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FAIR COMMENT DEFENCE SUCCESSFULLY USED TO EXCUSE RADIO HOST FROM DEFAMATION CLAIM

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PRECIS: The Supreme Court of Canada has accepted the use of the fair comment defence in relation to a radio editorial that compared a social activist to certain notorious bigots. In reaching its decision the court analyzed the freedom of expression enjoyed by the media, but noted that this must be weighed against the reputations of individuals.

In *WIC Radio Ltd v Simpson* (2008 SCC 40; 2008-06-27) the Supreme Court of Canada restored a trial judgment, previously reversed by the British Columbia Court of Appeal, in which the fair comment defence was deemed applicable. The defence balances two values: the protection of a reputation and the freedom of expression.

Rafe Mair, a controversial radio host working for CKNW, owned and operated by WIC Radio Ltd, broadcasted an editorial concerning social activist Kari Simpson. In the broadcast Mair compared Simpson's behaviour to Hitler, the Ku Klux Klan and other notorious bigots.

Simpson submitted that parts of the broadcast were defamatory since they conveyed certain insinuations, including that:

- she encouraged parents to take their children out of schools in the case their teacher was gay; and
- she preached hatred against homosexuals in a way that could influence people to take matters into their own hands.

Mair alleged that he made no such attributions of violence.

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The Supreme Court noted that the freedom of expression enjoyed by the media was traditionally considered no greater than that of other members of the community. However, it observed that Section 2(b) of the Canadian Charter of Rights and Freedoms specifically refers to “freedom of the press and other media of communication”, presumably to highlight their significance in public life. Therefore, the court stated that the reputation of each individual is a value to be weighed against freedom of expression (including freedom of the media) in such a way as to attempt reconciliation.

The following elements constituted the fair comment defence:

- The comment must be on a matter of public interest;
- The comment must be based on fact;
- The comment, although it can include inferences of fact, must be recognizable as comment;
- The comment must satisfy the honest belief test (ie, could any person honestly express that opinion on the proved facts); and
- Even though the comment satisfies the honest belief test, the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice.

With regard to the appellant’s honest belief, Judge Binnie concluded that:

“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.”

In regard to express malice, the court recognized that proving this on the part of the media is generally very difficult since the media are well resourced and secretive about their inner workings - even more so regarding their confidential sources. Hence, it was affirmed that a defendant must prove the elements of the fair comment defence before the burden shifts to the plaintiff to defeat that defence by establishing, if possible, malice on the defendant’s part. Simpson did not appeal the trial judge’s finding that the defence was not impaired by malice.

The court held that the fair comment defence applied to the case at hand and the trial judge had been correct to allow it.



