File Number: 39796

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

BETWEEN:

GLEN HANSMAN

Appellant
(Respondent)

AND:

BARRY NEUFELD

Respondent
(Appellant)

APPELLANT'S FACTUM

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. On March 25, 2019, the *Protection of Public Participation Act* came into force in British Columbia.[1] The *PPPA* introduced a new pre-trial screening mechanism for proceedings that arise from an expression that "relates to a matter of public interest". The *PPPA* requires the court to dismiss the proceeding unless the plaintiff satisfies the court of certain criteria, namely that: (i) the proceeding has substantial merit; (ii) the defendant has no valid defence; and (iii) the plaintiff will suffer harm "serious enough that the public interest in continuing the expression outweighs the public interest in protecting that expression".

2. The appellant, Glen Hansman ("Hansman"), is a gay man and teacher. At the time of the events giving rise to this litigation, he was the President of the British Columbia Teachers' Federation ("BCTF"), the union representing approximately 45,000 teachers and associated professionals in British Columbia.

3. The respondent, Barry Neufeld ("Neufeld"), is an elected public school board trustee in the Chilliwack School District in British Columbia. Neufeld launched a barrage of public statements attacking lesbian, gay, bisexual, transgender and queer ("LGBTQ") individuals and the use of educational resources designed to increase inclusivity in schools and teach students, in an age-appropriate way, about sexual orientation and gender identity. Neufeld's statements were extreme, using words such as "evil ideology", "eugenics" and "destruction of humanity", mixed with denunciation of same sex marriage and same sex parenting. This led to a number of people in the education field criticizing Neufeld's statements, including Hansman. Neufeld's continued statements lead to further criticism and to the BCTF filing a human rights complaint against him. Neufeld brought a defamation action and declared his intention to bring Hansman "DOWN".

4. The British Columbia Supreme Court dismissed Neufeld's defamation action under the *PPPA*. The court found Neufeld failed to discharge his burden of establishing that Hansman's defence of fair comment was not valid. If it was wrong in that conclusion, the court said it would dismiss the action because Neufeld failed to discharge his burden of showing harm "serious enough that the public interest in continuing the proceeding outweighs the public interest in

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[1] *Protection of Public Participation Act*, S.B.C. 2019, c. 3 ["*PPPA*"].

protecting that expression." The court found Neufeld presented "precious little evidence" of harm while Hansman's expressions "deserve significant protection."

5. The Court of Appeal allowed Neufeld's appeal. It concluded the chambers judge had erred in his approach to the fair comment defence and to the weighing of the competing public interests. However, the Court of Appeal did not reweigh the relevant factors in the case itself. It simply allowed the appeal and reinstated the defamation action. Incredibly, it did not even mention that Hansman's expressions were directed at protecting and promoting the equality of one of the most vulnerable groups in society, transgender individuals.

6. The Court of Appeal erred in overturning the decision of the chambers judge. This is a textbook example of a case that is properly dismissed under the *PPPA*. Hansman has a strong fair comment defence, Neufeld has not established the likelihood of significant harm if the action does not proceed, and the public interest in protecting Hansman's expressions – which were in response to an attack on LBGTQ persons and those who support the use of materials designed to help make schools inclusive for students of all sexual orientations and gender identities – is high. This Court should allow the appeal and reinstate the dismissal of Neufeld's proceeding.

B. Background and SOGI

7. Since 1992, sexual orientation has been a prohibited ground of discrimination under British Columbia's *Human Rights Code*.[2] A prohibition against discrimination on the basis of "gender identity or expression" was expressly added in 2016.[3] Prior to 2016, discrimination on the basis of gender identity or expression was addressed under the ground of sex.[4]

8. A Ministerial Order in British Columbia requires school boards to establish student codes of conduct that address issues related to discrimination, acceptable and unacceptable behaviour, and "safe, caring and orderly school environments."[5] Shortly after the 2016 change to the *Human*

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[2] *Human Rights Code*, R.S.B.C. 1996, c. 210.
[3] Reasons for Judgment of the Supreme Court of British Columbia, Appellant's Record ("AR") Vol. I at 1 ("BCSC Reasons") at para. 14.
[4] Affidavit # 1 of Glen Hansman affirmed April 17, 2019 ("Hansman Affidavit") at para. 6, AR Vol. II at 63; *Vancouver Rape Relief Society v Nixon*, 2005 BCCA 601; *XY v Ontario (Minister of Government and Consumer Services)*, 2012 HRTO 726.
[5] Exhibit A to Hansman Affidavit, AR Vol. II at 75-76.

Rights Code, the Ministry of Education issued an updated Order that required school boards to include a reference to "gender identity and expression" in the student codes of conduct.[6]

9. The term SOGI stands for Sexual Orientation and Gender Identity.[7] SOGI 123 is a collaboration involving British Columbia's Ministry of Education, the Faculty of Education at the University of British Columbia, the ARC Foundation, the BCTF and community organisations representing LGBTQ persons. The purpose is to share SOGI-inclusive tools and resources in three areas: the development of policies and procedures, the creation of inclusive environments, and the sharing of curriculum resources for educators.[8] This is intended to help "educators make schools inclusive and safe for students of all sexual orientations and gender identities".[9] SOGI 123 materials were drafted to be age-appropriate tools for teaching about sexual orientation and gender identity and can be used in many subject areas.[10]

10. Teachers are required by the *Human Rights Code*, *School Act* and associated regulations, and the *Teachers Act* and associated standards, to deliver an inclusive curriculum for all students in a safe school environment.[11] The *School Act* also requires that all public schools "must be conducted on strictly secular and non-sectarian principles".[12]

C. The First Facebook Post

11. Neufeld's public statements reveal a broad set of views about LGBTQ individuals and those who support the use of SOGI 123 resources. This is evident from a review of Neufeld's first Facebook post on October 23, 2017:

> Ok, so I can no longer sit on my hands. I have to stand up and be counted. A few years ago, the Liberal minister of education instigated a new curriculum supposedly to combat

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[6] BCSC Reasons at para. 15; Hansman Affidavit at para. 8, AR Vol. II at 63-64.
[7] Hansman Affidavit at para. 5, AR Vol. II at 63.
[8] BCSC Reasons at paras. 7, 16; Hansman Affidavit at para. 9, AR Vol. II at 64; Affidavit #1 of Kaily Wong sworn July 4, 2019 ("Wong Affidavit"), Exhibit C, AR Vol. V at 42-51.
[9] Wong Affidavit, Exhibit C, AR Vol. V at 49.
[10] BCSC Reasons at para. 16; Hansman Affidavit at para. 9, AR Vol. I at 64, citing: https://www.sogieducation.org/, which includes lesson plans here: https://bc.sogieducation.org/sogi3
[11] *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 8; *School Regulation*, B.C. Reg. 265/89, s. 4; *Teachers Act*, S.B.C. 2011, c. 19, s. 13 and the standards established under that section, including that teachers "respect and value the diversity in their classrooms, schools and communities", "treat students equitably with acceptance, dignity and respect", and "work to create a positive, safe and inclusive learning environment to best meet the diverse needs of students.
[12] *School Act*, R.S.B.C. 1996, c. 412, s. 76(1).

> bullying. But it quickly morphed into a weapon of propaganda to infuse every subject matter from K-12 with the latest fad: Gender theory. The Sexual Orientation and Gender Identity (SOGI) program instructs children that gender is not biologically determined, but is a social construct. At the risk of being labeled a bigoted homophobe, I have to say that I support traditional family values and I agree with the College of paediatricians that allowing little children choose to change gender is nothing short of child abuse. But now the BC Ministry of Education had embraced the LGBTQ lobby and is forcing this biologically absurd theory on children in our schools. Children are being taught that heterosexual marriages is no longer the norm. Teachers must not refer to "boys and girls" they are merely students. They cannot refer to mothers and fathers either. (Increasing numbers of children are growing up in homes with same sex parents) If this represents the values of Canadian society, count me out! I belong in a country like Russia, or Paraguay, which recently had the guts to stand up to these radical cultural nihilists. [A link to a news article about Paraguay omitted.][13]

12. There is evidence in the record that "traditional family values" and "LGBTQ lobby" are phrases frequently employed by persons who are opposed to equality for LGBTQ persons.[14] There is also evidence that Russia and Paraguay are unsafe places for LGBTQ individuals, and at the time of Neufeld's post there had been significant media coverage about violence against LGBTQ individuals in those countries.[15] Additionally, there is evidence that the "College of paediatricians" mentioned in the post is the American College of Pediatricians ("ACP"), a small, socially conservative group founded in the United States in 2002 as a protest against the American Academy of Pediatrics' support for adoption by gay couples. The Southern Poverty Law Centre has listed the ACP as a hate group.[16]

D. Reaction to the First Facebook Post

13. Reaction to Neufeld's Facebook post appeared on the same day as the post.[17] There were several articles published that included comments from members of the public and the education

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[13] BCSC Reasons at para. 18; Affidavit # 1 of Sara Dettman affirmed April 17, 2019 ("Dettman Affidavit"), Exhibit A, AR Vol. III at 16. The blog post about Paraguay provided by the link is found at Hansman Affidavit, Exhibit D, AR Vol. II at 84.
[14] Hansman Affidavit at para. 15, AR Vol. II at 65.
[15] Hansman Affidavit at para. 18, AR Vol. II at 66.
[16] Hansman Affidavit at para. 16, AR Vol. II at 65.
[17] BCSC Reasons at para. 19.

sector, before Hansman was contacted for comment.[18] There are many examples in the record of comments in response to Neufeld's post.[19]

14. Morgane Oger, a transgender woman who ran for the British Columbia NDP in the previous provincial election, stated that Neufeld should be ashamed of himself and as a person in a position of leadership "should know better than to quote a widely discredited pseudo-science source in order to publish hateful material against a minority group."[20]

15. A number of people in the education field were also critical of Neufeld's comments.

16. The former Chair of the Vancouver School Board, Patti Bachus, was reported in the media as calling for Neufeld to resign, as well as apologize.[21]

17. Justine Hodge, the Chilliwack District Parent Advisory Council's chair, was reported as saying that Neufeld's "comments promote the exclusion and isolation of a growing subset of children, including those with same-sex parents." She remarked that there are transgender students and teachers in schools and it is Neufeld's "duty to ensure a safe and positive learning environment for all" and that the Council does not agree with or condone Neufeld's comments.[22]

18. Hansman was contacted by media outlets for comment and opined that Neufeld should step down as trustee and that Neufeld "has violated his obligations as a school board trustee to ensure that students and staff have a safe, inclusive environment."[23] Hansman also opined that Neufeld's views were "bigoted" and "whether he likes it or not, members of the LGBT community are here to stay."[24]

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[18] BCSC Reasons at paras. 19-21; Hansman Affidavit at para. 12, AR Vol. II at 65; Dettman Affidavit, Exhibits V, T, U, AA and S, AR Vol. III at 141-146, 129-131, 133-139, 160-163, 125 which were all published prior to exhibit W, AR Vol. III at 148-51 which quotes Hansman. Exhibit U, AR Vol. III at 136 quotes a BCTF tweet.
[19] See Dettman Affidavit Exhibits S to DDDDD, AR Vol. III at 134 – Vol. IV at 259.
[20] Chilliwack Progress, October 23, 2017, Dettman Affidavit, Exhibit V, AR Vol. III at 142.
[21] Chilliwack Progress, October 23, 2017, Dettman Affidavit, Exhibit V, AR Vol. III at 143.
[22] Chilliwack Progress, October 23, 2017, Dettman Affidavit Exhibit V, AR Vol. III at 144.
[23] Huffington Post, October 24, 2017, Hansman Affidavit, Exhibit F, AR Vol. II at 97.
[24] Neufeld alleged these opinions were defamatory: Amended Notice of Civil Claim at para. 15, AR Vol. I at 85. The link to the full nine-minute interview in which these opinions were stated was provided to the British Columbia courts: Hansman Affidavit at para. 26, AR Vol. II at 67. The interview is available here: https://globalnews.ca/video/3823083/backlash-after-school-trustee-criticizes-lgbtq-program

19. Hansman's views were informed by his experience as a gay man and member of the LGBTQ community, a teacher in British Columbia's school system and President of the BCTF.[25] In his role as President of the BCTF, Hansman was frequently called on by the news media to comment on matters of public interest, including: education policy, education programs and resources; the relationship between the BCTF and various levels of government; and, other matters relating to schools, students, teachers and education.[26]

20. Criticism of Neufeld's Facebook post was also expressed by Gordon Swan, president of the British Columbia Schools Trustee Association, by the Honourable Rob Fleming, the Minister of Education, and by members of the Chilliwack School Board.[27] Minister Fleming was quoted as saying Neufeld is "not a role model in the school system on this issue" and he hoped Neufeld would "come around and realize that in order to remove fear and intimidation and a bullying culture in our school system, SOGI 123 is essential." Minister Fleming said Neufeld's views were "outdated and bigoted".[28]

21. There were also statements of opposition, and statements of support, posted on the Neufeld's Facebook page.[29]

22. On October 25, 2017, Neufeld issued a press release in which he stated he wanted "to apologize to those who felt hurt by my opinion, including members of the Chilliwack Board of Education." He stated that he was "critical of an education resource, not individuals."[30] Neufeld did not retract any of his statements. Hansman considered this an attempt to minimise the full impact of the post and to deny what in his view was a clear attack on the people who created and supported the SOGI 123 materials.[31]

E. Neufeld's Ongoing Public Statements

23. On November 21, 2017, Neufeld was a keynote speaker at an event organized by Culture Guard, an organization that has consistently opposed LGBTQ inclusion efforts in British

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[25] Hansman Affidavit at paras. 13 & 19 AR Vol. II at 65-66.
[26] Hansman Affidavit at para. 21, AR Vol. II at 66.
[27] See for example Dettman Affidavit Exhibits Z and CC, AR Vol. III at 155 & 166.
[28] Dettman Affidavit, Exhibit Z, AR Vol. III at 155.
[29] Neufeld's Facebook page, Dettman Affidavit, Exhibit A, AR Vol. III at 17-33.
[30] BCSC Reasons at para. 28; Dettman Affidavit, Exhibit PP, AR Vol. III at 221.
[31] Hansman Affidavit at para. 28, AR Vol. II at 67.

Columbia schools. Its founder is Kari Simpson, who has a history of making anti-LGBTQ statements and was the plaintiff in the unsuccessful libel suit upon which the chambers judge relied in considering the strength of Hansman's defence of fair comment in this case.[32]

24. At the Culture Guard event, Neufeld described SOGI as "an institutionalization of codependency encouraging and enabling dysfunctional behaviour and thinking patterns" and the "coddling and encouraging what I regard as the sexual addiction of gender confusion". He also stated that using SOGI 123 resources amounted to "gaslighting"[33] and an "attack on the foundation of the child's being which is child abuse."[34]

25. Minister Fleming commented that it was "disturbing" that Neufeld had spoken at this "hateful event" and labelled Neufeld's behaviour as "shameful". He opined that Neufeld's October apology was not sincere, adding that "Elected trustees are supposed to advocate for students not hurt them".[35]

26. On December 18, 2017, Neufeld made another Facebook post in which he said that he had "been suddenly thrown into the role of a prophet: speaking out to the lawmakers in Victoria and trying to motivate lukewarm Christians who are sitting idly by as all of society 'Slouches towards Gomorrah'". He described his job as "policy maker" and stated that "the current emphasis is on inclusion" and he did "not want to give in to the self-serving agenda of LGBTQ+ groups who want to be given priority as the most downtrodden of victims…"[36]

27. Neufeld said that "gender fluidity theory" "has already demonized people of faith who believe that God created humans male and female: In the image of God." He went on to state unless the Church pushes back against the "new teaching", the day will come "(maybe it is already here) when the government will apprehend your children and put them in homes where

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[32] Hansman Affidavit at paras. 29-34, AR Vol. II at 68; *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2018] 2 S.C.R. 420 discussed *infra*.
[33] "Gaslighting" is defined by the Oxford Dictionary as "Manipulate (someone) by psychological means into doubting their own sanity" (see: https://www.lexico.com/en/definition/gaslight).
[34] Hansman Affidavit at paras. 29-33, AR Vol. II at 67-68; BCSC Reasons at para. 29. A video of the speech is available online: https://www.langleyadvancetimes.com/news/chilliwack-school-trustee-says-he-will-run-on-gender-positive-platform-next-year/
[35] Dettman Affidavit, Exhibit QQQ, AR Vol. IV at 100-101.
[36] Dettman Affidavit, Exhibit B, AR Vol. III at 37.

they will be encouraged to explore homosexuality and gender fluidity."[37] Neufeld supported his prophecy by invoking the legacy of residential schools:

> You think that is impossible? Well the Canadian government did exactly that to Aboriginal families until a few decades ago. Determined to destroy the traditional teachings of their culture and re educate children into the prevailing worldview of the government. The Government have already ensured that families with traditional Family values will not be approved as foster homes and are refused the right to adopt children. But the government has always done a horrid job of being a parent.[38]

28. In December 2017, the Chilliwack District Parent Advisory Council asked Neufeld to step down from his position as a school trustee. Neufeld responded by launching a letter writing campaign against the Council's Chair.[39] His January 1, 2018 email stated that, "Not all of these parents subscribe to the unscientific gender-fluid theory that "*what is between one's legs is not always the same as what is between one's ears*" and that, "These parents may have been overwhelmed by the threats of the transgender radicals: '*Do you want a dead son or a living daughter (or vice versa).*'" He stated that the Council's Chair was "taking sides with only a handful of radical parents, and alienating the vast majority of parents who trust biology and common sense".[40]

29. On January 18, 2018, Neufeld's fellow trustees on the Chilliwack School Board passed a motion during an in-camera meeting requesting Neufeld's resignation because of the Chilliwack Board of Education's loss of confidence in his ability to perform effectively the duties of a trustee. Neufeld did not resign.[41]

30. In response to the request to resign, Neufeld issued a press release in which he said he supports all students, regardless of sexual orientation, gender identity, race, religion or background, "including children who come from homes with traditional family values" and

> I have simply taken issue with one facet of the SOG 1-2-3 learning resources; the teaching of the controversial gender-fluid theory as fact. Despite the pressure to resign, I believe that I must remain on the Board to be a lonely voice protecting impressionable

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[37] Dettman Affidavit, Exhibit B, AR Vol. III at 38-39.
[38] Dettman Affidavit, Exhibit B, AR Vol. III at 39.
[39] Chilliwack Progress article, January 5, 2018, Dettman Affidavit, Exhibit ZZZ, AR Vol. IV at 137-143. According to the article, Neufeld's email was sent to "an unknown number of recipients".
[40] Hansman Affidavit at para. 35, AR Vol. II at 69-70.
[41] Hansman Affidavit at para. 39, AR Vol. II at 70.

> children who I believe will be confused and harmed, resulting in increased occurrences of gender dysphoria in at-risk children.[42]

31. On January 29, 2018, the BCTF and the Chilliwack Teachers' Association filed a complaint against Neufeld at the British Columbia Human Rights Tribunal. An amended complaint was filed on February 19, 2019.[43] The complaint alleges that Neufeld violated the prohibitions against discrimination regarding employment and publishing statements that indicate discrimination or an intention to discriminate against a person or a group or class of persons, or "is likely to expose a person or a group or class of persons to hatred or contempt."[44]

32. At a School Board meeting on February 13, 2018, Neufeld read from a prepared statement and repeated his previous comments comparing support for transgender students to governments' oppression of Indigenous peoples through residential schools.[45]

33. On March 19, 2018, Neufeld made a post on Facebook in which he made comments about Caitlyn Jenner. He said, "Not everyone is as rich as Bruce Jenner, who with plastic surgery, and tons of cosmetics manages to create a pretty convincing caricature of a woman."[46] He also stated that "activists are using mafia and Bolshevik techniques to convince the most powerful sectors of our society to acquiesce to their demands."[47]

34. In April 2018, Hansman was interviewed by various media outlets about the BCTF's human rights complaint. In one interview, Hansman noted that if Neufeld were a teacher he would be removed from the school system.[48] In one interview Hansman opined that Neufeld had "tip toed quite far into hate speech" and that his statements were "similar to cases the tribunal has heard before so we feel it's really important to pursue this."[49] In making that comment,

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[42] Affidavit #1 of Rosalind Britten, sworn May 22, 2019, Ex G, AR Vol. V at 18.
[43] Hansman Affidavit, at paras. 40-41, AR Vol. II at 70. The complaint was accepted for filing on April 20, 2018.
[44] Amended Complaint to the British Columbia Human Rights Tribunal, Exhibit H to Hansman Affidavit, AR Vol. II at 105-118. CUPE filed a similar complaint with the Tribunal on January 15, 2018: see Dettman Affidavit, Exhibit BBBB, AR Vol. IV at 149-150.
[45] Dettman Affidavit, Exhibit LLLL, AR Vol. IV at 184-185.
[46] Dettman Affidavit, Exhibit F, AR Vol. III at 53.
[47] Dettman Affidavit, Exhibit F, AR Vol. III at 54.
[48] Affidavit #1 of Jacqueline E.M. Thorsell, affirmed March 25, 2019 ("Thorsell Affidavit"), Exhibit O, AR Vol. II at 18. See also *Kempling v. British Columbia College of Teachers*, 2005 BCCA 327 wherein the Court of Appeal upheld a suspension of a teacher.
[49] News 1130, April 22, 2018, Hansman Affidavit, Exhibit J, AR Vol. II at 124.

Hansman was referring to section 7 of the *Human Rights Code* upon which the BCTF's human rights complaint is based and which prohibits representations "likely to expose a person or a group of persons to hatred or contempt."[50] In another article, it is noted that Neufeld "has a responsibility to uphold the Human Rights Code", and Hansman is quoted as saying that Neufeld "is creating a school environment for both our members and students that is discriminatory and hateful".[51] Other articles published in April 2018 contain similar quotes from Hansman.[52]

35. On April 23, 2018, there were rallies held both in support of SOGI 123 and LGBTQ inclusion and in opposition to it outside the offices of the BCTF.[53]

36. In or around July 2018, Neufeld posted a meme on his Facebook page that had a photo of a cow and a child on it and stated: "When you think injecting cattle with hormones is evil but injecting kids with hormones to change their gender is just fine".[54]

F. School Board Elections and Commencement of Defamation Proceedings

37. In the lead-up to the elections for the Chilliwack School Board on October 20, 2018, Neufeld and others formed an anti-SOGI slate to run together for office.[55]

38. On September 19, 2018, during the run-up to the election, Neufeld (through his counsel) sent Hansman a letter demanding that Hansman retract a list of "comments" alleged to have been made "over a number of months" (the "Demand Letter"). The Demand Letter set out various allegations that Hansman was said to have made about Neufeld in the course of that campaign. In the Demand Letter, counsel said that unless a retraction and apology was received within 10 days of the letter proceedings would be commenced.[56]

39. The same day that the Demand Letter was sent to Hansman, Neufeld told The Valley Voice News, an online publication, that he was suing Hansman for defamation. The next day, September 20, 2018, contents of the Demand Letter were published in The Valley Voice News,

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[50] Hansman Affidavit at paras. 46, AR Vol. II at 71.
[51] Star Vancouver, April 10, 2018, Thorsell Affidavit, Exhibit D, AR Vol. II at 17.
[52] See Exhibits K and L to Hansman Affidavit, AR Vol. II at 128, 133.
[53] Dettman Affidavit, Exhibit PPPP, AR Vol. IV at 197.
[54] Barry Neufeld July 2018 Facebook post, Dettman Affidavit, Exhibit G, AR Vol. III at 59.
[55] BCSC Reasons at para. 39.
[56] BCSC Reasons at para. 37; Hansman Affidavit Exhibit M, AR Vol. II at 138.

including the list of alleged defamatory comments.[57] In a letter to Neufeld's counsel, counsel for Hansman questioned the sincerity of the apology request given that Neufeld, at the same time as he was delivering the Demand Letter "was publicly declaring his intention to proceed with that litigation, and assisting a third party in republishing the words that he claims damage his reputation."[58]

40. On October 12, 2018, eight days before the election, Neufeld filed his defamation action.[59] On his Facebook page, Neufeld stated "This time, Mr. Hansman, you are going DOWN!"[60]

41. In his Notice of Civil Claim as amended, Neufeld sought to hold Hansman liable, not only for comments Hansman made about Neufeld, his opposition to SOGI 123, SOGI-inclusive schools, and his fitness for public office, but also for comments concerning Neufeld made by other persons, including Minister Fleming, transgender activist Morgane Oger, and unnamed protesters who, at meetings and rallies, carried signs critical of Neufeld.[61]

42. In a Facebook post addressing the trustee elections, Neufeld stated that he was concerned for the safety of children "who are being taught silly ideas that they can choose their gender" and he objected to children being taught to "approve of gay 'rainbow' families". He said this was an "attack on people of faith" and he was critical of Christian churches for "being slow to stand up against this evil agenda". He lamented the fact that "many of our churches have been infected with 'Pink Christianity.'" He also described his "opponents" as being "full of furious hatred" and "determined to destroy us, our families and our jobs."[62]

43. In another Facebook post on October 19, 2018, Neufeld criticized other aspects of SOGI 123, referring to inclusive education teaching about LGBTQ families as an "evil ideology" affecting children's mental health.[63]

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[57] BCSC Reasons at para. 37; Hansman Affidavit at para. 50, AR Vol. II at 72; Exhibit N, AR Vol. II at 141.
[58] Hansman Affidavit, Exhibit O, AR Vol. II at 146.
[59] BCSC Reasons at paras. 38-39.
[60] Dettman Affidavit, Exhibit M, AR Vol. III at 77.
[61] Amended Notice of Civil Claim at paras. 31-33, 47, AR Vol. I at 91-93, 98.
[62] Facebook post reproduced in Press Progress article dated October 16, 2018, Thorsell Affidavit, Exhibit D, AR Vol. II at 46.
[63] Neufeld October 19, 2018 Facebook post, Dettman Affidavit, Exhibit I, AR Vol. III at 63.

44. On October 20, 2018, Neufeld was re-elected as a trustee.[64]

45. After the election, Neufeld continued to make posts regarding LGBTQ persons. In a thank you post to his supporters on October 22, 2018, Neufeld asked, "Is heterosexual marriage no longer the norm? If not, what will replace it? Hopefully not the unscientific ideology of non-binary gender". In addition, Neufeld included a message to "persons who currently identify as Lesbian, Gay, Transgender, Queer, Two Spirited or whatever" and stated that these individuals have nothing to fear from him. He went on to state:

> …Contrary to what you have been told to believe; We actually love all students no matter their sense of self identity and we care about you. But Love must be tempered with Truth. Be patient! You will mostly likely grow out of your feelings of confusion and angst. They are fleeting and temporary. Please slow down. Don't let others label you when you are so young…[65]

46. Also in October 2018 after the election, Neufeld sent an email to The Valley Voice News suggesting that transgender individuals had committed election fraud. The online site reported that Neufeld wrote "pro-Sogi transgender persons may have voted twice" and that "Transgender people often have two sets of identification: one for the sex they were assigned at birth, and another new set when they legally changed their name and gender".[66]

47. On November 17, 2018, Neufeld posted a story on Facebook asking his followers to donate to the Fraser Valley Autism Society for his birthday. In this post, Neufeld stated that "a large proportion of kids who present as gender Dysphoric are actually on the Autism spectrum". He went on to state that if children on the autism spectrum and other "disturbed and mentally ill children" were to learn about "this new non-binary gender ideology, I fear there will be a dramatic increase of children clamouring for social transition, puberty blockers and a lifetime of taking hormones. They will become sterile, have brittle bones and when they are 18, even want to chop off perfectly good body parts! And public schools are 'supporting' this?"[67]

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[64] BCSC Reasons at para. 39.
[65] Neufeld October 22, 2018 Facebook post, Dettman Affidavit, Exhibit K, AR Vol. III at 70-71.
[66] Hansman Affidavit, Exhibit H, para 27 of Complaint, AR Vol. II at 111. Also available at "What Happened to 80 Votes?", The Valley Voice (26 October 2018) online: http://thevalleyvoice.ca/Voice%20Stories/October%202018/chilliwack-school-board-candidate-kaethe-jones-may-ask-for-eletions-recount-audit-2018.htm
[67] Neufeld November 17, 2018 Facebook post, Dettman Affidavit, Exhibit N, AR Vol. III at 79.

48. On November 20, 2018, Neufeld posted a message on Facebook similar to his November 17, 2018 Facebook story and reiterated his statement that transgender students "are actually on the Autism spectrum."[68]

49. In a December 9, 2018 Facebook post Neufeld said the following:

> The elites will destroy all gay kids. They are culling them from the gene pool. Make no mistake about it. The trans agenda is eugenics. They are not on the side of LGBT+. Don't ever think they are. Snakes are everywhere. More division and destruction of humanity.[69]

G. Decisions of Courts Below

50. On November 26, 2019, the chambers judge, Justice Ross, dismissed Neufeld's defamation action under the *PPPA*. He found that Neufeld had not discharged his burden of establishing that the defence of fair comment was not valid.[70] In the event he was incorrect, the chambers judge considered whether the action should nevertheless be dismissed under s. 4(2)(b) because the public interest in continuing the proceeding did not outweigh the public interest in protecting Hansman's expressive activity. He noted that Neufeld had presented little evidence of harm causally connected to Hansman's statements.[71] Moreover, the fact that Neufeld had been re-elected as a trustee was "some evidence of the limited damage that he suffered."[72] On the other hand, Hansman's comments were on the need for safe and inclusive schools and as such "deserve significant protection".[73] He concluded that the public interest weighing favoured dismissal.[74]

51. The Court of Appeal allowed the appeal and reinstated the defamation action.[75] It found there was a basis in the record to conclude that the defence of fair comment would be invalid. It also found that the chambers judge erred in his assessment of the competing public interests.

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[68] Neufeld November 20, 2018 Facebook post, Dettman Affidavit, Exhibit O, AR Vol. III at 97.
[69] December 9, 2018 Facebook Post, Dettman Affidavit, Exhibit Q, AR Vol. III at 110.
[70] BCSC Reasons at paras. 108-137.
[71] BCSC Reasons at paras. 147-153.
[72] BCSC Reasons at para. 146.
[73] BCSC Reasons at para. 160.
[74] BCSC Reasons at para. 161.
[75] Reasons for Judgment of the Court of Appeal for British Columbia, AR Vol. I at 50 ("BCCA Reasons").

PART II – STATEMENT OF ISSUES

52. This case raises the following issues for consideration by this Court:

(a) Did the Court of Appeal err in overturning the chambers judge's dismissal of the action on the basis of the fair comment defence?

(b) Did the Court of Appeal err in overturning the chambers judge's conclusion that the public interest in continuing the proceeding did not outweigh the public interest in protecting the defendant's expression?

PART III – STATEMENT OF ARGUMENT

A. Introduction: the PPPA

53. Subsection 4(1) of British Columbia's *PPPA* authorizes a person who is sued in respect of an "expression" to apply to court to have the action dismissed on the basis that "the expression relates to a matter of public interest."

54. Subsection 4(2) requires the court to dismiss the proceeding unless the plaintiff satisfies the criteria set out in that subsection. Subsection 4(2) reads as follows:

> 4(2) If the applicant [defendant] satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent [plaintiff] satisfies the court that
>
> (a) there are grounds to believe that
>
> (i) the proceeding has substantial merit, and
>
> (ii) the applicant [defendant] has no valid defence in the proceeding, and
>
> (b) the harm likely to have been suffered by the respondent [plaintiff] as a result of the applicant's [defendant's] expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

55. Ontario has a similar legislative scheme in s. 137.1 of the *Courts of Justice Act*.[76] The criteria found in subsection 4(2) of the *PPPA* are the same as those found in s. 137.1(4) of the Ontario statute. In Ontario, "a judge shall not dismiss a proceeding … if the responding party

[76] *Courts of Justice Act*, R.S.O. 1990, c. C.43.

satisfies the judge" of the applicable criteria. In BC, the language is even stronger: "the court must make a dismissal order unless the respondent satisfies the court" of the criteria.

56. This Court provided guidance on how to apply the framework established by the Ontario legislation in *1704604 Ontario Ltd. v. Pointes Protection Association* and *Bent v. Platnick*.[77] That analysis applies to the *PPPA*.

57. At second reading of the bill that became the *PPPA*, the Attorney General of British Columbia stated that the legislation "is intended to protect an essential value of our democracy, which is public participation in the debates of the day." The Attorney General noted that such participation is threatened when persons initiate or threaten "lawsuits against individuals who are critical of them in order to stop them from participating in that public debate."[78]

58. As this Court explained in *Pointes*, a statute like the *PPPA* "is meant to function as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions."[79] Such lawsuits are often referred to by the acronym "SLAPP", which stands for strategic lawsuits against public participation. Doherty J.A. in *Platnick v. Bent*[80] identified four indicia of a SLAPP which this Court in *Pointes* summarized as follows:

> (1) "a history of the plaintiff using litigation or the threat of litigation to silence critics"; (2) "a financial or power imbalance that strongly favours the plaintiff"; (3) "a punitive or retributory purpose animating the plaintiff's bringing of the claim"; and (4) "minimal or nominal damages suffered by the plaintiff".[81]

59. It is now settled that legislation like the *PPPA* is not intended to terminate only those lawsuits that bear the indicia of a SLAPP. The legislation "is fundamentally a public interest weighing exercise and not simply an inquiry into the hallmarks of a SLAPP."[82]

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[77] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 ["*Pointes*"] and 2020 SCC 23 ["*Bent*"].
[78] British Columbia, Legislative Assembly, *Hansard*, 41st Parl, 4th Sess, (14 February 2019) at p. 7018 (Hon. D. Eby), quoted by the chambers judge at para. 54.
[79] *Pointes* at para. 16.
[80] 2018 ONCA 687 at para. 99.
[81] *Pointes* at para. 78.
[82] *Pointes* at para. 79. See also *Bent* at para. 171 where this Court said that *Pointes* "squarely rejects any inquiry into the hallmarks of a SLAPP".

60. The *PPPA* protects expression by providing a procedural means by which courts may remove from the system, at an early stage in the litigation, "proceedings that adversely affect expression made in relation to matters of public interest."[83] When properly applied, the procedure will ensure parties are not mired in lengthy and costly trials of claims that do not satisfy the criteria of the *Act*.[84]

61. The *PPPA* is consistent with judicial efforts to ensure that the substantive law of defamation strikes a proper balance between protection of reputation and protection of expression. In *Grant v. Torstar*,[85] for example, this Court considered whether the press had adequate protection for publishing stories that are on matters of public interest. It concluded that "the current law with respect to statements that are reliable and important to public debate does not give adequate weight to the constitutional value of free expression."[86] To recalibrate the balance between protection of expression and reputation, the Court recognized a new defence of responsible communication on matters of public interest. The *PPPA* and the substantive law of defamation thus operate in tandem to ensure that expression on matters of public interest is given proper protection in our democracy.

62. With that background in mind, we turn to address the individual requirements of the *PPPA* as they apply to the facts of this case.

B. The Public Interest

63. Hansman's comments to the media constitute expression that relates to a matter of public interest. His expression was in support of safe and inclusive schools, in defence of a marginalised and vulnerable group, and against intolerance and discrimination.

64. While there is no qualitative assessment of the expression when determining whether the defendant's expression relates to a matter of public interest,[87] it is important to properly characterise the public interest at this stage. The characterisation of the public interest will

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[83] *Pointes* at para. 30.
[84] See *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420 at para. 15 where this Court referred to "the ballooning cost and disruption of defending a defamation action."
[85] *Grant v. Torstar*, 2009 SCC 61, [2009] 3 S.C.R. 640.
[86] *Ibid*. at para. 65.
[87] *Pointes* at para. 28.

inform the later qualitative analysis that takes place during the weighing exercise under s. 4(2)(b). As this Court explained in *Pointes*, "the inquiry is a contextual one that is fundamentally asking what the expression is really about".[88] At this stage, the entire expression must be considered.[89]

65. The Court of Appeal held that Neufeld's statements related "to the same matter of public interest".[90] This was an error that affected the Court of Appeal's approach to the weighing exercise. Although both Neufeld and Hansman's statements related to matters affecting the LGBTQ community, their statements do not relate to the same matter of public interest. Neufeld's statements were harshly critical of support for transgender students and gay marriage and denied the existence of transgender persons' identity. Hansman's statements were made against this intolerance and in support of safe and inclusive schools.

C. "Substantial Merit" Requirement

66. In *Pointes* this Court explained that a plaintiff must satisfy the court that "there are grounds to believe that its underlying claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success."[91]

67. In *Grant v. Torstar*, this Court set out the requirements for a successful defamation action:

> A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.[92]

68. The chambers judge considered that Neufeld had met the "substantial merit" standard because Hansman had conceded that he made the statements in question, the statements had been

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[88] *Pointes* at para. 30.
[89] See *Levant v. DeMelle*, 2022 ONCA 79 at para. 58.
[90] BCCA Reasons at para. 63.
[91] *Pointes* at para. 54.
[92] *Grant v. Torstar*, 2009 SCC 61, [2009] 3 S.C.R. 640 at para. 28.

published, and at least some of the statements were capable of defamatory meaning.[93] He thus concluded that Neufeld's claim was "legally tenable and supported by evidence."[94]

69. This finding is not at issue on this appeal. However, Hansman notes that meeting the merit standard under s. 4(2)(a)(i) is not revelatory of the strength of Neufeld's claim. This is because a plaintiff faces a "relatively light burden"[95] in a defamation action and much of the important analysis will therefore centre on applicable defences.

D. "No Valid Defence" Requirement

70. In *Pointes*, this Court explained that the question of whether a defendant has a valid defence mirrors the question of whether the plaintiff has a claim with substantial merit. That is, the court must determine whether "the plaintiff has shown that the defence, or defences, put in play are not legally tenable or supported by evidence that is reasonably capable of belief such that they can be said to have no real prospect of success."[96]

71. Hansman put into play two defences on the *PPPA* application: qualified privilege and fair comment. On qualified privilege, the chambers judge noted that Hansman was "proffering the defence in circumstances that are not 'textbook' for qualified privilege."[97] That conclusion was not challenged at the Court of Appeal and is not at issue on this appeal. On fair comment, the chambers judge agreed that Hansman has a valid defence and that Neufeld's action should be dismissed for this reason. Hansman submits that the Court of Appeal was wrong to overturn that decision.

i) Test for Fair Comment

72. The leading case on fair comment is this Court's decision in *WIC Radio Ltd. v. Simpson*.[98] In that case, the plaintiff Kari Simpson sued the defendants Rafe Mair and WIC Radio Ltd. over comments made by Mr. Mair on his radio show. As Justice Binnie explained, the context of the comments was a "public debate over the introduction of materials dealing with

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[93] BCSC Reasons at paras. 44, 88.
[94] BCSC Reasons at para. 88.
[95] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 ["*Pointes ONCA*"] at para. 3
[96] *Pointes* at para. 59.
[97] BCSC Reasons at para. 106.
[98] *WIC Radio Ltd. v. Simpson*, 2008 SCC, [2008] 2 S.C.R. 420 ["*WIC Radio*"].

homosexuality into public schools." Mair and Simpson were on the opposite sides of a "debate about whether the purpose of this initiative was to teach tolerance of homosexuality or to promote a homosexual lifestyle."[99]

73. Justice Binnie set out the following portion of Mair's editorial statement that contained the "nub" of Simpson's complaint:

> Before Kari was on my colleague Bill Good's show last Friday I listened to the tape of the parents' meeting the night before where Kari harangued the crowd. It took me back to my childhood when with my parents we would listen to bigots who with increasing shrillness would harangue the crowds. For Kari's homosexual one could easily substitute Jew. I could see Governor Wallace — in my mind's eye I could see Governor Wallace of Alabama standing on the steps of a schoolhouse shouting to the crowds that no Negroes would get into Alabama schools as long as he was governor. It could have been blacks last Thursday night just as easily as gays. Now I'm not suggesting that Kari was proposing or supporting any kind of holocaust or violence but neither really — in the speeches, when you think about it and look back — neither did Hitler or Governor Wallace or [Orval Faubus] or Ross Barnett. They were simply declaring their hostility to a minority. Let the mob do as they wished.[100]

74. The trial judge found the imputation of these words was that Simpson would condone the use of violence against gay persons and that this was defamatory.[101] However, the trial judge dismissed the action on the basis of the fair comment defence. The British Columbia Court of Appeal allowed Simpson's appeal and sent the matter back to trial for an assessment of damages. This Court allowed Mair's appeal and restored the trial judgment dismissing the action.

75. The Court found that the defence of fair comment "helps hold the balance in the law of defamation between two fundamental values, namely the respect for individuals and protection of their reputation from unjustified harm on the one hand, and on the other hand, the freedom of expression and debate that is said to be the 'very life blood of our freedom and free institutions.'"[102]

76. The Court considered that a re-examination of the defence of fair comment was required in order to ensure that the balance between these two values was properly struck. The Court concluded that one element of the test should be changed. Whereas the Court had previously

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[99] *Ibid*. at para. 3.
[100] *Ibid*.
[101] *Ibid*. at paras. 10, 60.
[102] *Ibid*. at para. 1.

endorsed a test that required speakers to honestly hold the opinions they expressed (a subjective test), it was more consistent with "the requirements of free expression" to introduce an objective test, namely whether any person could honestly hold the opinion expressed by the speaker. As Justice Binnie put it for the Court:

> Admittedly, the "objective" test is not a high threshold for the defendants to meet, but nor is it in the public interest to deny the defence to a piece of devil's advocacy that the writer may have doubts about (but is quite capable of honest belief) which contributes to the debate on a matter of public interest.[103]

77. This Court set out and discussed the new test in *Grant v. Torstar* as follows:

> As reformulated in *WIC Radio*, at para. 28, a defendant claiming fair comment must satisfy the following test: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognisable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?; and (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. *WIC Radio* expanded the fair comment defence by changing the traditional requirement that the opinion be one that a "fair-minded" person could honestly hold, to a requirement that it be one that "anyone could honestly have expressed" (paras. 49-51), which allows for robust debate. As Binnie J. put it, "[w]e live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones" (para. 4).[104]

78. In *WIC Radio*, this Court found that the first four requirements were all met: (1) the debate on the inclusion in schools of educational material on homosexuality was a matter of public interest;[105] (2) the facts upon which the comments were based were set out in the editorial or were known to Mair's audience;[106] (3) the statement that Simpson would condone violence would be understood as a comment and not an imputation of fact;[107] and (4) a person could honestly express that opinion given previous statements of Simpson that used violent imagery.[108] Regarding the fifth element, malice, Simpson did not challenge the trial judge's conclusion that Mair's fair comment defence was not vitiated by malice.[109]

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[103] *Ibid* at para 50.
[104] *Grant v. Torstar*, 2009 SCC 61, [2009] 3 S.C.R. 640 at para 31.
[105] *WIC Radio* at para. 57.
[106] *Ibid*. at para. 34.
[107] *Ibid*. at para. 27.
[108] *Ibid*. at paras. 60, 62.
[109] *Ibid*. at para. 63.

ii) Fair Comment Defence in this *PPPA* Application

79. In his Amended Notice of Civil Claim Neufeld identifies 11 publications containing allegedly defamatory remarks.[110] The Court of Appeal stated that the chambers judge "worked from a summary of the type of comments made by Mr. Hansman rather than addressing the specific expressions in issue."[111] In the Court of Appeal's view, the chambers judge needed to consider "the constituent elements of the fair comment defence as applied to each expression."[112]

80. Hansman disagrees that the chambers judge erred in proceeding in the manner he did. The chambers judge's reasons are responsive to the submissions made by counsel at the hearing. As the chambers judge pointed out, Neufeld "emphasized the following statements made by the defendant in interviews":[113]

> "He [Neufeld] should step down or be removed," [Comment 1]
>
> "regardless of **his bigoted views**…….he has responsibilities.…for ensuring a safe and inclusive school …" [Comment 2]

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[110] The 11 statements appear in the following publications: "Chilliwack school trustee slammed for comments about LGBTQ youth and anti-bullying curriculum" (Vancouver Sun; October 24, 2017) (AR Vol. II at 89) [**Comment 1**]; television interview with Hansman on Global News; link to interview was provided in Hansman Affidavit at para. 26 (AR Vol. II at 67). The interview is available here: https://globalnews.ca/video/3823083/backlash-after-school-trustee-criticizes-lgbtq-program [**Comment 2**]; "Barry Neufeld, Chilliwack School Board Trustee, Slams B.C. Gender Inclusivity Program" (Huffington Post; October 24, 2017) (AR Vol. II at 95) [**Comment 3**]; Comments referred to at para. 20 of the Amended Notice of Civil Claim, the publications of which are not in the record [**Comment 4**]; "B.C. teachers' union files human rights complaint against Chilliwack school trustee Barry Neufeld over allegations of transphobia" (The Star Vancouver; April 10, 2018) (AR Vol. II at 17) [**Comment 5**]; "Controversial Chilliwack Trustee the subject of Human Rights Tribunal complaint" (City News 1130; April 12, 2018) (AR Vol. II at 125) [**Comment 6**]; "Controversial Chilliwack school trustee facing human rights complaint from BCTF" (CBC News; April 13, 2018) (AR Vol. II at 129) [**Comment 7**]; "Rallies for, against SOGI resource planned in Vancouver" (April 22, 2018; City News 1130) (AR Vol. II at 134) [**Comment 8**]; "BCTF president speaks out against anti-refugee, anti-LGBTQ school trustee candidates" (City News 1130; September 16, 2018) (AR Vol. V at 23) [**Comment 9**]; "Anti-SOGI Chilliwack school trustee files defamation lawsuit against BCTF president" (Chilliwack Progress; October 19, 2018) (AR Vol. II at 55) [**Comment 10**]; "Most anti-SOGI trustee candidates fail to pick up seats" (CBC News; October 22, 2018) (not in record but available online here [**Comment 11**].

[111] BCCA Reasons at para. 26.

[112] BCCA Reasons at para. 27.

[113] BCSC Reasons at para. 24.

> "Sometimes our beliefs, values, and responsibilities as professional educators are challenged by those who promote hatred." [Comment 4[114]]
>
> "For some reason, because his comments have been largely restricted to **transphobic comments**… some are willing to give him a pass on this." [Comment 5]
>
> BCTF President Glen Hansman says the trustee "tip toed quite far into **hate speech**" and sent a disturbing message to both students and parents. [Comment 6]
>
> The president of the British Columbia Teacher's Federation says a Chilliwack school trustee who has made controversial LGBT comments **shouldn't be "anywhere near students**" and that's why the BCTF has filed a human rights complaint against him. [Comment 7]
>
> [Emphasis contained in the Amended Notice of Civil Claim.]

81. Missing from this list are specific references to comments contained in Comments 3 and 8-11. Other than one comment that refers to Neufeld's "misogynist and other problematic statements" and one comment that does not refer to Neufeld, the missing comments are all the same or substantially similar to the comments contained in this list.

82. Comment 3 contains a reference to the obligation on a trustee to ensure safe and inclusive schools. The allegation that Neufeld has failed to do so is also the allegation in Comment 2.

83. Comment 8 refers to "hateful comments made by Trustee Neufeld" which is similar to the comment found in Comment 6.

84. Comment 9 refers to a person running for the position of trustee who has spread hate about LGBTQ people and made "vile comments about refugees and immigrants". The Court of Appeal noted Hansman's denial that this comment was about Neufeld but said there are grounds to believe that Neufeld could establish the contrary.[115] It did not identify those grounds. With respect, the Court of Appeal was plainly wrong. This comment was about another person running for trustee; it was not about Neufeld.[116]

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[114] Hansman admitted making this comment but denies it was specifically about Neufeld; rather he was referring "more generally to those who attack efforts to ensure that LGBTQ students can attend safe and inclusive schools" (Hansman Affidavit at para. 38, AR Vol. II at 70).
[115] BCCA Reasons at para. 29.
[116] At the hearing before the chambers judge counsel for Neufeld accepted that the comment was "in response to another school board trustee, when you read the article, running for election who's against SOGI" (Transcript of Proceedings, p. 80, ll. 28-31, AR Vol. V at 86).

85. Comment 10 refers to "other misogynist and problematic statements [of Neufeld] reported by Press Progress" in an article entitled "This Man is Probably the Worst School Trustee in British Columbia".[117] We return to Comment 10 below.

86. Comment 11 is an article from the CBC dated October 22, 2018.[118] The Notice of Civil Claim refers to the comment that "Hate and bigotry have no place in school boards." Again, this is similar to comments quoted by the chambers judge.

87. This review of the comments shows that the chambers judge did not overlook any key allegation of defamation in this case. Nor was he obliged to provide reasons for judgment that showed him applying each element of the test for fair comment to each of the 11 publications. This does not mean he failed to undertake that analysis. For example, Neufeld argued that all of "the impugned statements were statement of facts", not opinion. The chambers judge rejected that argument. Relying on *WIC Radio*, the chambers judge concluded that "similar statements have been found to be comments, not statements of fact." This is an appropriate approach in the context of a *PPPA* application, a screening mechanism designed to weed out unmeritorious claims at an early stage but without engaging in a "deep dive into the evidence".[119]

88. To overturn the chambers judge, the Court of Appeal had to find that the judge's conclusion on one or more of the elements of the fair comment defence was based on a legal error or a palpable and overriding factual error. The chambers judge committed no such errors.

89. The first element of the test is that the comments must be on a matter of public interest. In *WIC Radio* this Court said "[t]he public interest is a broad concept" and the onus to establish this element of the test "is relatively easy to discharge."[120] There is no question that this part of the test is satisfied. Neufeld is an elected member of a school board who made comments about LGBTQ persons and SOGI 123 that Hansman, an educator and member of the LGBTQ community, considered harmful. In his role as President of the BCTF, Hansman was often

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[117] AR Vol. II at 46.
[118] Neither party put this article into the record but it is still available online: "Most anti-SOGI school trustee candidates fail to pick up seats" (CBC article posted October 22, 2018).
[119] *Pointes* at para. 52.
[120] *WIC Radio* at para. 30.

contacted by the media to respond to various issues impacting the educational system.[121] There is a strong public interest in responding to Neufeld's comments.

90. The second element of the test is that the comments must be based on fact. In *WIC Radio* the Court explained that "[t]he comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made." The facts must "be sufficiently stated or otherwise known to the listeners [or readers]" so that they "are able to make up their own minds on the merits" of the comment.[122]

91. The Court of Appeal stated that there are grounds to believe Hansman will not be able to establish that the facts upon which certain comments were made were either stated in the publications or known to readers and listeners. It identified two categories: (1) Hansman's comments that Neufeld promoted or spread hatred and created a school environment that is discriminatory and hateful, and (2) Hansman's comment that Neufeld made "vile comments about refugees and immigrants as a group".[123] As noted above, the Court of Appeal clearly erred regarding the latter because it was accepted at the hearing in BC Supreme Court that Hansman's comment was about a different candidate for school trustee. With respect to the first category, the Court of Appeal did not identify the "grounds" upon which it based its conclusion.

92. A review of the comments demonstrates that the facts were sufficiently stated in the publications. In the first and third comments, for example, Neufeld's first Facebook post is quoted extensively. In the second comment, which is a nine-minute television interview with Hansman, the Facebook post is shown on screen.[124] These were all comments published immediately following the first Facebook post.

93. The "hate" references from Hansman appear in press articles several months later reporting that a human rights complaint had been filed against Neufeld. The fifth comment, for example, appears in an article reporting on the fact that the BCTF had filed a human rights

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[121] Hansman Affidavit at para. 21, AR Vol. II at 66.
[122] *WIC Radio* at para. 31.
[123] BCCA Reasons at para. 29.
[124] The link to the full nine-minute interview in which these opinions were stated was provided to the British Columbia courts: Hansman Affidavit at para. 26, AR Vol. II at 67. The Facebook post is shown at the four minute mark. The interview is available here: https://globalnews.ca/video/3823083/backlash-after-school-trustee-criticizes-lgbtq-program

complaint against "Neufeld, alleging his public comments about trans people have created an unsafe work environment for teachers and exposed trans people to hatred." The article quotes from the first Facebook post but also from subsequent public statements by Neufeld and from the human rights complaint itself. The article also notes that the human rights complaint alleges Neufeld's comments "have encouraged hateful comments about trans people on his Facebook wall, and thus exposed them to hatred." This surely constitutes a sufficient factual foundation for Hansman's opinion that Neufeld "is creating a school environment for both our members and students that is discriminatory and hateful."[125]

94. Moreover, at the time the media was reporting on the human rights complaint and then later when it was reporting on the school board elections "the general facts giving rise to the dispute" would have been known to readers of the articles.[126]

95. The third element is that the comment must be recognisable as a comment as opposed to an imputation of fact. The Court of Appeal stated "there are grounds to believe that . . . the statements were not recognizable as comment for at least some of the publications".[127] The court does not point to any publications as examples or identify the grounds that led it to reach this conclusion. In Hansman's submission, all of the impugned statements are properly characterized as comments on the views expressed by Neufeld.

96. In *WIC Radio* this Court said that "the notion of 'comment' is generously interpreted" and that the onus on this issue "is relatively easy to discharge."[128] A comment includes a "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof."[129] The question of "[w]hat is comment and what is fact must be determined from the perspective of a 'reasonable view or reader.'"[130]All of Hansman's impugned statements fit within the broad definition of comment and would have been understood by a reasonable

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[125] Comment 5, AR Vol. II at 17.
[126] *WIC Radio* at para. 34. The numerous articles attached to the Hansman Affidavit ,Exhibits E, F, I, J, K, L & N (AR Vol. I at 88-99, 119-137& 141-145) and the Dettman Affidavit. Exhibits S to DDDDD (AR Vol. III at 134 - Vol. IV at 259) establish the extent to which this matter was in the public domain.
[127] BCCA Reasons at para. 36.
[128] *WIC Radio* at para. 30.
[129] *Ibid*. at para. 26.
[130] *Ibid*. at para. 27.

reader as such. There are no grounds to believe that Hansman has no real prospect of satisfying this element of the test.

97. The fourth element is that the comment must satisfy an objective test: could any person honestly express that opinion on the proved facts. In *WIC Radio* the Court explained:

> "Honest belief", of course, requires the existence of a *nexus* or relationship between the comment and the underlying facts. Dickson J. himself stated the test in *Cherneskey* as "could any man honestly express that opinion on the proved facts" (p. 1100 (emphasis added)). His various characterizations of "any man" show the intended broadness of the test, i.e. "however prejudiced he may be, however exaggerated or obstinate his views" (p. 1103, citing *Merivale v. Carson* (1887), 20 Q.B.D. 275 (C.A.), at p. 281). Dickson J. also agreed with the comment in an earlier case that the operative concept was "honest" rather than "'fair' lest some suggestion of reasonableness instead of honesty should be read in" (p. 1104).[131]

98. Neufeld himself opined that he might be labelled a bigot and a homophobe as a result of his first Facebook post so it can hardly be contended that no person could express that opinion. Other persons described Neufeld's views as hateful. The Court of Appeal did not suggest there are grounds to believe that no person could honestly express the opinions expressed by Hansman on the proved facts. It is submitted there are no such grounds and that this element of the test is satisfied.

99. The final element of the test addresses malice. The defence of fair comment "can be defeated if the plaintiff proves that the defendant was actuated by express malice." The chambers judge found there was no evidence of malice. He found that Hansman's affidavit "makes it clear that he did honestly hold the views that he expressed in the interviews" and thus "on the evidence before me, there is no prospect of a finding that the defendant made the statements, either knowing them to be false or with reckless indifference to whether they were true or false."[132] The chambers judge noted that Neufeld had not availed himself of the opportunity to cross examine Hansman on his affidavit.

100. The Court of Appeal found two errors in the judge's reasoning. First, the court said that Hansman had not asserted expressly that he had an honest belief in the defamatory

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[131] *Ibid*. at para. 40.
[132] BCSC Reasons at para. 141.

publications.[133] Second, in the Court of Appeal's view it was wrong to suggest that malice could only be proved by a full admission on cross-examination.[134] It is submitted the chambers judge did not err in his treatment of malice as found by the Court of Appeal or in any other way.

101. First, the chambers judge did not say that Hansman expressly stated that he had an honest belief in his opinions. Rather, the chambers judge reached this conclusion based on his reading of Hansman's affidavit as a whole. There is no error in this reading. Indeed, it is submitted it is the correct reading.[135]

102. On the second point, the Court of Appeal misconstrued the reasoning of the judge. The judge did not say that an admission during cross-examination is the only way to establish malice in a defamation case. His point was there was not a shred of evidence that malice played any role in Hansman's comments. In what is best understood as hyperbole, and to highlight the fact that Neufeld chose not to cross-examine Hansman on his affidavit, the judge made his remark that short of an admission on cross-examination it was difficult to envision the fair comment defence being defeated because of malice.

103. The Court of Appeal's two objections mask the fact that Neufeld was under an obligation to establish grounds to believe there was a real prospect of finding malice. He failed to do so.

104. There remains for consideration only Hansman's reference to Neufeld's "misogynist" statement, as this comment was not one of the primary allegations of defamation examined by the chambers judge. That comment was based on a screen shot of Neufeld's Facebook page reproduced in a Press Progress article.[136] The screen shot reads as follows:

> **Barry Neufeld** One of the most under-rated natural anti-depressants for women, that is male semen. Women who regularly have unprotected sex (married women) are happier and less suicidal than women who have "protected" sex. . . .[137]

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[133] BCCA Reasons at para. 43.
[134] BCCA Reasons at para. 44.
[135] See Hansman Affidavit at paras. 13-19, 23-25, 28, 45-46 where Hansman explains his concerns and motivations (AR Vol. II at 65-67, 71).
[136] This Man is Probably the Worst School Trustee in British Columbia" (Press Progress; October 16, 2018) (AR Vol. II at 46).
[137] *Ibid*. (AR Vol. II at 49).

105. There is a public interest in responding to comments that propound such views about women. The factual basis for Hansman's opinion is the Press Progress article which is referenced in the article containing Hansman's comment. It is a comment that would be understood as an opinion rather than an imputation of fact. This is readily apparent from a review of the full quote in which the comment appears:

> His other misogynist and problematic statements reported by Press Progress are also cause for alarm and not becoming of a school trustee.[138]

A person could honestly express that opinion on these facts. As for malice, the chambers judge found no evidence of this. It follows Neufeld has failed to establish a real prospect that the fair comment defence will not succeed in relation to the misogynist comment.

106. In conclusion on fair comment, Hansman submits that the following passage in *WIC Radio*, at para. 57, is applicable to Neufeld's defamation action:

> As the Ontario Court of Appeal recognized over a century ago in words that apply equally to the case on appeal, "[w]hoever seeks notoriety, or invites public attention, is said to challenge public criticism; and [s]he cannot resort to the law courts, if that criticism be less favourable than [s]he anticipated" (*MacDonell v. Robinson* (1885), 12 O.A.R. 270, at p. 272).

107. It is submitted that the chambers judge was correct to find a close similarity between Neufeld and Simpson's defamation actions and correctly applied *WIC Radio* in the context of a *PPPA* application. Hansman's fair comment defence is strong and he should not be required to go through a lengthy and expensive defamation trial. Neufeld's action should be dismissed.

E. Weighing Exercise

108. In *Pointes*, this Court explained that the weighing exercise "provides courts with a robust backstop to protect freedom of expression".[139] At this stage of the analysis, a court "must make a dismissal order unless the respondent satisfies the court that":

> the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.[140]

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[138] Thorsell Affidavit, Exhibit D, AR Vol. II at 58.
[139] *Pointes* at para. 53.
[140] *PPPA*, s. 4(2)(b).

109. The weighing exercise is informed by s. 2(b) *Charter* jurisprudence, "which grounds the level of protection afforded to expression in the nature of the expression".[141] As this Court has explained "not all expression is created equal".[142]

i) Public Interest in Protecting the Defendant's Expression

110. Although the plaintiff has the burden to establish harm as a prerequisite to the weighing exercise,[143] we address the public interest in protecting the defendant's expression first.

111. In *Pointes*, this Court identified both the subject matter of the expression and the form of the expression as important considerations in evaluating the public interest in protecting the defendant's expression.[144] The quality of the defendant's expression and the motivation behind it are also relevant at the weighing stage.[145] These criteria are all relevant here.

112. The subject matter and motivation behind Hansman's comments are clear from the face of his statements and his affidavit evidence. On its face, Hansman's expression is aimed at protecting a disadvantaged group in society, members of the LGBTQ community. One segment of that community, transgender individuals, are among the most vulnerable in our society.[146] As summarized by the British Columbia Human Rights Tribunal:

> . . . despite some gains, transgender people remain among the most marginalized in our society. Their lives are marked by "disadvantage, prejudice, stereotyping" . . . They are stereotyped as "diseased, confused, monsters and freaks" . . . Transpeople face barriers to employment and housing, inequitable access to health care and other vital public services, and heightened risks of targeted harassment and violence. The results include social isolation, as well as higher rates of substance use, poor mental health, suicide, and poverty . . . For transgender children, anti-trans bullying leads to higher rates of absenteeism and poorer educational outcomes, which then has ripple effects for their health and future prospects. . . .[147]

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[141] *Pointes* at para. 77.
[142] *Pointes* at para. 76 citing *R. v. Keegstra*, [1990] 3 S.C.R. 697.
[143] *Bent* at para 142.
[144] *Pointes* at paras. 120-124.
[145] *Pointes* at para. 74.
[146] See *C.F. v. Alberta (Vital Statistics)*, 2014 ABQB 237 at para. 46 (accepting that the social stigma attached to being transgender is "pretty severe") and *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726 at para. 169 (holding "It is abundantly clear that transgendered persons have been and continue to be the subject of stigma and prejudice in our society").
[147] *Oger v. Whatcott (No. 7)*, 2019 BCHRT 58 at para. 62.

113. It is important to understand that statements denying the existence of transgender persons act to "dehumanize transgender people." This, in part, is because, "Most protected groups do not have a social context or history of being told they do not exist and that people who claim to be part of the group are lying or mentally ill."[148] Some of Neufeld's statements fit this description and therefore have a particularly profound impact on transgender people.

114. Schools must be safe and inclusive places for students. This is particularly true for students who may face marginalisation in society. The school setting must not only be free of violence and harassment, but adults who are part of the school community, including teachers and union leaders, have a responsibility to proactively address discrimination. As stated by the UN Commissioner for Human Rights with respect to discrimination faced by LGBTQ youth, "Confronting this kind of prejudice and intimidation requires concerted efforts from school and education authorities and integration of principles of non-discrimination and diversity in school curricula and discourse".[149] Hansman's expression furthers this objective in speaking out against discrimination and in support of safe and inclusive schools.

115. Hansman's comments reflect these concerns. For example, in Comment 5, the excerpts including Hansman's comments are as follows:

> Glen Hansman, president of the BCTF, said if Neufeld was a teacher, he would be removed from the school system.
>
> "For some reason, because his comments have been largely restricted to transphobic comments… some are willing to give him a pass on this."
>
> …
>
> As a school board member, Neufeld has a responsibility to uphold the *Human Rights Code*. "This isn't just a simple matter of (Neufeld) philosophically disagreeing with the concept of transgender or supporting students who are transgender, he is creating a school environment for both our members and students that is discriminatory and hateful," he said.

116. In the article including Comment 7, along with reviewing the allegations in the human rights complaint, the article includes Hansman's comments as follows:

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[148] *Ibid*. at paras. 156-57.
[149] UNHCR, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, UNGA, 19th Sess Un Doc A/HRC/19/41 (2011).

> The president of the British Columbia Teachers' Federation says a Chilliwack school trustee who has made controversial LGBT comments shouldn't be "anywhere near students" and that's why the BCTF has filed a human rights complaint against him.
>
> …
>
> Hansman says the law is well established and clear and Neufeld should know better.
>
> "Schools are not, nor have they been the world's most awesomest places for LGBTQ youth, It is still not, in 2018, necessarily safe for someone to come out at school and that's probably doubly so for someone who is trans."[150]

117. Another example that shows the subject matter and quality of Hansman's comments is the nine minute interview with Global News, which constitutes Comment 2 and is available online.[151]

118. Hansman's motivation is also clear from his affidavit evidence, where he explained his concerns with Neufeld's statements.[152] He also explained that Neufeld continued to make statements the BCTF viewed as discriminatory and that people in authority, like Neufeld, "have to understand that things they say in public can have a real and significant impact on vulnerable students and teachers within the school system".[153]

119. The form of Hansman's expression is also significant. Hansman was contacted by reporters and asked for his comments. This exemplifies not only that the matter was one of public importance (which is amply demonstrated by the record), but also that his comments were to the media who perform an important societal function protected by the s. 2(b) *Charter* guarantee of freedom of the press. This is a not a situation where Hansman was self-publishing his comments. Although Neufeld largely made his comments on Facebook, as well as through other mediums, Hansman's comments about Neufeld were all made to the press.

120. Reporting by the press on matters of public importance is a central component of our democracy. As this Court has held, "freedom of the press and other media is vital to a free society".[154] In order to inform the public, freedom of the press must necessarily include the

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[150] Hansman Affidavit, Exhibit K, AR Vol. II at 129.
[151] Comment 2 is available here: https://globalnews.ca/video/3823083/backlash-after-school-trustee-criticizes-lgbtq-program
[152] Hansman Affidavit at paras. 13-19, 23-25, 28, 45-46, AR Vol. II at 65-67, 71-72.
[153] Hansman Affidavit at paras. 41, 45, AR Vol. II at 70-71.
[154] *Canadian Broadcasting Corp v. Lessard*, [1991] 2 S.C.R. 421 at para. 2.

freedom to gather news.[155] At the time when he was contacted for comment, Hansman was President of the BCTF and was "frequently called on by news media to comment on matters of public interest".[156] When Hansman shared his views and opinions with reporters, he did not control what parts of the interviews were used in the reports.[157]

121. The quality of Hansman's comments is high. His expression in support of safe and inclusive schools, in defence of a marginalised and vulnerable group, and against intolerance and discrimination is close to the *Charter*'s core values. The Court of Appeal seemed to imply that the quality of Hansman's speech was diminished because he used the terms "bigoted, transphobic, anti-immigrant, racist, misogynist and hateful".[158]

122. First, as explained above, Hansman did not say that Neufeld was anti-immigrant or racist. Second, his use of the terms "bigoted, transphobic, misogynist and hateful" were measured, proportionate, and made as part of his broader statements about the need for safe and inclusive schools. This was appropriate language to respond to Neufeld's public statements. Hansman did not employ deliberate falsehoods or vitriol.[159]

123. The high value of Hansman's expressive activity is in no way diminished by the fact that he opined that Neufeld "tip toed quite far into hate speech." Hansman believes this.[160] The BCTF has brought a human rights complaint alleging just that.[161] There is a public interest in knowing this and Hansman's comments were made in that context.

124. The misogynist comment is also proportionate. As noted above in the context of the fair comment analysis, Hansman's comment was in response to a screen shot from Neufeld's

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[155] *Ibid*.
[156] Hansman Affidavit at para. 21, AR Vol. II at 66.
[157] Hansman Affidavit at para. 23, AR Vol. II at 66.
[158] BCCA Reasons at para. 62. We note however that it is not clear what significance the Court of Appeal placed on this because it never engaged in a weighing exercise similar to that performed by this Court in *Pointes* and *Bent*.
[159] See *Pointes* at para 75, citing *Pointes ONCA* at para. 94 for the proposition that "the public interest in protecting that speech will be less than would have been the case had the same message been delivered without the lies, [or] vitriol".
[160] Hansman Affidavit at para. 46, AR Vol. II at 71.
[161] Hansman Affidavit, Exhibit H, AR Vol. II at 106-118.

Facebook page where he made comments regarding women who have protected sex and women who have unprotected sex.[162]

125. Hansman's expression – made in response to repeated statements by Neufeld – is at the high end of the protection deserving spectrum.

ii) Harm Allegedly Suffered

126. As this Court explained in *Pointes*, "harm is principally important in order for the plaintiff to meet its burden".[163] At this stage of the analysis, the chambers judge must consider "the *harm* suffered by the responding party *as a result* of the moving party's expression." Harm can be either monetary or non-monetary. Its magnitude "becomes relevant when the motion judge must determine whether it is 'sufficiently serious' that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression".[164]

a) Evidence of Harm and Causation

127. While the plaintiff need not prove harm or causation, the plaintiff must "provide evidence for the motion judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link."[165] Bald assertions of harm are not sufficient. Nor should the pleaded harm be taken at face value. The required evidence "will be especially important where there may be sources other than the defendant's expression that may have caused the plaintiff harm."[166]

128. The chambers judge's decision is consistent with this approach.[167] He noted a "causal link" was required and "bald assertions" are not sufficient.[168] He also noted that there was next to

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[162] AR Vol. II at 244.
[163] *Pointes* at para. 68.
[164] *Pointes* at paras. 68-70 (emphasis in original).
[165] *Pointes* at para. 71.
[166] *Pointes* at para. 72.
[167] At para 59 of the BCSC Reasons the chambers judge stated Hansman did not address balancing. The judge was referring to the fact that this was not addressed in Hansman's main written submissions. It was addressed in the notice of application and written reply submission: see Notice of Application (AR Vol. I at 188) and Hansman's Written Reply submission (AR Vol. I at 163). At para 50 of the BCCA Reasons, the court erroneously stated the chamber's judge did not have the assistance of the defendant "who choose not to make submissions on this issue".
[168] BCSC Reasons at paras. 149-50.

no evidence led by Neufeld regarding harm or damage, finding there was "precious little evidence from the plaintiff that can be weighed as part of the balancing of interests."[169]

129. The Court of Appeal found that the chambers judge erred by failing "to give full effect to the presumption of damages in defamation."[170] The Court of Appeal was wrong to interfere with the chambers judge's decision on this basis. Although general damages "are presumed in defamation actions … the magnitude of the harm will be important in assessing whether harm is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression".[171] As the Ontario Court of Appeal recently explained, "The presumption of damages in a defamation action involving an individual only goes so far".[172] The chambers judge accepted that damages are presumed once a statement is found to be defamatory.[173] However, as he repeatedly noted at the weighing stage of the analysis under s. 4(2)(b), Neufeld had failed to adduce evidence of any harm beyond bare assertions in his affidavit. The chambers judge was right to consider the paucity of evidence in considering the magnitude of harm.

130. In this case, Neufeld plead that he suffered damage to his reputation professionally, socially and generally within his community, across Canada and internationally as well as suffering indignity, personal harassment, stress, anxiety, mental and emotional distress, stigmatization, humiliation and isolation.[174] However, he chose to lead no evidence to substantiate this other than an affidavit with a bare assertion that the pleadings were true.[175]

131. Even if he had led evidence, the examples of stigmatization, humiliation and isolation Neufeld plead were all actions taken against him by other bodies, such as the Chilliwack School Board's request for his resignation and direction to him not to deliver commencement speeches to four high schools because, as he plead, "his presence supposedly made it unsafe for LGBTQ students". The chamber's judge concluded there was no basis to find that these organisations took action against Neufeld because of Hansman's comments:

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[169] BCSC Reasons at para. 152.
[170] BCCA Reasons at para. 51.
[171] *Bent* at para 144.
[172] *Levant v. DeMelle*, 2022 ONCA 79 at para. 68.
[173] BCSC Reasons at para. 83.
[174] Amended Notice of Civil Claim at paras. 46-47, AR Vol. I at 97-98.
[175] Affidavit #1 of Barry Neufeld sworn May 30, 2019, AR Vol. V at 30.

> Based on the present sparse evidence, it strains credulity to accept that the actions of unrelated organizations were influenced or affected by Mr. Hansman's statements. The clear inference is that those organizations made their own decisions about the plaintiff in response to the Facebook Post.[176]

132. There is no basis to disturb this factual finding.

133. Neufeld's repeated inflammatory statements towards the LGBTQ community, including teachers and students, should also inform the assessment of any damage potentially suffered by him. As explained recently by the Ontario Court of Appeal in *Levant v. DeMelle*:

> …when a person injects themselves into public debate over a contentious topic, they must expect they are going to be met with some measure of rebuttal, perhaps forceful rebuttal, by those who take the opposite view… While such responses do not justify crossing the line into defamatory speech, they are a factor to consider in assessing the level of damages that the defamatory aspect of the response may create.[177]

134. The rationale for a similar approach is strong here. By any measure, Neufeld's statements were inflammatory. When a person not only injects themselves into a debate on a contentious topic, but also makes repeated public inflammatory statements, which they acknowledge from the outset will be viewed as bigoted and homophobic, this must have some bearing on the level of damage they can claim regarding the response.

135. On the evidence, the chambers judge was entitled to conclude that Neufeld had failed to establish that the harm likely to have been suffered by him was "serious enough" to outweigh the public interest in protecting Hansman's expression.[178]

b) "Chilling Effect" of Dismissing Defamation Action is Not Part of the Test

136. As part of its harm analysis, the Court of Appeal said it was relevant to consider "the potential chilling effect on future expression by others who might wish to engage in debates on this or other highly charged matters of public interest – that is, the risk that people would withdraw or not engage in public debate for fear of being inveighed with negative labels and accusations of hate speech with no opportunity to protect their reputation."[179] The Court of

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[176] BCSC Reasons at para 150.
[177] *Levant v. DeMelle*, 2022 ONCA 79 at para. 70.
[178] BCSC Reasons at paras. 161, 179.
[179] BCCA Reasons at para. 65.

Appeal said this was the proper approach because "it is not only the harm to the plaintiff that is being weighed but the public interest in vindicating a potentially meritorious claim."[180]

137. The appellant disagrees with this interpretation of s. 4(2)(b). In *Pointes* this Court said that plaintiffs are required to show it is likely they have suffered or will suffer harm. The "corresponding public interest" in allowing the proceeding to continue is the existence of that harm.[181]

138. The Court of Appeal found support for its approach in *Pointes*, relying on the following:

> [80] … the importance of the expression, the history of litigation between the parties, broader or collateral effects on *other* expressions on matters of public interest, the potential chilling effect on *future* expressions either by a party or by others, the defendant's history of activism or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the *Charter* or human rights legislation. I reiterate that the relevance of the foregoing factors must be tethered to the text of s. 137.1(4)(b) and the considerations explicitly contemplated by the legislature to conduct the weighing exercise. [Italics added by this Court; underlining added by the Court of Appeal.][182]

139. For a number of reasons, it is submitted, "the potential chilling effect" identified by the Court of Appeal cannot be grounded in paragraph 80 of *Pointes*.

140. At this point in its analysis the Court had already addressed harm to plaintiffs and it had held that monetary harm or reputational harm may be considered.[183] While "the provision does not depend on a particular kind of harm," it does require harm "to the responding party", that is, the plaintiff.[184] The Court of Appeal's proffered "chilling effect" is not harm to the plaintiff, but harm to a class of persons who might be deterred from engaging in public debate if they cannot sue in defamation.

141. In *Pointes* this Court found that general harm is not relevant. The defendant in *Pointes* had argued that there would be harm to the principle of finality in litigation if it could not sue the

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[180] BCCA Reasons at para. 63.
[181] *Pointes* at para. 82. See also para. 79 referring to the "corresponding public interest" as being "the harm suffered or potentially suffered by the plaintiff."
[182] *Pointes* at para. 80, cited in BCCA Reasons at para. 64.
[183] *Pointes* at para. 69.
[184] *Pointes* at para. 68.

plaintiffs for breach of the settlement agreement. The Court rejected that argument saying that the value of finality of litigation could only be relevant at this stage "to the extent that it relates to harm suffered by the plaintiff, not harm in general."[185]

142. The Attorney General of British Columbia's statements during first and second reading of the bill that became the *PPPA* also do not support the Court of Appeal's interpretation. At first reading, the Attorney General stated "the act would improve access to justice, would balance the protection of freedom of expression with the protection of reputation and economic interests."[186] The focus on actual harm to the plaintiff's reputation and economic interests is also evident in comments made by the Attorney General at second reading:

> What the bill proposes to do is strike a balance between a couple of values. One is the value of protecting an individual's reputation or a company's reputation. The other is the value of a robust and rigorous debate that the courts have described as freewheeling, that can be heated, that can result in intemperate comments. But that's part of public debate, and it shouldn't be met with threats of litigation to stop people from talking about the issues of the day. Those are values that this bill is aimed at addressing.[187]

These statements make it clear that on the plaintiff side of the weighing exercise courts must consider harm that likely has been or will be personally suffered by the plaintiff.

143. A further difficulty with the Court of Appeal's "chilling effect" approach is that courts already consider the quality of a defendant's statements when assessing the public interest in protecting their expression. In addressing the "chilling effect" it identified, the Court of Appeal focused on the "accusations of hate speech" and "the risk of being tarred with negative labels".[188] It appears the Court of Appeal is counting this "chilling effect" both as part of the harm suffered by the plaintiff and as part of the assessment of the quality of the defendant's expression. If "the risk of being tarred with negative labels" is to be considered as part of the analysis, it should not gain a disproportionate weight by being counted both for the plaintiff on one side of the equation and against the defendant on the other.

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[185] *Pointes* at para. 118.
[186] British Columbia, Legislative Assembly, *Hansard*, 41st Parl, 4th Sess, (13 February 2019) at p. 6974 (Hon. D. Eby).
[187] Quoted by the chambers judge at para. 54 of his reasons.
[188] BCCA Reasons at para. 69.

c) Alternatively, "Chilling Effect" Should be Given Little Weight

144. If, however, a potential chilling effect on others who may be "inveighed with negative labels" and cannot sue in defamation should be considered when determining the public interest in permitting the proceeding to continue, it is not something that can be given much if any weight in this case and would not justify overturning the chambers judge's finding that the "interest in public debate outweighs the interest in continuing the proceeding on these facts".[189]

145. It is difficult to construct an analysis to weigh the harm to others, who may not be able to sue in defamation if they are inveighed with negative labels, in the abstract. Perhaps this is why the Court of Appeal did not undertake this analysis. In fact, the Court of Appeal did not engage in a weighing exercise at all. It simply indicated what it found to be errors in the chambers judge's approach and set aside his decision.

146. If the Court is to conduct such an analysis in this case, the starting point must be consideration of the effect on others with "contentious opinions" similar to those expressed by Neufeld. This is because others who engage in public debate, in a less inflammatory manner, would not be dissuaded from participating because Neufeld cannot sue in defamation. They would understand that Neufeld's inability to sue was not because he holds "contentious opinions" but because Hansman's expression was a measured response to Neufeld's statements. In other words, at this stage the Court must still examine the nature and quality of Neufeld's expression and Hansman's expression. In this case, the quality of Neufeld's expression is at the lowest end of "the protection-deserving spectrum."[190] He purports to be taking a position on a "facet of the SOGI 1-2-3 learning resources: the teaching of the theory, as if it was fact, that gender is fluid, that there are more than two genders, and that gender is not based in biology."[191] If this were his only statement, this statement alone would be at the low end of the protection-deserving spectrum as this statement denies the existence of transgender and non-binary persons. Neufeld is stating there are only two genders and those are based on "biology", or in other words, a person's assigned gender at birth.

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[189] BCSC Reasons at para. 179.
[190] *Bent* at para. 169.
[191] Exhibit G to Britten Affidavit, AR Vol. V at 18.

147. A review of the record shows Neufeld made a broader array of public statements about the LGBTQ community, including statements about transgender identity, gay marriage and same sex parenting. He has also criticized members of the LGBTQ community and others who support the use of age-appropriate materials to educate students about sexual orientation and gender identity. He has offered praise of countries where LGBTQ people are oppressed.

148. For example, Neufeld views "lukewarm Christians… sitting idly by" and failing to "push back" on matters of concern to the LGBTQ community as an indication that society is "slouch[ing] towards Gomorrah." Persons who are transgender are not recognized by their gender identity. Caitlyn Jenner is not Caitlyn Jenner but "Bruce Jenner" doing an impressive "caricature of a woman". The government is going to take children away from their parents and force them to experiment with homosexuality and gender fluidity. People who support gender identity have "an evil agenda". Christian churches that do not oppose this have been "infected" with "Pink Christianity." Neufeld has denied the existence of transgender people and stated "the trans agenda is eugenics" contributing to the "destruction of humanity". This is not informed and constructive debate generating fruitful public discourse. By any analysis these are inflammatory and offensive statements that form the basis of two ongoing human rights complaints filed with the BC Human Rights Tribunal.

149. Furthermore, there was no basis in the evidence to support the conclusion that Neufeld or anyone witnessing this "public discourse" would have been deterred from speaking out on matters of public interest. On the contrary, Neufeld continued to voice his opinions, even after many individuals spoke out in opposition to his statements.

150. On the other side of the equation, Hansman's expression should be accorded high protection, as discussed above. Therefore, even if the potential chilling effect of dismissing a defamation action on others is a relevant consideration, the result in this case should not change. Neufeld has failed to demonstrate that the weighing of the public interest favours permitting this proceeding to continue. The chambers judge's decision should be restored.

PART IV – COSTS

151. The appellant seeks party and party costs in this Court and the British Columbia Court of Appeal and costs in the Supreme Court of British Columbia on a full indemnity basis pursuant to s. 7(1) of the *PPPA*.

PART V – ORDER SOUGHT

152. The appellant seeks an order allowing the appeal and restoring the Order of Justice Ross dated November 26, 2019 allowing the application of the defendant under the *PPPA* and dismissing the action of the plaintiff, with costs as set out in Part IV of this factum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Robyn Trask
Michael Sobkin
Counsel for the Appellant

Dated at Vancouver, British Columbia this 11th day of April, 2022.

PART VI – TABLE OF AUTHORITIES

Decisions	Cited at para(s):
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Teachers Act, S.B.C. 2011, c. 19, s. 13	10
Secondary Sources	**Cited at para(s):**
British Columbia, Legislative Assembly, *Hansard*, 41st Parl, 4th Sess, (13 February 2019) at p. 6974 (Hon. D. Eby)	142
British Columbia, Legislative Assembly, *Hansard*, 41st Parl, 4th Sess, (14 February 2019) at p. 7018 (Hon. D. Eby)	57
BC Teachers' Council, "Professional Standards for BC Educators" (June 19, 2019)	10

UNHCR, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, UNGA, 19th Sess Un Doc A/HRC/19/41 (2011)	114