

The Unfairness of Fair Comment:

How the defence to defamation went wrong in Canada and how to fix it

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Introduction:

The defence of fair comment in Canada needs reform. The current test, drawn from the Supreme Court decision in *WIC Radio v Simpson*,¹ simply does not make sense when separated from the common law values that inform it. The results in confusion when courts try to apply the defence and creates a “chilled” atmosphere for free of expression. Opinion pieces and political commentary strike at the heart of democratic discourse, but they are not adequately protected by our current regime. The seismic technological transformations in media that have occurred in the past two decades adds urgency to this project — now, those who are producing political commentary are operating with much smaller budgets for legal defence. A choice avenue of reform involves simplifying the test along the lines proposed by the Canadian Civil Liberties Association (CCLA), which would cleanly remove the remnants of the common law bias towards protection of reputation and, consequently, rightly emphasize the *Charter* value of freedom of expression instead. Chief among its other virtues, a simpler test would reduce the amount of unwarranted legal action.

In my paper, I will firstly explain how both defamation and fair comment have their modern-day roots in British common law and how Canadian jurisprudence has failed to shed the problems inherent in these tests. In the second part of my paper, I argue the Supreme Court’s efforts to align fair comment with *Charter*² values in *WIC Radio* actually compounded these problems. The current test consists of elements that are vaguely defined, overlapping in scope, and are combined in an unclear manner.

¹ *WIC Radio Ltd v Simpson*, 2008 SCC 40 [*WIC Radio*].

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982.

The third section of my paper describes how, when it is not cumbersome or contradictory, the current test for fair comment begets confusion: courts have since struggled to apply it in a consistent manner. Finally, I address proposed reforms by academics and the CCLA, which should be taken seriously. Adopting the CCLA's two-part test would have manifold advantages.

Throughout my paper, I will compare the outcomes of the various tests in order to determine which would enable the scope of Canadians' freedom of expression to be most robustly protected.

Part I: The common law roots of defamation and fair comment

Before delving into the troubles related to fair comment, I will briefly discuss defamation. The challenge of reforming the defence of fair comment is bound up in part with how Canadian jurisprudence has conceived of the onus of proof in defamation lawsuits.

1. Defamation in common law

Brown on Defamation offers various formulations for the tort of defamation, a representative one of which is this: "Broadly speaking, a defamation is a false statement to a person's discredit. It encompasses any words which injuriously affects a person's fame, reputation or good name, or diminishes his or her respectability."³ Thus, defamation must be *false*. The goings-on about reputation and good names and diminishing respectability speak to the power of the false statement to be understood, nonetheless, as *potentially being true*. If the defamatory statement could not ever be understood to be true, then there is no way that it could disgrace, nor could it denounce. The power of the statement is in its *potential truth value*; the tort arises from the fact that is false.

Examples under the common law test for defamation:

³ *Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States)*, 2nd (online), at 4.2(1) [*Brown*] [footnotes omitted].

Absurd: “Barack Obama is a white supremacist.” This is a false statement, but sufficiently obvious in its absurdity *not* to meet the threshold for defamation: it cannot be understood to be true. In our minds, we think: Obama is African American; he believes that Blacks can and should hold positions of power within American society. Thus, it is unlikely that this statement could have any damaging effect on Obama’s reputation. The audience would immediately dismiss it as being, rightly, untrue.

Plausible but no basis in fact: “Premier Rachel Notley is corrupt.” This is a false statement, but it could lower Notley’s reputation and diminish her respectability. We don’t know offhand that she is not corrupt — because she is a public official with power over the finances of a province, it is possible that the statement is true. Thus, it is eligible for defamation.

Plausible and basis in fact: “Donald Trump is a white supremacist.” Upon first (and, for that matter, lingering) regard, the statement is not self-evidently false. We would have to investigate in order to understand whether it is false. Meanwhile, this statement could lower the reputation of Trump amongst certain demographics. (Other demographics may already think this!) This is also a statement with potentially sufficient falsehood and injurious effect for a charge of defamation.

Truth: “Ratko Mladic is a war criminal.” This is a true statement. If you didn’t know that Mladic was a Bosnian war criminal and thought that he was just another elderly Romanian villager living down the lane, then this statement would lower your esteem of him. But because it is based in truth, it is not defamatory.

2. Defamation in Canada

In Canada, the test has been articulated slightly differently. In our courts, the threshold for defamation is, arguably, lower. Specifically, the Supreme Court has, in light of the *Charter*, codified the importance of reputation regardless of the truth value of the statement allegedly impugning the plaintiff’s reputation. In the 1995 case of *Hill v Scientology*, the court was asked to consider whether defamation was incompatible with *Charter* protections for freedom of expression. With confidence, the court held that it was not.

Nonetheless, Cory J, writing for the majority, performs a bit of a sleight of hand on the whole topic of 2(b) rights:

Although much has very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual.⁴

Placing reputation at the fore and suggesting that reputation is an issue of human dignity (which would be then in turn be protected somewhere, implicitly, in the *Charter*, thoughts which, I will show, inform the majority in *WIC Radio*) is problematic. But because Cory J finally proposes that reputation should be “balanced against the equally important right of freedom of expression,” his decision is seen as an advance in protecting freedom of expression.⁵

This deference to reputation, however balanced against free expression, underpins all the decisions I discuss in the paper. It results in an undeniably lower threshold for proving defamation than in other jurisdictions. In *Hill*, after much discussion of the historical underpinnings and enduring value of retaining defamation as an actionable tort, the court settles on a not-outrageous definition as “injurious false statements.” But in *WIC Radio*, Binnie J, while expressing a similar deference to reputation, goes a little further. For him, the process of a defamation charge unfurls thusly: “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.”⁶ This means that, in order to show defamation, a plaintiff has only to prove publication

⁴ *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, at para 107, 126 DLR (4th) 129 [*Hill*].

⁵ See, for instance, Steven Frankel, “Case Comment: *WIC Radio v. Simpson*,” (2009) 67:1 UT Fac L Rev 93 at 96 [*Frankel*].

⁶ *WIC Radio supra* note 1 at para 1 [emphasis added]. This is not unanimously endorsed; in *Grant v Torstar*, 2009 SCC 61 [*Grant*], the defamatory statements are those “untrue [statements] ... that tended to lower [the plaintiff’s] reputation in the community. ... then the burden shifts [to the defendant] to establish the defences he has pleaded” at para 28. LeBel’s dissent in *WIC Radio* also offers a more commonly accepted definition, influenced by Salmond’s summary of British law: “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

of something that harmed the plaintiff's reputation. If damage is presumed, then the plaintiff doesn't even, really, need to show that the offending statement offended anyone but herself. This provides a very low threshold for defamation.

Examples under Canadian defamation law (WIC Radio/Binnie):

Absurd: "Obama is a white supremacist" is still unlikely to be considered defamatory, since it's hard to lower the reputation of someone who is so well-known for not being a white supremacist with such a barb. The falsity of the statement is obvious, therefore damage to the reputation remains minimal or nonexistent.

Plausible but no basis in fact: "Rachel Notley is corrupt" still qualifies for defamation.

Plausible and basis in fact: "Trump is a white supremacist" would immediately (or much more likely to be immediately) considered defamatory. It's not clear whether the statement is true or false, on first glance. But for the purposes of Canadian law, *we assume at this point that the statement is false*. The onus for proving the falsity has shifted — that whomever uttered the statement would now have to defend the statement would have to use fair comment to illustrate that the facts generating the opinion were true.

Truth: Because our threshold is only that one's reputation is damaged, "Ratko Mladic is a war criminal" could form a defamation charge. It would be silly, but if he had somehow kept his war criminality a secret, and then his cover was blown, he could! We would proceed, assuming that the statement is false *even though it's not*. The onus would then be on the defendant to provide a relevant defence.

3. Fair comment prior to the Charter

The leading case for fair comment prior to the *Charter* was *Cherneskey v Armadale Publishers Ltd.*⁷ The case involved law students who wrote a letter to the *Saskatoon Star-Phoenix* suggesting that city alderman Morris Cherneskey had a "racist attitude" because of his opposition to an alcoholic

particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem" at paras 67-70.

⁷ *Cherneskey v Armadale Publishers Ltd.*, [1979] 1 SCR 1067, 90 DLR (3d) 321 [*Cherneskey*].

rehabilitation centre in a predominantly indigenous neighbourhood. The letter was published. Chernesky, in turn, sued the newspaper publishers for defamation. At trial, the judge found defamation, but fair comment failed because the views espoused in the letter were not honestly believed by the publisher, nor anyone associated with the publishing of the letter (except, of course, for the writers themselves, who were not asked to give evidence).⁸ The publisher appealed to the Supreme Court, which ultimately upheld the trial court's decision.

This case is emblematic of the deep-seated problems with fair comment itself. The parameters, as most simply put forth in the decision, is “protection afforded only when the opinion [on a matter of public interest] represents the honest expression of the view of the person who expresses it.”⁹ The complicating factor in this case is that “the person expressing it” was the newspaper, not the original writers of the letter. In fact, in the wake of the decision, the provinces each in turn wrote legislation to overturn the decision.¹⁰

The majority decision, written by Laskin CJ, extracts a “clear statement” on the nature of fair comment from *Silken v Beaverbrook Newspapers Ltd.*¹¹ The passage also lays the foundation for future confusion about fair comment.

⁸ *Ibid* at 1068. At trial the executive vice-president of the paper's publisher didn't believe that Cherneskey was a racist. But this is not exactly what the letter to the editor was proposing. The letter never said that any individual was racist or held a racist attitude, but that actions *embodied* a racist attitude. This may be splitting hairs, but to demand the publisher believe the statement honestly attached itself to the person (Cherneskey, the racist), versus the equally plausible notion that it attached to the “resistance” to the housing (the community opposition was racist behaviour), adds another level of unnecessary complexity.

⁹ *Ibid* at 1072-1073.

¹⁰ *Frankel*, *supra* note 5, at 99. See, for instance, Ontario's *Libel and Slander Act*, RSO 1990, c L 12, section 24: “Where the defendant published defamatory matter that is an opinion expressed by another person, a defence of fair comment by the defendant shall not fail for the reason only that the defendant or the person who expressed the opinion, or both, did not hold the opinion, if a person could honestly hold the opinion” R.S.O. 1990, c. L.12, s. 24. Or Alberta's *Defamation Act* RSA 2000, c D-7, section 9(1): “If a defendant published an opinion expressed by another person, other than an employee or agent of the defendant, that is alleged to be defamatory, a defence of fair comment shall not fail by reason only that the defendant did not hold that opinion.”

¹¹ *Silken v Beaverbrook Newspapers Ltd*, [1958] 1 WLR 743, [1958] 2 All ER 516.

The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury, and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it agrees with the comment instead of applying the true test: was this an opinion, however exaggerated, obstinate, or prejudiced, which was honestly held by the writer?¹²

This formulation demands scrutiny. The basis of “public life” is that anyone can participate by uttering any sort of comments so long as those statements are “honestly held.” Note how the “crank” or the “enthusiast” can be “exaggerated,” “obstinate,” or “prejudiced” and are set against the “reasonable person” who makes legal judgements. The scope of unreasonableness permitted is broad, indeed boundless — otherwise, why would we contrast the crank (who reads pessimistically) and the enthusiast (who reads with an outcome in mind) with the reasonable jury member? Note also how the comment doesn’t have to have any rational connection to the proven facts — it can be exaggerated (a distortion of the facts) obstinate (out of step with the facts), or prejudiced (reading the facts unfairly). There are no substantive parameters for the crank to express his or her crankiness, so long as the crank is subjectively honestly invested in it. In other words, the “truth value” of the comment is derived from the truthful belief of the person expressing it.¹³ Commenting is subjective, and its “fairness” as comment is guaranteed by the subjectivity of the subject expressing it. The jury should not interfere with subjective judgements, even if they are libellous, if the author of them truly believed them.¹⁴ So long as we are not malicious, we are fine.

Examples under pre-Charter Canadian fair comment:

¹² Quoted in *Cherneskey*, *supra* note 7 at 1073.

¹³ Quotation marks because the point and problem are also that fair comment, as a comment, doesn’t have a truth value by definition.

¹⁴ Laskin CJ summarizes this test in quoting the lower court dissent of Brownridge JA: “a newspaper cannot publish a *libellous* letter and then disclaim any responsibility by saying that it was published as fair comment on a matter of public interest but it does not represent the honest opinion of the newspaper” *Cherneskey*, *supra* note 7 at 1069.

All of the examples pertain to the public interest. Note that using *Cherneskey* test, the publisher would be on the hook unless statutorily prohibited.

Absurd: For Obama, we haven't shown defamation, so we don't need to worry about defences. That said, if you had a sufficiently out-of-touch person who honestly believed that Obama was a white supremacist, then he or she could successfully deploy the defence of fair comment.

Plausible but no basis in fact: The statement "Rachel Notley is corrupt" could successfully be defended under fair comment if the person honestly believed it.

Plausible and basis in fact: "Trump is a white supremacist" Similarly, this statement could successfully be defended under fair comment if the person honestly believed it. The black man from Detroit may get a pass, while Ivanka Trump or, who knows, the leader of the Ku Klux Klan may not.

Truth: "Ratko Mladic is a war criminal," if it succeeded as defamation, would easily be defended as fair comment, presumably, since everyone should honestly believe that he is a war criminal. We would take it for granted that the speaker honestly believed it, because everyone does. That said, because fair comment is effectively entirely subjective, the defence could fail, in wild theory. If the defendant didn't actually believe that Mladic was a war criminal and was just calling him one to make life hard for him,¹⁵ then potentially this test would produce the outcome of Mladic succeeding on a defamation charge.

Part II: Post-Charter fair comment: *WIC Radio v Simpson*

The Supreme Court grappled with these questions — of how to determine subjective honest belief in light of the *Charter* and what to make of the *Cherneskey* jurisprudence that had been legislatively overridden — in *WIC Radio*. The Court specifically contemplated the defence of fair comment in light of *Charter* section 2(b) commitments to freedom expression. Spoiler: the consequence fell far short of the protection that 2(b) seemed to promise.

¹⁵ Note even here how malice creeps into the defeat of honest belief.

The well-known facts concerned radio host Rafe Mair's on-air comparisons of Kari Simpson, who was a "family rights" activist, to Adolf Hitler and the Ku Klux Klan. Simpson sued the radio station for defamation. At trial, the judge allowed the defence of fair comment. On appeal, the defence failed because, as summarized by Binnie J: "In [the appeal judge's] view, the defence of fair comment was not available because there was no evidentiary foundation... nor had Mair testified that he had an honest belief that Simpson would condone violence."¹⁶

Writing for the majority, Binnie J pulls the test for fair comment from the Dickson J dissent in *Cherneskey*. The elements of the defence are 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.¹⁷

This is not an unproblematic test. The first element is uncontroversial — fair comment's *raison d'être* is to defend public comments about public figures. The second and third we'll leave aside for the moment as neutral. The fourth element, however, is not. The onus has potentially shifted, depending on how the judge wants to approach the definition of defamation, by virtue of (d). If falsity is part of the definition of defamation, then what is added by the objective honest belief requirement? The resulting statement is false; we already know that because it has either been presumed or required in establishing that there was defamation. In other words, if no man could honestly express the opinion on the proven facts, how could the defamatory statement have any sting? There is already implicit proof that it is reasonably possible to express such an opinion, otherwise how could it lower the plaintiff's reputation?

¹⁶ *WIC Radio*, *supra* note 1 at para 4.

¹⁷ *WIC Radio*, *supra* note 1 at para 1.

I'm not alone in noticing this contradiction. Richard Butler, commenting on *WIC Radio*, writes the court “failed to observe that, if a comment is *not* objectively capable of honest belief by someone, it would not have any defamatory impact. The plaintiff would not have discharged the primary onus of proving the tort, and the defence of fair comment would not be needed.”¹⁸ He, as the CCLA and others have argued, would prefer that the honest belief requirement be eliminated altogether.

One could argue that it's an honest opinion based on *the proven facts*, while the defamation does not require proven facts to establish that “anyone” could believe it. But this defeats the point of changing the test post-*Charter* to remove subjective honest belief. As we will see later, in practice, the honest belief on the proven facts risks turning into this step (and perhaps the whole test) into a subjective test — on the facts proven to be available to her, could the *defendant* have believed what she said?¹⁹ This is exactly the opposite of what the alleged goal of *Charter* reform was — and it was another of the reasons, no doubt, why the CCLA suggested removing the honest belief component entirely.²⁰ At best, it is redundant; at worst, it transforms into an appraisal of whether the defendant made a subjectively reasonable comment.

Other commentators, such as Steven Frankel, have also observed problems in switching from a subjective test of honest belief to an objective one. Frankel argues that the honest belief requirement can be interpreted in two ways, both of which are problematic. For one, the threshold for honest belief is “so low... that it is almost meaningless.”²¹ This begets confusion about application and could lead to courts unnecessarily investigating whether the content of the comment was objectively reasonable (i.e., shifting

¹⁸ Richard Butler, “The Passing of Reputation: Recent Developments in the Law of Defamation,” (2010) 68:4 *Advocate* 539 at 540.

¹⁹ For instance, *Roshard v St Dennis* 2013 BCSC 1388 [*Roshard*], which I will discuss at length shortly.

²⁰ See paras 41-44 CCLA Factum. And on this note, the CCLA is blunt: “A requirement that the defendant prove honest belief offends Charter values and the approach mandated by this Court in *Pepsi-Cola*. The CCLA submits that limiting fair comment to opinions held by the speaker serves no legitimate purpose; to the contrary, this requirement undermines the Charter's guarantee of expressive freedom. Comments which contribute to public debate serve s.2(b)'s core values, whether they are honestly believed or not” at para 42. This is discussed further in the last section of my paper.

²¹ *Frankel*, supra note 5 at 107.

what was intended as a subjective test about belief into an objective test overlapping with the third element of the test). As Rothstein J also notes in his concurring judgement in *WIC Radio*:

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.²²

In other words, so long as there are facts underlying the statement, if the defence is meant to protect opinions of all varieties, then requiring an objectively honest belief is redundant. Meanwhile, the complexity, as we will see in the British Columbian case of *Roshard v St Dennis*, does actually result in misapplication.

The objectively honest belief component is additionally troubled by malice. One of the definitions adopted in *WIC Radio* of malice is “any indirect motive or ulterior purpose [...] established if the plaintiff can prove that the defendant was not acting honestly when he published the comment.” This would seem to be a contradiction: how can a defence involving honest belief be defeated by dishonest belief? Binnie J endorses a process wherein the defendant proves fair comment, including an *objectively* honest belief, and then the onus switches to the plaintiff to show that there was, *subjectively*, malice.²³ Thus, there is no contradiction. LeBel, in his decision, shows he thought this through more thoroughly — but what he proposes is also problematic. LeBel holds there is no conflict between the tests for honesty of belief and malice: a negative proof of objectively honest belief doesn’t necessarily indicate malice.²⁴ But the issue is

²² *WIC Radio*, *supra* note 1 at para 110.

²³ *Ibid*, at paras 52-53. I think this has been sufficiently troubled by the difficulties in establishing an objectively honest belief. Binnie goes on to reject the view from the “interveners supporting the media” that the honesty of belief should be rolled into the malice test, with the onus on the plaintiff.

²⁴ *WIC Radio*, *supra* note 1, at para 102

the other way around: how can you have fair comment (which entails an honest belief) be defeated by malice (no honest belief)?²⁵

Examples of post-WIC Radio fair comment:

We'll assume, again, public interest.

Absurd: Obama is in a bad mood and he decides to sue for defamation even though no one reasonably believes that he's a white supremacist. He has lots of money and he's tired of people talking about him in the media. Using the most lenient test, he doesn't have to show that the statement is false in order for it to be considered false for the purposes of the action. Consequently, the crank who has blurted out these remarks on the radio now has to prove that someone could have honestly believed Obama is a white supremacist in order to be availed of the defence of fair comment. Either there is evidence for this, or not (in this case, not!), but it's switching the evidentiary burden of the tort from plaintiff to defendant to show that there was defamation at all. On these facts, fair comment fails. There is no need to prove malice. Judicial discretion would no doubt determine what would happen to the original defamatory charge.

Plausible but no basis in fact: Because "Rachel Notley is corrupt" has no factual basis, the defence of fair comment would fail. No need to prove malice.

Plausible and basis in fact: Trump can sue for defamation without having to show that there are reasonable arguments for his *not* being a white supremacist. (Again falsity seems to be generally assumed in Canadian courts.) Fair comment is an easy defence, however, since there is plentiful evidence that one

²⁵ Yes, one honest belief is objective and the other is subjective — but the previous criticisms apply. This is tremendously complicated, which will lead to courts misunderstanding both fair comment and malice. Moreover, if you have a person who is making an otherwise fair comment that has been determined to be a "recognizable" comment based on facts on a topic of public interest, which is objectively honestly believable, does it really matter at all if there is malice involved? And how does this proof of malice play against the fact that fair comment is meant to protect the crank and the enthusiast as they express their honestly-held beliefs that may be exaggerated, obstinate, or prejudiced? What is the line between prejudice and malice? Or obstinacy and malice? Some of these difficulties are resolved if you look for "ill will" and call it malice (rather than imposing a subjective honest disbelief test) — but, again, this is so complicated.

could summon to make the assertion that he is a white supremacist. Nonetheless, if it were Hilary Clinton making the charge, her defence of fair comment could be defeated by malice.

Truth: Using the lowest thresholds, “Ratko Mladic is a war criminal,” somehow damaging reputation and thus presumed false, would be abundantly eligible for the defence of fair comment. It is a matter of public interest, there are lots of facts, the comment is pretty clearly a comment, and one could honestly believe it. The loosey-goosey conception of malice, though, could still defeat the defence.

Of course, some of these outcomes would never happen. No indicted war criminal is going to sue for defamation for being called a war criminal. But more nuanced versions of these examples could come about. And this is a far cry from the “any crank gets her cranky moment at the microphone” notion of fair comment.

Part III: Post-WIC Radio confusion

The fears that various commentators, and LeBel himself, expressed about the complexity of the current test for fair comment have manifested. The test is too complicated for judges to apply the test efficiently and confidently. Moreover, the threshold for fair comment has often asked whether there is a reasonable connection between the proven facts and the comment.

In *Roshard v St Dennis*,²⁶ Ms. Christ’l Roshard, mayor of Lillooet, had a scrupulously ethical involvement in grape-growing initiative. Some of this scrupulously ethical behaviour was available to the public, but most of it was not. She was up for reelection and city councillor Mr. Patrick St Dennis decided to challenge her bid for mayor. On the radio, he suggested that Roshard had been wasting taxpayers’ time and money in her involvement with this grape-growing initiative. In turn, Roshard sued for defamation.²⁷ In this case, the statements were untrue — Roshard had gone to great lengths to ensure she was acting without conflict of interest — but fair comment failed because the judge was not convinced that “anyone

²⁶ *Roshard supra* note 19.

²⁷ Defamation was defined as “whether they were untrue statements that tended to lower Ms. Roshard’s reputation in the community. If they are, then the burden shifts to Mr. St. Dennis to establish the defences he has pleaded” *Ibid* at para 21.

could honestly have expressed the opinion on the actual facts, that Ms. Roshard was using up taxpayers' time promoting the Grape Project."²⁸

In this case, someone *could have* expressed the statement on the proven facts. It would have been the wrong interpretation of the facts, but Canadian common law purports to protect obstinate and prejudiced speech. Moreover, the case hinged on Mr. St Dennis' inside knowledge, as a city councillor, of what measures Roshard had taken to ensure no conflict of interest. Even based on these facts — which were not known to the general public — one could plausibly express skepticism. Were the measures that Roshard had taken truly sufficient? What Schultes J held was that *the defendant*, being a fellow contender for mayor with knowledge of council workings, could not have expressed the opinion honestly.

This process renders the honesty of belief component not an objective test but an investigation into the parameters of subjective honest belief. The question, "Could anyone honestly believe the comment on the proven facts?" turns into "Could anyone *who is the defendant* honestly believe...." This subjective mind-reading is exactly what the *Charter* reform claimed to avoid, and what the CCLA in its factum for *WIC Radio*, alleged was the central violation of free expression.²⁹

Then Schultes J goes on to find that fair comment, which has already failed, would have been defeated by malice anyway. He holds that the malice "does not arise from a direct intention to harm Ms Roshard, but instead from an ongoing, and if I may say quite obstinate, disregard for the truth of the situation on his part: *Hill* [...] at paras. 145-6" (emphasis added).³⁰ Note that this is actually a misquotation.³¹ In *Hill*, the malice is defined (in part) as "speaking dishonestly, or in knowing or reckless

²⁸ *Ibid* at para 68.

²⁹ CCLA Factum para 42.

³⁰ *Supra* note 19 at para 70.

³¹ It is also an incorrect pinpoint; should be to paragraph 148, which says "Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes ... "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. ... Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth." *Hill*, *supra* note 4.

disregard for the truth.”³² Obstinate and prejudiced speech is meant to be protected! Recklessly disregarding the truth isn’t the same thing! So, confusion.

Cases invoking fair comment are almost invariably messy like this. The thoroughly (and correctly) reasoned decision by Justice Tysoe in *Creative Salmon Company Ltd v Stanifold*, overturned a trial decision that denied the defendants fair comment. The trial judge read the “honest belief” element of the fair comment test to be subjective honest belief on the facts known to the defendant.³³ In *Mainstream Canada v Stanifold*, the same BC Court of Appeal judge found that a trial judge had, again, misinterpreted the test, although his logic this time was less straightforward.³⁴ In *Chandra v CBC*,³⁵ Dr Ranjit Kumar Chandra went to court over a CBC documentary about him was defamatory, arguing the defence of fair comment did not apply because the CBC’s position was not “fair” — i.e., Mr Chandra went to court with lawyers arguing a totally wrong definition of fair comment. (The judge in found in favour of the CBC.) In summary: most post-*WIC Radio* cases concerning fair comment seem to involve one or more of the parties, and sometimes the judges, not understanding the test.

Part IV: Canadian Civil Liberties Association and Other Proposed Reforms

³² *Hill*, *supra* note 4 at 148.

³³ *Creative Salmon Company Ltd v Stanifold*, 2009 BCCA 61 at para 28.

³⁴ But had the trial judge misunderstood? At the appeal court, Tysoe J took issue with the trial judge’s observation that the facts relevant to the comment were available, although “to the determined reader.” He held: “In my opinion, the defence of fair comment is not intended to be available when only a portion of the audience was aware of the facts upon which a comment was made or could have been aware of those facts with *relative ease* without being required to use their own initiative to search out those facts,” *Mainstream Canada v Stanifold*, 2013 BCCA 341 at para 43, emphasis added. Is this what the “comment must be based on facts” part of the test is meant to generate for “anyone’s honest belief”? Or does it really only serve to reinforce a subjective test of honest belief, which was the whole point of reforming the test post-*Charter*?

³⁵ *Chandra v CBC*, 2015 ONSC 4832.

The CCLA served as an intervenor in *WIC Radio*. Few of its recommendations made it into the majority decision, although it influenced LeBel’s dissent. In the CCLA factum, the organization proposed that fair comment be stripped down, according to consensus among academics and experts, so as not to involve any honest belief at all: “fair comment to opinions held by the speaker serves no legitimate purpose Comments which contribute to public debate serve s 2(b)’s core values, whether they are honestly believed or not.”³⁶ The CCLA also argued that the onus should be shifted: in order to be actionable, the plaintiff only would have to establish: “(a) the words in question are about the plaintiff and are defamatory; and (b) the words are not fair comment.”³⁷ Fair comment are comments on matters of public interest; determining what is a factual statement and what is comment should be generously made in favour of the speaker. Statements of facts which are inaccurate would simply be considered defamatory.

In contrast, comments would have broad protection because, as comments, they do not have truth values. This observation, while simple, has the power to set aside virtually all of the mess about honesty of belief and whether proven facts can sustain a prejudiced comment, and malice as being a willful disregard for the truth. According to the CCLA: “Unlike false statements of fact, a comment makes no factual statement about the plaintiff. A comment, which is simply an opinion, cannot therefore be demonstrably true or false.”³⁸ (This is the thinking behind the proposal that fair comment is not a defence to defamation at all — if fair comment exists, then defamation, because it focusses on truth values, does not.)³⁹

Adopting these reforms would align, in some ways, Canada’s fair comment to the American model (a development explicitly dismissed in *Hill*⁴⁰), although without an actual malice component. In the

³⁶ *WIC Radio*, *supra* note 1 (Factum of the Canadian Civil Liberties Association at para 42).

³⁷ *Ibid* at para 32

³⁸ *Ibid* at para 35.

³⁹ See *Brown*, *supra* note 3 at 15.2: “There is a difference of opinion among common law judges and academic commentators whether fair comment should be treated as an instance of qualified privilege, *or whether it should be treated as an instance where there simply is no defamation*. The former is the prevalent view; the latter view is to be preferred” [emphasis added].

⁴⁰ See the summary, for instance, in *Brown*, *supra* note 3 at 27.2.

leading American case, *New York Times Co v Sullivan*,⁴¹ before a public personality can file for defamation, he must prove that the defendant was motivated by “actual malice” in damaging the plaintiff’s reputation. Remarkably, the court held public discourse can meaningfully involve factual inaccuracies. Actual malice could be shown by proving that the defendant uttered the comment “with knowledge that it was false or with reckless disregard of whether it was false or not.”⁴² This test retains an element of subjective honest belief, which was present in pre-*Charter* Canadian decisions but transformed by *WIC Radio* and retained explicitly in continuing to permit malice to defeat fair comment. The CCLA proposal meticulously avoids such speculation about subjective belief, since that is contrary to the free expression provisions of the *Charter*. Thus, it is a preferable approach — and one, which we can see, most broadly protects speech.

Examples under CCLA’s combined test for defamation and fair comment:

Absurd: In order to file for defamation, Obama would have to prove damage to his reputation (unlikely) and then show that the speaker was making a statement of fact, rather than opinion, which is inaccurate. Because we are meant to interpret what is opinion generously, neither elements of the test are strongly met and the claim is unlikely to be actionable — but again, this is because the statements are absurd and so it’s hard to show damage.

Plausible but no basis in fact: In contrast, Notley could show damage to her reputation and would have to show that the statement was intended to be a mistaken factual assertion. This claim is likely to be actionable/is unlikely to be protected by fair comment — but depending on how generous the categorization of comment is, it could be.

Plausible and basis in fact: The damage to Trump’s reputation in accusing him to be a white supremacist remains minimal and, again, with a generous interpretation of fair comment on public matters, the claim is not actionable.

⁴¹ *New York Times Co v Sullivan* 376 US 254, 84 S Ct 710.

⁴² *Ibid* at para 280.

Truth: “Ratko Mladic is a war criminal,” is a true statement. On a generous protection, it would also be afforded fair comment. Consequently, a defamation charge remains difficult.

Part V: Conclusion

The CCLA proposal for fair comment and defamation charges is compelling and should be considered as a template for reform. It successfully eschews the problems of both subjective and objective honest belief tests, is more straightforward to administer, and protects the widest ambit of free speech. Because it shifts the onus of proof to the plaintiff, such a test would reduce the amount of litigation in courts, which is costly for media organizations, and afford such organizations a greater confidence in publishing controversial materials that legitimately contribute to public discourse in Canada.