broadcasting from the Pacific Centre in downtown Vancouver.

I really hate to give Kari Simpson any more publicity, something she soaks up like a blotter, but she's become such a menace I really think something must be said. When I first knew Kari some 8 or 9 years ago she was involved in helping families whose children had been wrongfully taken by the authorities. She and I did a number of programmes on this, and this programme was nominated for a Michener Award as a consequence. Even more importantly the Ombudsman looked into the matter and changes were made. I felt very good about what Kari had done — she'd done excellent work — and what I'd been able to do by way of giving it some publicity. We worked together on other matters until it gradually became apparent to me that Kari was starting to become a little too uncritical of the causes she was taking. We both went overboard in the case of a lawyer's complaints against authorities. Although there was something in what he said, he went too far and he had to apologize. Then Kari got involved in a case where a Langley family didn't want their daughter to be forced to take essential medical treatment and the child died. There were other cases, one involving Munchausen's Syndrome, where Kari not only defied authority — nothing wrong with that — but she began to quarrel with experts, not based on another expert's opinion but on her own, offering as her qualifications that she was a mom. I began to wonder what had happened. Instead of well researched opinions Kari was now proceeding from a semi-religious base, and it was not long before the gay community was in her sights. The next thing I knew an editorial of mine stating my belief in the civil liberties of all including gays brought a letter from her claiming that I was in favour of grown men molesting young boys. To say the least I was taken aback, and after demanding an apology and not getting one told my producers that I no longer wish to have anything

to do with her. Now, part of that I admit was personal. Who wouldn't be mortified of being accused of supporting paedophilia but most of it was that I could no longer trust her judgment, and I certainly couldn't judge what she presented as fact.

Then Kari got involved in the 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. By this time in my view Kari had become unbalanced on the subject. I could only conclude and it's still my opinion that once her organization got a little bigger and got some funds it went to Kari's head, but that's just what I think. Whatever, she's become more than just a little hung up on gays in the school system and more than just a little disingenuous when she claims that she doesn't really have anything against homosexuals. This latest business in Surrey is a disgrace. That parents would start taking children out of school because the teacher is a gay is beyond my comprehension. 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 3 and 4, 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 40's, 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 happily 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's one of the three or four teachers I've had who had a profoundly positive effect on my learning. I tell you this because I don't think that there are very many of you listening who didn't have a gay teacher somewhere, whether you knew it or not.

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 [Orval Faubus] or Ross Barnett. They were simply declaring their hostility to a minority. Let the mob do as they wished.

As I listened to Kari Simpson I wondered about her, but I also wondered what was the matter with those parents, and 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 Ku Klux Klan. I'm not talking the violent aspects of those groups but the philosophical parallels to other examples of intolerance.

What's next on the agenda in Surrey? Will there be a 1999 version of the Scopes trial in Tennessee in the 20's whereafter the legal fight of the century between William Jennings Bryan and Clarence Darrow, a teacher named John Scopes was found guilty of teaching evolution? 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. I in no way compare her to the violent people in the past that I spoke of and alluded to. 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 a public decent enough to know a mean-spirited, power mad, rabble rousing and, yes, dangerous bigot when they see one.

When we come back we'll talk to Mike Smyth right after this.

(A.R., at pp. 389-90)

Appeal allowed with costs.

Solicitors for the appellants: Owen Bird Law Corporation, Vancouver.

Solicitors for the respondent: Lianne W. Potter Law Corporation, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: Osgoode Hall Law School of York University, North York.

Solicitors for the intervener the British Columbia Civil Liberties Association: Holmes & King, Vancouver.

Solicitor for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, the British Columbia Association of Broadcasters, RTNDA Canada/The Association of Electronic Journalists, the Canadian Publishers' Council, Magazines Canada, the Canadian Association of Journalists and Canadian Journalists for Free Expression (Collectively "Media Coalition"): Brian MacLeod Rogers, Toronto.