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**Malice, Motive and Honesty: Reforming the Canadian Fair Comment Defence**

Commenting on a draft version of the United Kingdom's *Defamation Act, 2013* (the "*Defamation Act*"), Deputy Prime Minister Nick Clegg proclaimed:

“These reforms will create libel laws that will be a foundation for free speech, instead of an international embarrassment. In a modern, liberal and open society dissent should be celebrated, and debate should be raucous. The press should be free – and in our society, they will be.”<sup>1</sup>

The Supreme Court of Canada, in considerably less charged language, has issued several judgments in the past decade designed to achieve similar goals.<sup>2</sup> Canadian provincial governments have also taken steps to bolster protections within defamation law for freedom of expression – albeit at a considerably slower pace.<sup>3</sup> However, despite (largely) shared agreement between the legal communities in Canada and the United Kingdom on the importance of robust public debate and a free press, our defamation laws differ in several respects from the *Defamation Act*'s provisions. Should Canadian courts and/or provincial legislatures follow the United Kingdom's lead and adopt similar reforms? Has the United Kingdom better addressed defamation law's core dilemma – optimally balancing freedom of expression with protection for reputation?

This paper examines these broad, inter-related questions as they relate to the *Defamation Act*'s statutory defence of fair comment (s. 3). Specifically, it argues for an intermediate position

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<sup>1</sup> Nick Clegg, “Comment is Free: We Will End The Libel Farce” *The Guardian* (15 March 2011).

<sup>2</sup> *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 [“*WIC Radio*”]; *Grant v. Torstar*, 2009 SCC 61 [“*Grant*”]; *Crookes v. Newton*, 2011 SCC 47.

<sup>3</sup> See Ontario's *Protection of Public Participation Act*, S.O. 2015, c.23 – Bill 52; Quebec's *Code of Civil Procedure*, R.S.Q. c. C-25, s. 54.1.

between s. 3 and the current Canadian fair comment defence with respect to the role of “malice”. Under Canadian defamation law, the fair comment defence is unavailable to a defendant who published her opinions for a predominantly malicious motive (the “**malice rule**”). “Malice” encompasses any “indirect or improper motive not connected with the purpose for which the defence [of fair comment] exists”.<sup>4</sup> By contrast, the s. 3 defence applies irrespective of a defendant’s motives for publication – but is entirely unavailable to a defendant who does not honestly believe the opinions she expressed.<sup>5</sup>

Canadian courts (and/or legislatures) should adopt an intermediate position between s. 3 and the current Canadian approach to fair comment, dispensing with unnecessary restrictions on freedom of expression under each defence. Proof of malice should no longer vitiate fair comment for honestly-held opinions. This reform would promote freedom of expression while maintaining robust protections for individual reputation, consistent with the Supreme Court’s guidance in *WIC Radio*.<sup>6</sup> It would also align Canadian defamation law with legislative and jurisprudential developments in other Commonwealth nations. Under the approach I envision, however, the fair comment defence and malice rule would still apply to opinions *not* honestly held by a defendant. While the *presence* of honest belief would preclude a finding of malice, the *absence* of honest belief would not be sufficient to constitute malice by itself. This approach differs from the s. 3 defence, which only extends to a defendant’s honestly held beliefs. Under my proposed test for fair comment, opinions not honestly believed by a defendant would lose eligibility only if they were made for an improper purpose unconnected to the purposes of the fair comment defence.

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<sup>4</sup> *WIC Radio*, *supra* note 2 at para. 1.

<sup>5</sup> *Defamation Act, 2013*, c.26 [“*Defamation Act*”], s.3(5).

<sup>6</sup> *WIC Radio*, *supra* note 2 at para. 2.

This paper proceeds in two parts. First, I provide a brief overview of Canadian defamation law, with a specific focus on the fair comment defence and the malice rule. I then outline and justify my proposed reforms, addressing objections to my position throughout.

## **Part I: Defamation Law, Fair Comment and the Malice Rule**

### A. Defamation Law

The tort of defamation operates as “the imperfect mechanism by which the law attempts to reconcile the competing interests of freedom of expression and the protection of individual reputation”.<sup>7</sup> It provides individuals with a “legal vehicle through which [they] may vindicate their personal and business reputation” by seeking civil damages against other persons who have spoken or published false statements about them.<sup>8</sup> However, defamation law also seeks to balance protection for reputation with other social values, chief among which are freedom of expression and freedom of the press. This balancing exercise permeates several aspects of modern defamation law – including the fair comment defence and the malice rule, as I discuss shortly.

To succeed in a defamation suit in Canada, plaintiffs must prove that the impugned statement(s) were published, referred to them, and would tend to lower their reputation in the eyes in the eyes of a reasonable person.<sup>9</sup> Once this test is satisfied, falsity and harm to reputation are presumed and the onus shifts to the defendant to establish a defence to defamation.<sup>10</sup> Canadian law recognizes several defences to defamation. Factually true statements qualify for the justification

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<sup>7</sup> Matthew Collins, *The Law of Defamation and the Internet*, 2<sup>nd</sup> Ed. (New York: Oxford University Press Inc., 2005) at 3.

<sup>8</sup> Raymond E. Brown, *Defamation Law: A Primer*, 1<sup>st</sup> Ed. (Toronto: Thomson Carswell, 2003) at 3 [“*Defamation Law: A Primer*, 1<sup>st</sup> Ed.”].

<sup>9</sup> *Grant*, *supra* note 2 at para. 28.

<sup>10</sup> *Grant*, *supra* note 2 at para. 28.

defence.<sup>11</sup> Statements made on certain “privileged” occasions may attract an absolute or qualified protection against liability for defamation.<sup>12</sup> Statements promoting the public interest that are published “responsibly” may be eligible for the defence of responsible communication.<sup>13</sup>

### B. The Fair Comment Defence

Most importantly for present purposes, the common law has long recognized a defence of “fair comment” on matters of public interest. Premised on the notion that “open and public discussion and comment on public issues is the very foundation of a free and responsible government”<sup>14</sup>, the defence seeks to encourage robust, “freewheeling debate” on political, social, economic and moral matters.<sup>15</sup> The fair comment defence therefore shares common aims with the broader constitutional right to freedom of expression guaranteed by the *Charter* – a point I develop further when justifying my proposed reforms to the malice rule.

### **The Canadian Fair Comment Defence**

The Canadian fair comment defence extends to statements of opinion:

- (a) on a matter of public interest;
- (b) based on an “sufficient substratum” of true facts;
- (c) recognizable as comment (though they can include inferences of fact);
- (d) that any man could honestly express on the proved facts; and
- (e) that are not predominantly motivated by malice<sup>16</sup>

### **The English Fair Comment Defence**

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<sup>11</sup> *Ibid* at paras. 32-33.

<sup>12</sup> *Ibid* at paras. 34-35.

<sup>13</sup> *Ibid* at para. 126.

<sup>14</sup> *Defamation Law: A Primer*, 1<sup>st</sup> Ed., *supra* note 8 at 169.

<sup>15</sup> *WIC Radio*, *supra* note 2 at para. 2.

<sup>16</sup> *WIC Radio*, *supra* note 2 at paras. 2, 28, 59.

Section 3 of the *Defamation Act* codifies the English defence of fair comment, now referred to as the “honest opinion” defence. The defence applies to statements of opinion:

- (3) indicating, whether in general or specific terms, the basis of the opinion; and
- (4) that could have been held by an honest person on the basis of
  - a. any fact which existed at the time the statement was published; or
  - b. anything asserted to be a fact in a privileged statement published before the statement complained of.<sup>17</sup>

The defence is defeated if the defendant did not hold the opinion in question – though the claimant bears the onus of proving the defendant’s dishonesty.<sup>18</sup> This condition does not apply where the defendant publishes a statement made by another person, unless the defendant knew or ought to have known that the author did not hold the opinion.<sup>19</sup>

### **Differences Between the Canadian and English Fair Comment Defences**

The English honest opinion defence differs in several respects from its Canadian counterpart. First, s. 3 does not require a defendant’s statement to address a matter of public interest. Second, s. 3 allows a defendant to indicate, in *general or specific* terms, the basis of their opinion. This standard is more permissive than the Canadian approach, which requires defendants to establish a “sufficient substratum of facts” to support their opinion.<sup>20</sup> A general description may meet this standard in *some* circumstances – for example, where the dispute in question is well-known to the publisher’s audience.<sup>21</sup> Other circumstances, however, may require a more specific description of the facts on which an opinion is based.<sup>22</sup>

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<sup>17</sup> *Defamation Act*, *supra* note 4 at s.3(3), 3(4).

<sup>18</sup> *Ibid* at s.3(5).

<sup>19</sup> *Ibid* at s.3(6).

<sup>20</sup> *WIC Radio*, *supra* note 2 at para. 59.

<sup>21</sup> *Ibid*.

<sup>22</sup> *Mainstream Canada v. Staniford*, 2013 BCCA 341 at paras. 39-48.

Third, a defendant can satisfy the s. 3 test on the basis of *any fact which existed at the time the statement was published*, even if the defendant did not provide those particular facts as the basis for their opinion.<sup>23</sup> The Canadian fair comment defence, by contrast, considers the adequacy of supporting facts provided by the *defendant*<sup>24</sup>, not facts generally in existence when the comment was made. Fourth, the s. 3 defence is restricted to a defendant's honestly held opinions. The Supreme Court of Canada rejected this approach in *WIC Radio*.<sup>25</sup> The Canadian fair comment test employs a standard of "objective honest belief"<sup>26</sup>, though proof of subjective malice can still defeat the defence.<sup>27</sup> Finally, contrary to the Canadian approach, a defendant's motives for publishing honestly held opinions are irrelevant to the s. 3 defence – a point I consider further in my discussion of the malice rule below.

### C. The Malice Rule

The "malice rule" deems statements of opinion ineligible for the fair comment defence if they are published for a predominantly malicious purpose. "Malice" encompasses any "indirect or improper motive not connected with the purpose for which the defence [of fair comment] exists".<sup>28</sup> Examples of such motives include spite or ill-will towards the plaintiff, the pursuit of personal profit, and acting with reckless disregard for the truth.<sup>29</sup> Malice is determined by examining the "state of mind and motives of the defendant at the time of publication".<sup>30</sup> The

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<sup>23</sup> *Defamation Act*, *supra* note 4 at s.3(4)(a)

<sup>24</sup> *WIC Radio*, *supra* note 2 at para. 34.

<sup>25</sup> *Ibid* at paras. 35, 43.

<sup>26</sup> *Ibid* at paras. 46-48.

<sup>27</sup> *Ibid* at para. 1.

<sup>28</sup> *WIC Radio*, *supra* note 2 at para. 1

<sup>29</sup> *Smith v. Cross*, 2009 BCCA 529 at para. 34.

<sup>30</sup> *Defamation Law: A Primer*, 1<sup>st</sup> ed. at 188.

malicious purpose must be the defendant's *dominant* motive for publishing the impugned statements.<sup>31</sup>

The Supreme Court of Canada summarized the malice rule as follows in *Hill v Church of Scientology*:

“Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in *Cherneskey*... "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”.<sup>32</sup>

As mentioned above, the malice rule no longer applies under s. 3 of the UK's *Defamation Act* – though the defence only extends to opinions honestly believed by the defendant. This statutory reform consolidated earlier developments by English courts which restricted application of the malice rule to a defendant's honestly held beliefs.<sup>33</sup>

The malice rule stems from a line of jurisprudence that viewed fair comment as a branch of the qualified privilege defence.<sup>34</sup> Qualified privilege attaches to specific circumstances “when there is a need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source”.<sup>35</sup> The defence of qualified privilege does not extend to defendants predominantly motivated by malice.<sup>36</sup> Thus, on the traditional account, malice also defeated a fair comment defence. Courts have gradually recognized, however, that the fair comment and qualified privilege defences serve “different

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<sup>31</sup> *Creative Salmon Co. v. Staniford*, 2009 BCCA 61, leave to appeal ref'd, 2009 CarswellBC 1700 (“*Creative Salmon*”) at para. 42.

<sup>32</sup> *Hill v. Church of Scientology*, [1995] 2 SCR 1130 at para 145, internal cites omitted.

<sup>33</sup> *Albert Cheng and Another v Tse Wai Chun Paul*, [2000] HKFCA 35 [“*Tse Wai*”] per Lord Nicholls. See notes 76-78 for further examples.

<sup>34</sup> *Ibid* at paras. 57-59; *Brown on Defamation* vol. 5, 2<sup>nd</sup> ed. (Toronto: Thomson Reuters, 2016) at ss. 15-7 [“*Brown on Defamation*”]; *Branson v. Bower*, [2001] EWHC 460 (QB) at para. 18 [“*Branson*”].

<sup>35</sup> *Tse Wai*, *supra* note 32 at para. 55.

<sup>36</sup> *Botiuk v. Toronto Free Press Publications*, [1995] 3 SCR 3 at para. 79.

public policy imperatives”.<sup>37</sup> Fair comment is now generally viewed as a “right enjoyed equally by all members of the public, while a qualified privilege can be exercised only by those who have or are serving an interest protected by [an] occasion”.<sup>38</sup> As I argue below, our growing appreciation of the link between fair comment and freedom of expression suggests that we should reconsider the continued application of the malice rule to a defendant’s honestly held beliefs.

## **Part II: Reforming the Malice Rule**

The English and Canadian fair comment defences both contain unnecessary limits on freedom of expression. Canadian legislatures should adopt a hybrid model that dispenses with those restrictions. They should follow the United Kingdom’s lead in shielding a defendant’s honestly held beliefs from application of the malice rule. Honestly held beliefs should qualify for fair comment if they satisfy the first four elements of the *WIC Radio* test.<sup>39</sup> However, contrary to the provisions of s. 3, the Canadian fair comment defence and the malice rule should continue to apply to opinions *not* honestly believed by the defendant. Lack of honest belief should not constitute malice by itself.<sup>40</sup> Plaintiffs should also need to show – as they currently do in Canada – that the defendant acted for an “indirect or improper motive” unconnected to the purposes of fair comment. This approach provides optimal protection for freedom of expression while maintaining strong safeguards for individual reputation. It also comports with legislative and jurisprudential developments in other Commonwealth nations.

### **A. The Principled Argument For Reforming the Malice Rule**

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<sup>37</sup> *Branson*, *supra* note 33 at para. 18.

<sup>38</sup> *Brown on Defamation*, *supra* note 33 at ss. 15.

<sup>39</sup> See p. 4-5.

<sup>40</sup> *Ibid* at para. 102 *per* Lebel J. (dissenting, but not on this point); *Creative Salmon*, *supra* note 30 at paras. 33-34.



The malice rule, as it currently stands, unduly restricts expression falling squarely within the purpose of the fair comment defence and is unnecessary to provide robust protection for reputation. My proposed approach strikes a more appropriate balance between both *Charter* values, consistent with the Supreme Court’s guidance in *WIC Radio*.<sup>41</sup>

### **The Malice Rule Unduly Restricts Freedom of Expression**

Statements of opinion with the potential to spur debate on matters of public interest – fair comment’s core purpose – should be encouraged, not punished. The malice rule, however, opens such statements up to civil damage awards, “chilling” freedom of expression and undermining the values underpinning that constitutional guarantee.

#### *i. Fair Comment and Freedom of Expression: Common Purposes*

Freedom of expression is “among the most fundamental rights” protected by liberal democracies.<sup>42</sup> It has been recognized by multiple jurists as “the matrix, the indispensable condition, of nearly every other form of freedom”.<sup>43</sup> Most liberal constitutions offer protection for freedom of expression. Those protections safeguard the rights of individuals to express themselves in the manner of their choosing, as well as their ability to access expressive content produced by others.<sup>44</sup> Canadian courts interpret the *Charter*’s guarantee of freedom of expression in a “large and liberal” fashion.<sup>45</sup>

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<sup>41</sup> *WIC Radio*, *supra* note 2 at para. 2.

<sup>42</sup> *R v. Sharpe*, 2001 SCC 2 at para. 21.

<sup>43</sup> *Palko v Connecticut*, 302 US 316 (1937); *Ibid* at para. 23.

<sup>44</sup> *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 SCR 1326 at 1339-1340.

<sup>45</sup> See for example *Ford v Quebec (AG)*, [1988] 2 SCR 712 at para 59; Eric Barendt, *Freedom of Speech* (New York: Oxford University Press, 2007) at 65.

The defence of fair comment, in turn, gives “substance to the principle of freedom of [expression]” in defamation law.<sup>46</sup> Courts have long recognized the crucial link between fair comment and freedom of expression. In *Slim v Daily Telegraph Ltd.*, Lord Denning M.R. observed that the defence of fair comment is “one of the essential elements which go to make up our freedom of speech” and “must not be whittled down by legal refinements”.<sup>47</sup> Justice Binnie re-iterated the link between fair comment and freedom of expression in *WIC Radio*.<sup>48</sup> Summarizing the elements of the fair comment defence for a jury in *Silkin v Beaverbrook Newspapers Ltd.*, Lord Diplock stated:

“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?”<sup>49</sup>

Given the intimate connection between the defence of fair comment and the *Charter* right to freedom of expression, it is appropriate that they should share common purposes. In *Keegstra*, the Supreme Court outlined three purposes animating the *Charter* right to freedom of expression: promoting democratic self-governance, facilitating the search for the truth, and fostering individual self-fulfillment.<sup>50</sup> Those goals – and in particular, the first two - also animate the fair comment defence. The Supreme Court of Canada, after all, has emphasized that developments in

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<sup>46</sup> *Cherneskey v. Armdale Publishers Ltd.*, [1979] 1 S.C.R. 1067 at 1095, *per* Dickson J. (dissenting). See also: *WIC Radio*, *supra* note 2 at para. 35; *R v. Keegstra*, [1990] 3 S.C.R. 697 at para. 27.

<sup>47</sup> [1968] 1 All ER 497 at 503.

<sup>48</sup> *WIC Radio*, *supra* note 2 at paras. 15, 79. See also *Leenen v Canadian Broadcasting Corp* 2000 48 OR (3d) 656 at para. 122.

<sup>49</sup> [1958] 1 WLR 743 at 747.

the law of fair comment must be informed and guided by *Charter* values.<sup>50</sup> The Court explicitly acknowledged the link between the *Keegstra* principles and libel defences in *Grant v Torstar*:

“The first rationale, the proper functioning of democratic governance, has profound resonance in this context. As held in *Simpson*, freewheeling debate on matters of public interest is to be encouraged, and must not be thwarted by "overly solicitous regard for personal reputation"... The second rationale — getting at the truth — is also engaged by the debate before us. Fear of being sued for libel may prevent the publication of information about matters of public interest. The public may never learn the full truth on the matter at hand”.<sup>51</sup>

McLachlin C.J.’s comments, addressing the newly-minted defence of responsible communication, apply with equal force to the fair comment defence. Fair comment promotes democratic self-governance by encouraging “freewheeling debate of matters of public interest”.<sup>52</sup> Those debates can, in turn, facilitate the search for the truth by engaging the public’s interest in important issues and providing them access to diverse arguments and perspectives.

ii. *The Malice Rule and Freedom of Expression: Undue Restriction*

The malice rule, however, imposes liability on comments that promote fair comment’s purposes. An opinion, otherwise eligible for fair comment, is no less likely to spur debate and discussion because it was “maliciously” published. The public will very rarely be alive to a writer’s motives for publishing a comment. They are far more likely to engage with and be influenced by the comment’s *substance*. The value in controversial comments – namely, their ability to promote democratic self-governance and the search for the truth – stems from their content, not their authors’ motives. Lord Nicholls illustrated this principle in *Tse Wai*:

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<sup>50</sup> *WIC Radio*, *supra* note 2 at para. 2.

<sup>51</sup> *Grant*, *supra* note 2 at paras. 52, 54.

<sup>52</sup> *Grant*, *supra* note 2 at para. 41.

“Take the case of a politician or a journalist who genuinely believes that a minister is untrustworthy and not fit to hold ministerial office. Facts exist from which an honest person could form that view. The politician or journalist states his view, with the intention of injuring the minister. His reason for doing so was a private grudge, derived from a past insult, actual or supposed. I am far from persuaded that the law should give the minister a remedy”.<sup>53</sup>

Other scenarios – based on modifications to Canadian cases - are readily imaginable. An Aboriginal band member, harboring considerable animus towards his band’s chief councillor, may criticize potentially self-serving activities of that councillor solely to “challenge and undermine his authority”.<sup>54</sup> A civil rights activist with a history of personal animosity against a police officer may label that officer “racist” for strip searching three female African-Canadian twelve-year olds.<sup>55</sup> A political commentator may call the head of a prominent private organization “anti-Semitic” for suggesting that all adult Israelis are legitimate targets for violence.<sup>56</sup> A radio host harboring a personal vendetta against an extremist politician may accuse that politician of “bigotry”.<sup>57</sup> A gay blogger may criticize a religious official to “de-normalize” organized religion.<sup>58</sup>

The defendants in each of those cases may be motivated solely by spite or ill-will. Their comments nonetheless fall squarely within the purpose of fair comment. Moreover, their spite or ill-will may be entirely understandable, perhaps even stemming from the plaintiff’s past corrupt, racist or homophobic conduct. Distinguishing between truly “proper” and “improper” motives is a vexing task – and one irrelevant to the purposes fair comment seeks to promote. Indeed, the

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<sup>53</sup> *Tse Wai*, *supra* note 32 at para. 48.

<sup>54</sup> *Wilson v Switlo*, 2011 BCSC 1287 at paras. 2, 15-25, 30, 33-35, 482.

<sup>55</sup> *Campbell v. Jones*, 2002 NSCA 128 at paras. 1-8.

<sup>56</sup> *Awan v Levant*, 2014 ONSC 6890 at para. 52.

<sup>57</sup> *WIC Radio*, *supra* note 2 at paras. 3, 7.

<sup>58</sup> *Vigna v Levant*, 2010 ONSC 6308 at paras. 1-4. 131.

Supreme Court has already warned against employing vague qualitative standards within the fair comment defence. In *WIC Radio*, Binnie J. noted:

“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"”.<sup>59</sup>

Justice Binnie’s remarks address the “honest belief” test for evaluating a comment’s *substance*. His logic, however, applies equally to the *motives* underpinning a comment’s publication. Judges, guided by an ill-defined line of “malice”, should not exclude honestly held opinions published for “improper” motives from the fair comment defence. As Lord Nicholls stated in *Tse Wai*:

“The purpose and importance of the defence of fair comment are inconsistent with its scope being restricted to comments made for particular reasons or particular purposes, some being regarded as proper, others not...[n]or is it for the courts to choose between 'public' and 'private' purposes, or between purposes they regard as morally or socially or politically desirable and those they regard as undesirable. That would be a highly dangerous course. That way lies censorship. That would defeat the purpose for which the law accords the defence of freedom to make comments on matters of public interest”.<sup>60</sup>

The Supreme Court has also recognized that comments can spur public debate regardless of their author’s state of mind. In *WIC Radio*, Binnie J. acknowledged that it was not “in the public interest “to deny the [fair comment] 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

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<sup>59</sup> *WIC Radio*, *supra* note 2 at para. 28, emphasis added.

<sup>60</sup> *Tse Wai*, *supra* note 32 at para. 42.

matter of public interest.”<sup>61</sup> Similarly, it is not in the public interest to deny the fair comment defence to opinions published for an “ulterior” motive, but which are honestly-believed and contribute to debate on a matter of public interest. Such statements fall within the purpose of the fair comment defence, irrespective of the motives for which they are published. Exposing their authors to civil liability chills freewheeling debate and diminishes the diversity of viewpoints available to the public – outcomes antithetical to the objectives underlying the fair comment defence. As Professor Brown eloquently notes:

“Freedom of expression thrives on a diversity of views. It is important to us as a society to know the freely expressed secret thoughts and opinions of our citizens so that they can be confronted and, if necessary, corrected. To the extent that the law condemns the citizen for his or her candour in expressing an opinion on facts to which we are all privy, the fundamental discourse of our society is disadvantaged”.<sup>62</sup>

### **The Malice Rule’s Benefits for Protection of Reputation Do Not Outweigh Its Negative Impacts on Freedom of Expression**

Justice Lebel, dissenting in *WIC Radio*, noted that “the protection of reputation may justify judging the motive for expressing [an opinion]”.<sup>63</sup> The current malice rule, however, is not necessary to provide robust protection for reputation, for two reasons.

**First**, the four other prongs of the *WIC Radio* test provide meaningful protection for reputation. Statements clearly recognizable as comment and based on accurate facts have generally been considered less harmful to reputation than defamatory statements of fact.<sup>64</sup> As Professor Brown notes, “by reciting the facts upon which the opinion is based”, the defendant allows readers or

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<sup>61</sup> *WIC Radio*, *supra* note 2 at para. 50. My insertion is in square brackets.

<sup>62</sup> *Defamation Law: A Primer*, 1<sup>st</sup> Ed. at 185.

<sup>63</sup> *WIC Radio*, *supra* note 2 at para. 106.

<sup>64</sup> *WIC Radio*, *supra* note 2 at paras. 71-74 *per* Lebel J. (dissenting); Raymond E. Brown, *Defamation Law: A Primer*, 2<sup>nd</sup> ed. (Toronto: Thomson Reuters, 2013) at 290-291 (“Defamation Law: A Primer, 2<sup>nd</sup> ed.”).

listeners to “judge for themselves the extent to which the opinion is well founded”.<sup>65</sup> Statements of opinion recognizable as comment therefore say little about the plaintiff that “does not already inhere in the [true] facts that have been recited”.<sup>66</sup>

The “public interest” requirement provides further protection for plaintiffs against attacks directed at their private affairs.<sup>67</sup> Statements addressing matters of public interest engage stronger freedom of expression interests and therefore justify greater potential harm to individual reputation. Attacks on a plaintiff’s private affairs, by contrast, fall farther from freedom of expression’s core purposes. Excluding such statements from the fair comment defence reflects a basic principle: fair comment excuses defendants for making defamatory statements, not for the defendants’ own benefit, but for the *public*’s. When the public interest is not engaged, that protection is less justifiable. Accordingly, my proposed approach continues to provide plaintiffs with recourse against defendants who falsely comment on their private affairs.

The objective honest belief requirement provides additional safeguards against spiteful defendants. By demonstrating sincere belief in their own defamatory comments, defendants can prove that “any man” could have expressed those views – as Justice Binnie noted in *WIC Radio*, “the existence of a thing is absolute proof of its possibility”.<sup>68</sup> Defendants primarily motivated by spite or ill-will, however, will struggle to demonstrate their sincerity and therefore lose access to a reliable means of proving objective honest belief.

**Second**, the malice rule’s continued application to dishonest defendants provides significant protection for reputation. The most worrying scenarios captured by the malice rule – for

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<sup>65</sup> *Brown on Defamation* at ss. 15-45.

<sup>66</sup> *Defamation Law: A Primer*, 1<sup>st</sup> Ed. at 185.

<sup>67</sup> See for example: *McLoughlin v Kutasy*, [1979] 2 S.C.R. 311 at 321; 2964376 *Canada Inc. (Ameublement Prestige Furniture) v. Bisailon*, 2012 ONSC 3113 at paras. 33-36; *Veneruzzo et. al v. Storey*, 2017 ONSC 683 at paras. 30-32, 36.

<sup>68</sup> *WIC Radio*, *supra* note 2 at para. 44.

example, spiteful defendants levying accusations of criminal activity<sup>69</sup>, negligence<sup>70</sup> and incompetence<sup>71</sup> - often involve insincere defendants.<sup>72</sup> My proposed test provides plaintiffs with considerable protection in such circumstances. In doing so, it maintains an appropriate balance between protection for reputation and freedom of expression. Defendants seeking to abuse the protections of fair comment by publishing false, defamatory and insincere opinions will continue to face liability under my approach. However, defendants expressing their sincerely-held views, but who may have an ulterior social or personal purpose for publication, will enjoy wider latitude to comment on matters of public interest.

This development should be welcomed. Individuals are driven to comment on matters of public interest for a variety of reasons. Some desire greater public attention. Others may genuinely wish to influence public opinion against an individual or an organization. These motivations may stem from a sincere desire to improve society. They may also stem from deep seated animosity. All these motives may be entirely appropriate, given the facts of a particular case. As Lord Nicholls noted in *Tse Wai*:

“Especially in the social and political fields, those who make public comments usually have some objective of their own in mind, even if it is only to publicise and advance themselves... They may hope to achieve some result, such as promoting one cause or defeating another, elevating one person or denigrating another. In making their comments they do not act dispassionately, they do not intend merely to convey information. They have other motives. The presence of these motives... is not a reason for excluding the defence of fair comment. The existence of motives such as these when expressing an opinion does not mean that the defence of fair comment is being misused”.<sup>73</sup>

## B. The Jurisprudential Argument For Reforming the Malice Rule

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<sup>69</sup> *Mann v. I.A.M.A.W.*, 2012 BCSC 181 at para. 80 [“*Mann*”].

<sup>70</sup> *Hiltz and Seamone Co. v. Nova Scotia (A.G.)*, 1997 NSJ No. 530 (S.C.) at paras. 1, 117 [“*Hiltz*”].

<sup>71</sup> *A.T.U v. I.C.T.U.*, 49 Alta LR (3d) 1 (QB) at para. 36.

<sup>72</sup> *Ibid* at para. 31; *Hiltz*, *supra* note 70 at para. 81; *Mann*, *supra* note 69 at para. 113.

<sup>73</sup> *Tse Wai*, *supra* note 32 at para. 42.



Courts and legislatures in the United Kingdom, New Zealand and Australia have shielded honestly-held opinions from the malice rule. Similar reforms should be introduced in Canada.

### **United Kingdom**

As outlined earlier, honestly-held opinions do not lose their eligibility for the fair comment defence under the *Defamation Act, 2013* because of their authors' motives for publication.<sup>74</sup> This development codified earlier reforms introduced by English courts and jurists. *Tse Wai*, a judgment delivered by Lord Nicholls for the Hong Kong Court of Appeal, reshaped malice's role within the English fair comment defence. Lord Nicholls held that the malice rule does not apply to a defendant's honestly-held opinions.<sup>75</sup> The House of Lords endorsed his approach in *Panday v Gordon*<sup>76</sup> and *Spiller v. Joseph*.<sup>77</sup> English lower courts have also followed *Tse Wai* in adjudicating fair comment defences.<sup>78</sup> Scottish courts have gone further and abolished the malice rule outright.<sup>79</sup>

### **New Zealand**

New Zealand's malice rule is structured similarly to Lord Nicholl's approach in *Tse Wai*.<sup>80</sup> New Zealand's *Defamation Act, 1992* codifies the defence of fair comment.<sup>81</sup> The defence applies to a defendant's genuinely-held beliefs, irrespective of motive for publication. While evidence of malice may undermine a defendant's claim of genuine belief, it plays no further role in a fair comment analysis.<sup>82</sup>

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<sup>74</sup> *Defamation Act*, *supra* note 4 at s.3.

<sup>75</sup> *Tse Wai*, *supra* note 32 at para. 75.

<sup>76</sup> 2004 UKPC 36 at para. 12.

<sup>77</sup> [2010] UKSC 53 at paras. 66-68.

<sup>78</sup> *Branson*, *supra* note 33 at para. 11; *Yeo v. Times Newspapers Ltd.* [2015] EWHC 209 (QB) at paras. 26-27.

<sup>79</sup> *Massie v. McCaig & Others*, [2013] CSIH 14 at para. 32.

<sup>80</sup> Bevan Maten, "A Fairly Genuine Comment on Honest Opinion in New Zealand" (2005) 36 VUWLR 127 at 144.

<sup>81</sup> *Defamation Act, 1992*, s.9.

<sup>82</sup> *Ibid*, s.10(3).

## Australia

Australia's Uniform Defamation Laws also include statutory fair comment defences that protect honestly-held opinions from application of the malice rule.<sup>83</sup> Moreover, several Australian courts have endorsed Lord Nicholls' reasoning in *Tse Wai*.<sup>84</sup> Forrest J.'s remarks on this point in *French v Triple M* are particularly apposite:

“Someone can intensely dislike another person but still honestly believe the comments that he or she makes. The defence of fair comment should remain open to that person. On the other hand, if the statement is coloured only by spite or ill-will with no accompanying honest belief then the defence should be lost. In my view, Lord Nicholls' analysis should be accepted”.<sup>85</sup>

Law Commissions in England<sup>86</sup>, Ireland<sup>87</sup>, and New South Wales<sup>88</sup> have also criticized and/or supported reforming the malice rule, as have several defamation law scholars.<sup>89</sup>

## Canada

My proposed approach is not foreclosed by the Supreme Court's jurisprudence on fair comment.

In *WIC Radio*, Binnie J. noted:

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<sup>83</sup> See for example: *NSW Defamation Act, 2005*, pt. 4, Div 2, s.31; *SA Defamation Act, 2005*, pt. 4, Div 2, s.29; *Tasmania Defamation Act, 2005*, pt. 4, Div 2, s.29.

<sup>84</sup> *Brett May v. TCN Channel Nine Pty Ltd & Others*, [2007] NSWSC 760 at paras. 27-32; *French v. Triple M Melbourne Pty Ltd. & Others*, [2008] VSC 553 at paras. 18-20 [*French v Triple M*]; *Williams v Katis*, [2014] VSC 405 at para. 19.

<sup>85</sup> *French v. Triple M*, *supra* note 84 at para. 20.

<sup>86</sup> The Honorable Justice Faulks et. al. *Report of the Committee on Defamation* (London: 1975) at 40-41.

<sup>87</sup> Law Reform Commission of Ireland, *Report on the Civil Law of Defamation* (Dublin: 1991) at ch.6.4.

<sup>88</sup> New South Wales Law Reform Commission, *Report on Defamation* (Sydney: 1971) at paras. 205-206.

<sup>89</sup> *Brown on Defamation*, *supra* note 33 at ss. 15-3, 15-4; R. F.V. Heuston & R.A. Buckley, *Salmond and Heuston on the Law of Torts*, 20<sup>th</sup> ed. (London: Sweet & Maxwell Ltd., 1992) at 184; Jill Cottrell, “Fair Comment, Judges and Politics in Hong Kong” (2003) 27 *Melb. U. LR* 33 at 47-55; W. Page Keeton, “Defamation and Freedom of the Press” 54 *Texas LR* 1221 at 1235 (“evaluative opinions [should not be] actionable”).

“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”.<sup>90</sup>

Under my proposed test – and consistent with Binnie J.’s remarks – a defendant relying on *objective* honest belief (i.e., a defendant who lacks subjective belief in her own remarks, but is able to show that “any man” could have expressed them) will be ineligible for fair comment if the plaintiff establishes malice. A defendant who establishes *subjective* honest belief, however, will qualify for the fair comment defence upon satisfying the first four prongs of the *WIC Radio* test. This development represents an incremental, but important change to Canadian defamation law, consistent with the Supreme Court’s guidance in *Salituro*.<sup>91</sup>

### C. Maintaining the “Objective Honest Belief” Requirement

While s. 3’s approach to the malice rule marks a welcome development, Canadian courts/legislatures should not adopt the provision’s subjective test for honest belief. Section 3(3) of the *Defamation Act* states that the honest opinion defence is defeated if the defendant did not subjectively believe the opinion in question.<sup>92</sup> By contrast, the current Canadian fair comment defence employs an *objective* honest belief test. The inquiry under an objective test is not whether the specific defendant before the court believed the impugned statements, but whether “any man” could have honestly expressed the opinions therein.

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<sup>90</sup> *WIC Radio*, *supra* note 2 at para. 53, emphasis in original.

<sup>91</sup> *R v. Salituro*, [1991] 3 S.C.R. 654 at para. 37. This argument addresses the possibility of my proposed reforms being introduced by the judiciary. These factors (consistency with *WIC Radio*, incrementally changing the common law) would be far less relevant in the context of legislative reform.

<sup>92</sup> I should note that defendants who publish opinions they do not personally believe may succeed in establishing a defence under section 4 of the *Defamation Act* (“Publication on a matter of public interest”). To do so, however, they must establish the more onerous standard of “responsible” publication.

The objective honest belief test should be maintained. It provides greater protection for freedom of expression by allowing individuals to publish “devil’s advocacy” pieces that spur critical public debate on matters of public interest.<sup>93</sup> The objective approach also better guards against “libel chill”.<sup>94</sup> Under an objective test, defendants need not contemplate every possible imputation of their statements/articles prior to publication. Defendants and courts often disagree about the meaning(s) conveyed by potentially defamatory comments. In such situations, a subjective test may inappropriately deprive defendants of fair comment’s protections for publishing material containing defamatory meanings that they never intended to convey.

The facts of *WIC Radio* provide a useful illustration. The defendant, a “shock jock” radio host, broadcast an editorial criticizing the plaintiff for her views towards the introduction of materials in public schools dealing with homosexuality.<sup>95</sup> The editorial compared the plaintiff to Hitler and Governor Wallace of Alabama, though it explicitly stated that the defendant was “not suggesting that [the plaintiff] was proposing or suggesting any kind of holocaust or violence”.<sup>96</sup> The British Columbia Supreme Court nonetheless concluded that the article conveyed, among other things, that the plaintiff would “condone violence towards gay people”.<sup>97</sup> The defendant, however, had testified at trial that he did not believe the plaintiff would actually condone such violence.<sup>98</sup>

Other public statements by the defendant also suggested that he did not believe the plaintiff was a “violent person”.<sup>99</sup> Relying on this evidence, the British Columbia Court of Appeal held that

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<sup>93</sup> *WIC Radio*, *supra* note 2 at para. 50.

<sup>94</sup> *Grant*, *supra* note 2 at para. 2.

<sup>95</sup> *WIC Radio*, *supra* note 2 at para. 3.

<sup>96</sup> *Ibid.*

<sup>97</sup> *WIC Radio*, *supra* note 2 at para. 10.

<sup>98</sup> *Ibid* at para. 9.

<sup>99</sup> *Ibid* at para. 35.

the fair comment defence was unavailable, as the defendant had not established honest belief in the impugned statements.<sup>100</sup>

The Supreme Court of Canada reversed the Court of Appeal's decision. Justice Binnie's comments on the difficulties with the subjective honest belief test are particularly apposite:

“It seems to me that 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”.<sup>101</sup>

The Court's reasons for adopting an objective honest belief test remains sound. Defendants should not be required to contemplate and honestly believe all possible imputations of a comment on a matter of public interest. Skilfully written pieces of devil's advocacy should not be deterred by the prospect of defamation suits. The objective test better addresses these problems - and the chilling effects on freedom of expression that accompany them.

### **Conclusion**

The Supreme Court of Canada has taken several laudable steps over the past decade to liberalize Canadian defamation law and broaden the protections afforded by the fair comment defence. That project, however, remains unfinished. The malice rule, as currently formulated, unduly limits the scope of the Canadian fair comment defence. It inappropriately restricts expression falling squarely within the purposes of fair comment and is unnecessary to provide robust protection for reputation. The Canadian malice rule is also out of step with legislative and jurisprudential developments in other Commonwealth nations. Accordingly, Canadian courts and legislatures should follow the United Kingdom's lead and prohibit the application of the malice

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<sup>100</sup> *Ibid* at para. 13.

<sup>101</sup> *Ibid* at para. 35.

rule to a defendant's honestly held opinions. They should ensure, however, that the malice rule and the fair comment defence continue to apply to opinions that a defendant does *not* honestly believe – contrary to the approach adopted under s. 3 of the United Kingdom's *Defamation Act*. My proposed approach dispenses with unnecessary restrictions on freedom of expression under both Canadian and English law, facilitating “freewheeling [public] debate” and better aligning the fair comment defence with constitutional values. In doing so, my proposed reforms promote the rights of all Canadians – moderate and controversial, objective and opinionated, admired and abhorred – to comment freely and frankly on matters of public interest.