File Number: 39796

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

GLEN HANSMAN

Appellant
(Respondent)

and

BARRY NEUFELD

Respondent
(Appellant)

and

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FACTUM OF THE INTERVENER CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I - CONCISE OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. Freedom of expression and debate is said to be the "'very life blood of our freedom and free institutions.'"[1] The importance of freedom of expression cannot be overstated: this Court has recognized that free expression is "the matrix, the indispensable condition of nearly every other form of freedom … and [is] … little less vital to man's mind and spirit than breathing is to his physical existence."[2]

2. The private law of defamation requires carefully balancing the right to protect one's reputation from denigration *with* the constitutionally protected right to free expression. CCLA submits that the current balance between reputational rights and the right to voice one's opinion is not being appropriately struck in defamation law.

3. Currently, the bulk of the work in defamation law—and the bulk of where free expression concerns arise—occurs after an initial finding of defamation has been made. At this stage, the burden switches to the defendant to show that the defendant's expressions are protected by a recognized defence, such as truth, fair comment, or responsible communication.

4. The defence of fair comment is unique among all other defences in its singular focus on protecting opinions, not facts. There are few expressive rights more important than the right to voice one's opinion. In this respect, the defence of fair comment is a central guardian of the *Charter* right to free expression. Unfortunately, this paramount constitutional right is overly constrained within the current fair comment defence.

5. First, CCLA submits that categorizing an expression as fair comment is not a *defence* to defamation; fair comment means that the expression is not defamatory. This analysis should occur at the outset of the test for defamation, rather than at the defence stage.

6. Second, the onus should lie on the plaintiff to show that the impugned expression was published, referred to the plaintiff, lowered the plaintiff's reputation in the eyes of the community, and is not a fair comment (or, as CCLA prefers, a "protected comment").

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[1] *WIC Radio Ltd. v Simpson*, 2008 SCC 40 ["*WIC Radio*"] at para 1.
[2] *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at para 105 (McIntyre J. in dissent).

7. Third, when analysing whether an expression is a protected comment, the analysis must be contextual and generously made in favour of the speaker. Specific considerations should apply when the impugned expressions are in *response* to an initial public expression, and when the impugned expressions make allegations of prejudice.

8. This proposed structure would better accord with the constitutional protection necessary to safeguard expression of opinion. Further, it would better support access to justice, encouraging a minimalist approach to defamation law and ensuring that courts do not become awash with meritless defamation litigation in the Internet age. Lastly, this structure would dovetail with and further the purposes of Canada's anti-SLAPP legislation.

PART II - QUESTIONS IN ISSUE

9. CCLA takes no position on the facts or the outcome of this appeal. CCLA's argument in this appeal is limited to the proper interpretation of the current fair comment defence within the context of this appeal.

PART III - STATEMENT OF ARGUMENT

Fair Comment and the Constitutional Right to Free Expression

10. Among all the defences within the law of defamation, the fair comment defence reserves the greatest space for expressive freedom because it is the only defence that protects opinions, rather than statements of fact. A false statement of fact uttered about another has more adverse consequences for reputation than an opinion, because it is expected to be taken uncritically as "true." An opinion, however, will not be, so long as the listener or reader understands the opinion as such. The reader or listener is free to agree or disagree with the opinion.

11. On the flip side of the coin, democratic participation, self-expression, and the search for truth all rely heavily on an individual's right to share their opinion publicly. Justice Dickson noted that "citizens, as decisionmakers, cannot be expected to exercise wise and informed judgment unless they are exposed to the widest variety of ideas from diverse and antagonistic sources."[3] Similarly, Lord Denning spoke of the "right of fair comment" as one of the "essential elements

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[3] *Cherneskey v Armadale Publishers Ltd & King*, [1979] 1 SCR 1067 ["*Cherneskey*"] at p. 1096 (Dickson J. in dissent).

which go to make up our freedom of speech." He wrote that we "must ever maintain this right intact" without allowing it to be "whittled down by legal refinements."[4]

12. Equally, fair comment also promotes the *Charter* right of equality, promoting and protecting a diversity of views and opinions, including those who hold unpopular or non-traditional opinions, and including those who wish to respond to or debate those unpopular or non-traditional opinions. The right to fair comment protects equally those who support same-sex rights and those who do not, those who are concerned about discussing same-sex or trans rights in school curricula and those who support its inclusion. Fair comment, fundamentally, protects all minority rights to participation and allows social values to evolve through a commitment to open debate.

13. An individual's right to vindicate their good name and reputation is of course important and should be accorded reasonable protection. Ultimately, however, the right to reputation is not a constitutional right. As a result, there will be cases, as this Court noted in *WIC Radio*, when concerns about personal reputation must give way to a greater public interest:

> 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.[5]

14. Indeed, this Court has been consistently cautious to ensure that defamation law aligns with the constitutional rights that underpin it. In *WIC Radio*, for instance, this Court modified the defence of fair comment in order to harmonize defamation law with freedom of expression.[6] Soon afterwards, in *Grant v Torstar*, this Court introduced the defence of responsible journalism as an additional defence in defamation law, taking another step to ensure the common law adequately safeguarded and reflected *Charter* values.[7]

15. The Court must continue to oversee the evolution of the common law, and to provide clear guidance to ensure that lower courts apply the law in a consistent, rights-respecting manner. In particular, defamation law must be speech-protective when it comes to opinions or comments,

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[4] *Cherneskey,* supra at p. 1086, citing *Slim v Daily Telegraph Ltd.,* [1968] 2 QB 157 at p. 503.
[5] *WIC Radio*, supra at para. 2.
[6] *WIC Radio*, supra at para 49.
[7] *Grant v Torstar Corp.*, 2009 SCC 61 [*Grant*] at paras 3, 7.

such that it appropriately protects individuals from being dragged through court process for publicly stating their opinions and engaging in public debates.

CCLA's Proposed Structure of Fair Comment

16. As currently structured, the fair comment defence requires a threshold determination: the expressions at issue must be categorized as either a comment or a fact. If the expressions are comment, then the defence of fair comment is engaged.[8]

17. Once the expressions can be appropriately categorized as comment, the defence of fair comment requires that such comment (i) be on a matter of public interest; (ii) be based on facts, either stated or widely known, that are true or substantially true; (iii) although the comment can be or include inferences from facts, it must be recognizable as comment; and (iv) it must be one that a person could honestly make on the proved facts. Finally, (v) the defence can be fully defeated if the comment was actuated by express malice.[9]

Submission 1: Fair Comment Is Not A Defence

18. Given the importance of the right to fair comment, and the numerous *Charter* rights and values that underpin it, there is long-standing support for the view that a fair comment is simply *not* defamatory, and, in that sense, fair comment is not a *defence* to defamation but rather is non-defamatory expression. This point is controversial. Brown's leading text on defamation explains:

> There is a difference of opinion among common law judges and academic commentators on whether fair comment should be treated as an instance of qualified privilege, or whether it should be treated as an instance where there is simply no defamation. The former is the prevalent view; the latter view is to be preferred.[10]

19. CCLA agrees with Brown that the latter position should be preferred: fair comment is simply not defamatory. A comment adds no additional factual information about the plaintiff; it simply reflects the speaker's personal subjective response to those facts. Readers and listeners are invited to agree or disagree, and to consider their own responses to the underlying facts. Therefore,

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[8] *Grant, supra* at paras 30-32, 65.
[9] *WIC Radio*, *supra*, at para 28.
[10] Raymond Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States,* 2nd ed (Toronto: Thomson Reuters Canada, 2022), s. 15:3 [Book of Authorities of CCLA, Tab 1, pp 11, 36-37].

expressions of opinion do not meet the initial threshold in the defamation analysis in that the expressions do not injure the plaintiff's reputation (so long as the underlying facts are true, and so long as the comment is recognizable as such). An analysis of fair comment should therefore be incorporated into the preliminary test for defamation rather than considered as a "defence."

Submission 2: The Onus of Addressing Fair Comment Should Rest on the Plaintiff

20. In the trial of a defamation action, defendants currently bear the onus of showing that an impugned expression meets the test for fair comment. To keep the essential balance between reputation and free expression intact, however, the right to express one's opinions should be presumptively protected. Shifting the onus to the plaintiff would reduce the amount of defamation litigation and afford individuals and media organizations greater confidence in publishing potentially controversial commentary that legitimately contributes to public discourse and debate.

21. A claim in defamation would be actionable, therefore, where the plaintiff establishes:

(a) The words in question were published,

(b) The words in question refer to the plaintiff,

(c) The words in question lower the reputation of the plaintiff in the eyes of the community, and,

(d) The words in question are not "fair comment" (or "protected comment") because: i) the words in question are not a comment at all, but rather a fact that must be proven or otherwise justified; *or* ii) if the words in question are comment, the comment should not be protected.

22. The plaintiff should have the burden to show that the expression in question is *not* a protected comment, and is therefore defamatory. Once that burden has been overcome, the burden would then shift to the impugned speaker to determine whether defences such as qualified privilege or responsible journalism apply.

Submission 3: A "Fair Comment" Must Be Examined Generously and Contextually

23. With regard to the specific elements of determining whether an impugned expression is a "fair" or "protected" comment, a number of considerations should be kept top of mind to maintain

the careful balance between free expression and protection of reputation. Above all else, these considerations speak to a conception of "fair comment" that is robust, fulsome, and generous.

Categorizing an Expression as Fact or Comment

24. First, determining what is a factual statement and what is comment should be generously made in favour of the speaker and in favour of the right to express one's views publicly. A comment can include any "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof".[11] The test is contextual, and requires examining the language used, the medium in which the expressions were made, any cautionary terms used by the speaker, and the audience to whom the expressions were made.[12] The plaintiff must be able to show that, "in the context of the whole of the published matter," the statement made by the defendant is *not* a comment, but rather a fact that is capable of proof or disproof. Ultimately, however, jurisprudence has repeatedly confirmed that what is comment must be "generously interpreted".[13]

25. In the context of this appeal, and without getting into the exact expressions at issue, it will be helpful to keep in mind that some jurisprudence has already examined expressions of this nature. In the 2021 case of *Bernier*, for instance, the Ontario Superior Court of Justice determined that "a statement that a person is racist or a misogynist is a generalization or conclusion that is not itself either true or false".[14] Similarly, the Ontario Court of Appeal in *Levant* held:

> Calling someone prejudiced will normally be a conclusion or opinion based on the person's conduct or statements. […] The characterization as comment gives the greatest scope for freedom of expression and the preservation of *Charter* values, while giving full legal protection to the important interest of individuals in their reputation as part of their dignity and self-worth.[15]

26. CCLA agrees with this analysis, and submits that most allegations of prejudice, including racism, sexism, or transphobia, will be comment. These types of allegations do not contain any

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[11] *WIC Radio*, *supra* at paras 26-27.
[12] Brown on Defamation, 2nd ed. (Toronto: Carswell, 1999), pp 15-47, 27-477, 27-479, cited in *Baglow v Smith,* 2015 ONSC 1175 at para 229.
[13] *Awan v Levant*, 2016 ONCA 970 at para 84 [*Awan*]; *Volpe v Wong-Tam*, 2022 ONSC 3106 at para 229; *Levant v Demelle*, 2021 ONSC 1074 at para 37.
[14] *Bernier v Kinsella et al.*, 2021 ONSC 7451 at para 50.
[15] *Awan*, *supra* at para 84.

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truth values in and of themselves. Reasonable people might differ as to whether they agree with an allegation of this kind, and whether this type of allegation is properly supportable by specific examples, but it would be open to reasonable debate and differing opinion.

Determining Whether the Comment Should Be Protected

27. If the plaintiff cannot discharge her burden to show that the impugned expressions are facts and *not* comments, the analysis should then turn to an examination of whether the comments are "fair." It should be noted that the descriptor of "fair" is misleading, as it suggests that the opinion needs to be reasonable, impartial or courteous to be protected. That is not the case. Comments should be protected even if they are obstinate, dogmatic, intolerant, intemperate, or discourteous. The courts should not have a role in weighing the "value" or content of an opinion. A more appropriate term for this test, therefore, is "protected" comment" rather than "fair" comment.

28. Generally, the five elements reflected in the current defence of fair comment (at paragraph 17 above) are appropriate in determining whether a comment should be protected. Ultimately, however, this analysis must be contextual, and, again, must be made generously in favour of the speaker. Specific considerations should apply when the impugned expressions are a *response* to another public expression, and when the impugned expressions make allegations of prejudice.

29. First, the protected opinion must, of course, be on a matter of public interest. CCLA submits, as it did before this Court in *Whatcott*, that:

> it is fundamental to democracy that individuals be able to comment on the morality of others' behaviour and that norms of behaviour must be debatable. It is in this way and through democratic processes that people reach their own conclusions as to what behaviours should be permitted, encouraged, discouraged, or forbidden.[16]

30. Freedom of expression means little if it does not include the freedom to offend. But it also means little if it does not include the freedom to respond to, criticize, and debate potentially offensive comments. The right of fair comment must protect unpopular opinions, but it also must allow responses to and engagement with those opinions without fear of litigation. The "risk of being tarred with negative labels" like sexism, racism, etc., is a risk we all take when we participate in public debate in a free and democratic society. Criticism of this kind—as it relates to perceived discrimination or injustice—is exactly the type of opinion essential to democratic debate. It is only

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[16] *Whatcott v Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26 at para 35.

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through this free exchange of ideas that people can reach their own conclusions as to what behaviours should be encouraged, discouraged, permitted, or forbidden.

31. Second, the comment must be based on facts, either stated or widely known, that are true or substantially true. Where the impugned comment is in response to another public expression, the first expression constitutes the "stated facts" upon which the response is based. In accordance with a presumption in favour of expressive activity, this factor must be interpreted generously. There should not be a requirement for the responding party to *repeat* the first expression in order to comment on them; this would overly hinder the debate of opinions and ideas in the public sphere.[17] All that should be required is that the responding expression indicates that there is a controversy or public expression upon which they are commenting.

32. Third, although the comment can be or include inferences from facts, it must be recognizable as comment. The considerations outlined in paragraphs 24-26, above, regarding the difference between fact and comment, must be kept paramount.

33. Fourth, CCLA submits that there is little need for the criterion of objective honest belief (i.e., that the opinion must be one that a person could honestly make on the proven facts).[18] However, if this criterion is kept, then context is important. In this appeal, for instance, examining whether a person could honestly express the impugned opinions based on the proven facts requires an acknowledgement that different groups of persons—with different backgrounds and experiences—may differ in whether they could honestly express the opinion held. In defamation cases about allegations of prejudice, the perceptions of the members of the allegedly marginalized group must be considered, regardless of the nature of that group. In this case, a gay or trans listener may have a different position on whether Mr. Neufeld's expressions could be honestly made on the proven facts than a socially conservative listener.

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[17] *Creative Salmon Company Ltd. v Staniford*, 2009 BCCA 61 at paras 60-61.

[18] In this respect, CCLA agrees with the Law Commission of Ontario that the objective honest belief requirement is unnecessary, confusing, and should be eliminated entirely: LCO, "Defamation Law in the Internet Age" (March 2020), online: https://www.lco-cdo.org/wp-content/uploads/2020/03/Defamation-Final-Report-Eng-FINAL-1.pdf at p 30.

34. Finally, while an opinion may not be protected if it was actuated by express malice, malice must only be found where there is clear ill will or spite, and must not exceed those boundaries to impact recalcitrant, rude, or riotous opinions. We are allowed to call someone a phony, a jerk, a dimwit, or even "a most notable coward, an infinite and endless liar, an hourly promise breaker, the owner of no one good quality."[19] Criticism, hyperbole, and invective is not malicious, and should be protected — so long as it meets the other requirements for protection.

Examining Fair Comment Within Anti-SLAPP Legislation

35. The *Protection of Public Participation Act*, SBC 2019, c. 3 [the "*PPPA*"] acts as a preliminary mechanism to screen out lawsuits that unduly limit free expression in the public interest, so that Canadians may engage in matters of public interest without fear of legal reprisal.[20] The statute is specifically intended to limit lawsuits that prevent individuals from participating in public debate or that silence legitimate criticism on matters of public interest.[21]

36. For an underlying proceeding to have "substantial merit" under s. 4(2)(a)(i) of the *PPPA*, the plaintiff/responding party must show that the basis of the proceeding is legally tenable and supported by evidence that is reasonably capable of belief, such that it can be said to have a real prospect of success.[22]

37. CCLA submits: in a defamation proceeding, the plaintiff must show there is a real prospect of success that the impugned expressions were published, referred to the plaintiff, lowered the plaintiff's reputation, and could not be categorized as a protected comment.

This Modified Structure Has Three Main Advantages

38. CCLA's proposed modifications to the structure of "fair" or "protected" comment better accord with constitutional values. Examining comments within the initial test of defamation, with the onus on the plaintiff, provides more protection for the expression of an individual's

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[19] William Shakespeare, *All's Well That End's Well*, Scene VI, "Second Lord", online: http://shakespeare.mit.edu/allswell/full.html.
[20] *1704604 Ontario Ltd. v Pointes Protection Ass.*, 2020 SCC 22 [*Pointes*], at para 16.
[21] "Protection of Public Participation Act", 1st reading, British Colombia, Legislative Assembly, *Official Report of Debate (Hansard),* 41st Parl, 4th Sess, No 197 (13 February 2019) at 6974-75 (Hon. D. Eby).
[22] *Pointes*, *supra* at para 49.

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constitutionally-protected opinions, appropriately protecting those individuals from being dragged through the court process for publicly and legitimately engaging in public debates.

39. Further, these modifications would better support access to justice, encouraging a minimalist approach to defamation law and ensuring that courts do not become awash with meritless defamation litigation in the Internet age. With access to far-reaching online platforms, it is easier than ever before for private citizens to engage in public debates and state their opinions on matters of public interest. Expression is not protected when courts step in as umpires every time someone's opinion offends another (or someone is called racist), nor is it a good use of judicial resources to do so. Clear, bright-line, speech-protective rules promote certainty, discourage meritless actions, and allow courts to swiftly evaluate and screen out defamation claims that are trivial and unfounded.

40. Lastly, these modifications would better fulfill the aspirational goals of the *PPPA* and other anti-SLAPP legislation to limit lawsuits brought to silence legitimate criticism or stop participation in public debate. The modified fair comment criteria and the current anti-SLAPP regime have the possibility to work hand-in-hand to create a backstop within defamation law that limits the floodgates of possible defamation litigation and protects individuals from being sued for publicly stating expressions that should rightfully be protected.

41. Now is an appropriate time for incremental change of this nature. Since this Court's decision in *WIC*, social media has increased the ability of individuals to broadcast their opinions on debates of the day and anti-SLAPP legislation has come into effect across the country, emphasizing growing concerns with meritless lawsuits brought to silence speech. In light of this, CCLA's submissions represent incremental and appropriate modifications to the common law.

PARTS IV & V - SUBMISSIONS ON COSTS AND ORDER SOUGHT

42. CCLA seeks no costs and asks that no costs be awarded against it.

43. The CCLA takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 13th DAY OF JULY, 2022

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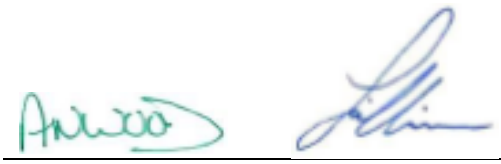

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