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 RECORD

(Pursuant to Rule 38 of the *Rules of the Supreme Court of Canada*)

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Neufeld v. Hansman,*
2019 BCSC 2028

Date: 20191126
Docket: S35152
Registry: Chilliwack

Between:

Barry Neufeld

Plaintiff

And

Glen Hansman

Defendant

Before: The Honourable Mr. Justice A. Ross

(In Chambers)

Reasons for Judgment

Counsel for the Plaintiff:	P. Jaffe E. Magnussen, A/S
Counsel for the Defendant:	R. Trask C. Veinotte J. Cooper, A/S
Place and Date of Hearing:	Vancouver, B.C. July 11-12, 2019 August 6, 2019
Place and Date of Judgment:	Chilliwack, B.C. November 26, 2019

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New Legislation and Introduction to this Application

[1] On March 25, 2019, the *Protection of Public Participation Act*, S.B.C. 2019, c.3 [*PPPA* or *Act*] received Royal Assent and came into force in British Columbia. It applies to actions commenced after May 15, 2018.

[2] As the title of the *PPPA* suggests, its purpose is to protect public participation in matters of public interest. In recent years, there has been a trend toward lawsuits being commenced to silence or punish a person's or company's critics. Those actions have come to be known as Strategic Lawsuits against Public Participation or "SLAPP" suits.

[3] The *PPPA* creates a new procedure that is designed to screen out actions that have the effect of limiting a defendant's participation in public debate. In that respect, the *PPPA* seeks to balance the rights of individuals to protect their reputations against the obvious benefit to a democratic society of protecting free speech and rigorous debate on issues of public interest.

[4] Section 4 of the *PPPA* sets out the tests that are to be applied when a defendant applies under the *Act* to have an action dismissed. It provides:

> **Application to court**
>
> 4 (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that
>
> (a) the proceeding arises from an expression made by the applicant, and
>
> (b) the expression relates to a matter of public interest.
>
> (2) If the applicant 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 satisfies the court that
>
> (a) there are grounds to believe that
>
> (i) the proceeding has substantial merit, and
>
> (ii) the applicant has no valid defence in the proceeding, and
>
> (b) 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.

[5] In this hearing, the defendant applies to dismiss the plaintiff's defamation action pursuant to s. 4 of the *PPPA*. He argues that the plaintiff sued him because of comments that he made in relation to a subject that was of public interest. He says the facts of this action satisfy the screening test established under the new *Act*.

[6] The plaintiff opposes the application on the basis that this is not the type of claim anticipated by the *Act*. He also argues that the defendant's application should fail on the merits. Finally, he says that if there is a question regarding whether he has established any burden upon him for this application, this application should be dismissed or adjourned, and his application for further document production from the defendant should be granted.

Background

[7] The background to this action lies within a philosophical dispute over the British Columbia Ministry of Education's publication of tools and resources relating to sexual orientation and gender identity ("SOGI 123"). The Ministry published those tools to teachers with the stated goal of promoting inclusive environments, policies, and procedures in respect of sexual orientation and gender identity.

[8] The plaintiff, an elected trustee of the Chilliwack School Board, does not agree with the use of SOGI 123 materials in schools.

[9] The defendant was, at the material times, the President of the British Columbia Teachers' Federation ("BCTF"). Prior to his election to that post, he was a teacher. He has now returned to being a teacher. It is a matter of record that the defendant is a gay man.

[10] The plaintiff posted certain criticisms of the Ministry's SOGI 123 resources on his Facebook page. His post attracted criticism and news media attention. In his capacity as the President of the BCTF, the defendant was interviewed about the plaintiff's post. The plaintiff alleges that the defendant defamed him in that interview, and in subsequent statements that were broadcast and published in the press and online.

[11] This application comes before this Court as a matter of first instance in this province. Both parties place considerable weight on the reasoning of the Ontario Court of Appeal in cases applying analogous legislation in Ontario. I am informed that the Supreme Court of Canada granted leave to appeal to parties in two of those cases; the appeals have been heard and are now on reserve. That judicial history suggests that the goal of a screening test to achieve early dismissals and reduce litigation costs is, in many cases, illusory.

[12] Both parties rely on evidence of the circumstances that surround this dispute, although the defendant tendered the vast majority of that evidence. The plaintiff argues that the collateral information provides context to his defamation claim, including the alleged innuendo in the defendant's statements and the alleged "smear campaign" in which the defendant and others engaged. The defendant says that the evidence is important in order for the court to have the full context of the public debate and to draw the necessary inferences that the plaintiff brought the defamation action in circumstances that meet the criteria of the *PPPA*.

[13] I have set out below a brief contextual history, followed by a chronology of the events that form the basis of this action and this application.

The Background and Allegations of Defamation

[14] In 2016, the *Human Rights Code*, R.S.B.C. 1996, c. 210 [*HRC*] was amended to include "gender identity or expression" as a prohibited ground of discrimination. Sexual orientation has been a protected ground under the *HRC* since 1992.

[15] Shortly after the 2016 amendment, the Ministry of Education issued an updated Ministerial Order, requiring that school boards include reference to "gender identity and expression" in their codes of conduct, in addition to the already required references to other prohibited grounds under the *HRC*. That update was announced by the Ministry on September 7, 2016.

[16] A group of organizations collaborated to prepare the SOGI 123 resources. That group included the Ministry of Education, UBC Faculty of Education, the BCTF,

and members of the communities representing Lesbian, Gay, Bisexual, Transgender, and Queer ("LGBTQ") groups. The materials were drafted with the stated goal of having age-appropriate tools for teaching about sexual orientation and gender identity available for teachers of children in Kindergarten through Grade 12.

[17] There was public debate regarding the use of the SOGI 123 materials in schools.

[18] On October 17, 2017, the plaintiff posted on his Facebook page the following (the "Facebook Post"):

> 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 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.]

[19] The plaintiff posted that statement on Facebook at some point prior to 1:23 P.M. on October 23, 2017. Mainstream media outlets, including Global News, CBC News, and CTV News published online articles about the post within hours. The defendant's submissions describe the reaction to the Facebook Post as immediate and widespread. There was a substantial amount of criticism of the Facebook Post.

[20] The defendant's affidavit material attaches numerous news articles regarding the Facebook Post that were published in the ensuing hours and days. The time and chronology of the news articles is noted on the exhibits.

[21] Mr. Hansman was first interviewed on the evening of October 23, 2017, in his capacity as the President of the BCTF. His comments were published in an online article on the website of News 1130, a local news radio station. He argues that other news articles demonstrate that his own comments were not the first, nor the only, criticism of the Facebook Post. His comments did, however, form the basis of this action.

[22] The public debate regarding use of the SOGI 123 materials continued over the next year and into the next election campaign for the Chilliwack School Board. The plaintiff continued to promote his own position in speeches and further Facebook posts. As set out in more detail below, the defendant was interviewed on several subsequent occasions.

The Chronology of Facts Relevant to This Action

[23] In his amended notice of civil claim, the plaintiff alleges that the defendant made defamatory statements on a number of dates, and in a number of broadcasts and publications. The amended notice of civil claim alleges a range of statements with a range of defamatory meanings. There are numerous types of damage alleged by the plaintiff. The causative relationship between the defendant's statements and the alleged damage suffered by the plaintiff also falls along a spectrum.

[24] The primary allegations of defamation are aimed at the defendant's statements that were personal attacks against the plaintiff. In his submissions, the plaintiff emphasized the following statements made by the defendant in interviews. Each statement is taken from the notice of civil claim with the emphasis as it appears in that document:

> "He [Neufeld] should step down or be removed,"
>
> "regardless of **his bigoted views**…….he has responsibilities….for ensuring a safe and inclusive school …"
>
> "Sometimes our beliefs, values, and responsibilities as professional educators are challenged by those who promote hatred."
>
> "For some reason, because his comments have been largely restricted to **transphobic comments**… some are willing to give him a pass on this."

> BCTF President Glen Hansman says the trustee "tip toed quite far into **hate speech**" and sent a disturbing message to both students and parents.
>
> 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.

[25] The plaintiff argues that these statements suggest that he is bigoted, hates homosexuals and transgender people, that he had committed the criminal offence of hate speech, and that he should not be allowed near children. Those statements are the core of the plaintiff's defamation case against the defendant; although, as noted, there are numerous other statements by the defendant that are delineated in the amended notice of civil claim.

[26] I have set out below the chronology and the context of the statements made by the defendant.

[27] Following the Facebook Post on October 23, 2017, the defendant was interviewed by News 1130, the Vancouver Sun, Global News, and the Huffington Post for articles that were broadcast and published in print and online within the next two days. The plaintiff alleges that during these interviews, the defendant's statements suggested that the plaintiff:

a) should step down from his position as a school board trustee;

b) violated his obligations as a school board trustee by not being in favour of safe schools for all students;

c) was allowing his religious views to affect his role as an elected official in a secular school system; and

d) is bigoted.

[28] On October 25, 2017, the plaintiff issued a press release stating, in part, "My post on Facebook has created a lot of controversy and first of all, I want to apologize

to those who felt hurt by my opinion, including members of the Chilliwack Board of Education … I am critical of an educational resource, not individuals."

[29] On November 21, 2017, the plaintiff spoke at a rally organized by a group called "Culture Guard". The rally was attended by people who supported Mr. Neufeld's opinions and by protesters who did not.

[30] On January 16, 2018, the Chilliwack Teachers' Association passed a resolution of non-confidence in the Chilliwack Board of Education in response to that board's failure to take a strong stand on the plaintiff's attack on SOGI 123.

[31] On January 17, 2018, the defendant made statements to several community newspapers in the Fraser Valley. The plaintiff alleges that during these interviews, the defendant suggested that the plaintiff promoted hatred.

[32] On January 19, 2018, the Chilliwack School Board and the Ministry of Education requested that the plaintiff resign from his position. He did not.

[33] On January 29, 2018, the BCTF (which is not a party to this action) filed a human rights complaint against the plaintiff, alleging that the plaintiff violated ss. 7 and 13 of the *HRC*. The complaint was accepted for filing by the BC Human Rights Tribunal on April 20, 2018.

[34] Between April 10 and 22, 2018, the defendant was interviewed by several local newspapers and radio stations, in articles broadcast on radio and television and published in print and online, regarding the human rights complaint. The plaintiff alleges that during these interviews, the defendant suggested that the plaintiff:

i. had created an unsafe work environment for teachers;

ii. exposed transgender people to hatred;

iii. was transphobic;

iv. should be removed from office;

v. discriminated against people based on their gender identity; and

vi. should not be anywhere near students.

[35] On April 22, 2018, the defendant was interviewed by a radio station for a story that was broadcast and published online regarding public rallies that were held to demonstrate for and against the SOGI 123 resources. The plaintiff alleges that during that interview, the defendant made statements suggesting the plaintiff had made hateful comments.

[36] On September 16, 2018, a radio station interviewed the defendant, broadcast the interview, and published it online. The plaintiff alleges that during that interview, the defendant suggested that certain people running in the school trustee election had spread hate against LGBTQ people and had made vile comments about refugees and immigrants as a group. The defendant also said that racism and misogyny exist in the school system, and that anyone seeking office should not be spreading hate and bigotry. The plaintiff says that, by innuendo, the defendant was referring to him.

[37] The plaintiff retained counsel, who sent a letter to the defendant on September 19, 2018. The letter outlined numerous alleged defamatory statements of the defendant, and demanded an apology and retraction (the "Demand Letter"). The contents of the Demand Letter were published the next day in an online newspaper called the "Valley Voice." The contents of the Demand Letter, including the specifics of the alleged incidents of defamation, were quoted in the article.

[38] On October 12, 2018, this action was commenced.

[39] The school board election was held on October 20, 2018. The plaintiff was re-elected as a trustee. In that election, he was part of a slate of candidates who grouped together based on their collective opposition to the SOGI 123 resources being used in schools along with other similar issues.

[40] In addition to the allegations in the amended notice of civil claim addressing the comments attributed to the defendant, the plaintiff also alleges that comments

made by other individuals, who are not defendants, were part of a "smear campaign" in which the defendant participated. Those allegations include:

a) comments made by Morgane Oger, a "transgender activist and the vice president of the British Columbia New Democratic Party", on October 25, 2017;

b) comments made by Rob Fleming, "who represents the riding of Victoria-Swan Lake in the Legislative Assembly of British Columbia and is presently the Minister of Education", on November 23, 2017, January 9, 2018, and September 17, 2018;

c) public demonstrators who displayed placards that republished and amplified the defendant's comments about the plaintiff in rallies held in April 2018; and

d) comments made by the Chilliwack Teachers Union on October 3, 2018.

[41] The amended notice of civil claim alleges that the "defendant's false and defamatory statements" meant, both expressly and by innuendo, and were understood by the public to mean that the plaintiff:

i promoted hatred;
ii committed hate speech;
iii was actuated by hatred of certain students;
iv was discriminatory against gay and/or transgender students;
v promoted hatred toward gay and/or transgender students in the school system;
vi made it unsafe for students in the school system;
vii was unfit to hold public office as a school board trustee;
viii violated ethical and/or legal duties applicable to school board trustees;
ix presents a safety risk to students;
x has bigoted views which threaten the safety and inclusiveness in schools;
xi has lied to the public about what SOGI 123 includes;

xii is a religious bigot who imposes his religious views on some students in a manner which makes it unsafe for such students;

xiii is racist, discriminatory, sexist, misogynist, transphobic and/or homophobic;

xiv has violated the rights of students under the *Canadian Charter of Rights and Freedoms* and BC *Human Rights Code*;

xv regards people who support transgender students as child abusers;

xvi is an outlier and part of a vanishing breed of racists;

xvii published knowingly false statements to injure the public interest; and

xviii is unfit to be a school board trustee because of his age.

[42] The amended notice of civil claim also alleges that:

(a) the defendant's statements were intended to convey the meaning that the plaintiff's comment constituted criminal conduct, being the spreading of false news or the public incitement of hatred;

(b) the defendant's comments were actuated by malice;

(c) on October 19, 2018 (after the commencement of this action), the defendant made further defamatory comments about the plaintiff by directing the public to an "obscure website" called "Press Progress" which published a "false and defamatory attack on the plaintiff" on October 16, 2018; and

(d) on October 22, 2018, the defendant made further defamatory statements to CBC Radio.

[43] The allegations particularized in the amended notice of civil claim are, of course, only allegations. I discuss below the proper analysis of the onus and burden of proof in the screening process established by the *PPPA*.

[44] I note at this point that the parties made helpful and reasonable admissions and acknowledgements in their submissions that assisted in the analysis of the facts. In particular:

a) the defendant acknowledged that he made all of the statements described in the amended notice of civil claim;

b) the defendant admitted that the statements had been published;

c) the defendant acknowledged that at least some of those statements are capable of defamatory meaning; and

d) the plaintiff acknowledged that the SOGI 123 issue was a matter of public interest.

The Purpose of the *PPPA* and the Ontario Legislation

[45] I noted above that this application comes before this Court as a case of first instance. There is, however, substantial judicial analysis of similar legislation.

[46] The *PPPA* is modeled on s. 137.1 of the *Ontario Courts of Justice Act*, R.S.O. 1990, c. C. 43. Section 137.1 is entitled "Dismissal of proceeding that limits debate" ("*OCJA* Provisions"). Those provisions have been considered by the Ontario Court of Appeal including *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 [*Pointes Protection*]; *Platnick v. Bent*, 2018 ONCA 687.

[47] In this application, both parties rely on the reasoning contained in the decisions of the Ontario Court of Appeal as being correct, although each party emphasizes different statements. Both parties agree that the court's analysis is correct. Neither party argues that the analysis undertaken by the Ontario Court of Appeal was wrong or is not applicable to the BC legislation. Having reviewed the decisions, I find the analysis helpful and the reasoning persuasive, although I have distinguished those cases in some respects. Where the wording of the *OCJA* Provisions differs from the BC *PPPA*, I have noted the different wordings and discussed whether they are consequential.

[48] As noted, the *OCJA* Provisions spawned a number of applications for dismissal of actions that were alleged by the defendants to be SLAPP suits.

[49] The rulings in six of the dismissal applications were appealed from the Ontario Superior Court of Justice to the Ontario Court of Appeal. To avoid inconsistent findings by different panels, the Ontario Court of Appeal heard all six

appeals at the same time. The court's main analysis of the *OCJA* Provisions is set out in *Pointes Protection*. That analysis was then applied to the other cases.

[50] The *Pointes Protection* decision discusses the background, legislative history, applicable tests, burdens, and purpose of the *OCJA* Provisions. I discuss below the Ontario Court of Appeal's description of the *OCJA* Provisions, their purpose, and their applicability in British Columbia.

[51] One major difference between the legislation in BC and the Ontario equivalent is that the *OCJA* Provisions contain a preamble setting out their purpose. The *OCJA* Provisions state:

> **137.1** (1) The purposes of this section and sections 137.2 to 137.5 are,
>
> (a) to encourage individuals to express themselves on matters of public interest;
>
> (b) to promote broad participation in debates on matters of public interest;
>
> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
>
> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

[52] The Ontario Court of Appeal in *Pointes Protection* discussed the purpose of the *OCJA* Provisions:

> [45] The purpose of s. 137.1 is crystal clear. Expression on matters of public interest is to be encouraged. Litigation of doubtful merit that unduly discourages and seeks to restrict free and open expression on matters of public interest should not be allowed to proceed beyond a preliminary stage. Plaintiffs who commence a claim alleging to have been wronged by a defendant's expression on a matter of public interest must be prepared from the commencement of the lawsuit to address the merits of the claim and demonstrate that the public interest in vindicating that claim outweighs the public interest in protecting the defendant's freedom of expression.

[53] The *Pointes Protection* decision also sets out that the legislation does not create any new substantive defences to defamation claims:

> [46] Significantly, the Act does not, except in a minor way, alter the substantive law as it relates to claims based on expressions on matters of public interest. There are no new defences created for those who speak out on matters of public interest. The law of defamation remains largely

> unchanged. Similarly, nothing in the Act affects the substantive law applicable to [the plaintiff's] breach of contract claim. [Footnote omitted.]

[54] Although there is no preamble to the *PPPA*, both parties point to the following statement by the Attorney General made while introducing the Bill for Second Reading in the B.C. Legislature in February 2019:

> This is a bill that is intended to protect an essential value of our democracy, which is public participation in the debates of the issues of the day, and in particular, to respond to a mischief that has arisen, which is people who are powerful and wealthy and able to afford lawyers initiating lawsuits or threatening lawsuits against individuals who are critical of them in order to stop them from participating in that public debate.
>
> 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.

(British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 4th Sess, No 198 (14 February 2019) at 1120 (Hon David Eby).)

[55] While the Attorney General's statements do not change or affect the interpretation of the provisions of the *PPPA*, they assist in determining its purpose and the mischief that the government sought to address. I discuss below the portion of the Attorney General's statement, relied upon by the plaintiff, regarding the prospect that the *Act* anticipates a plaintiff who is "powerful and wealthy … initiating … lawsuits".

[56] Earlier this year, Justice Murray, in *Galloway v. A.B.*, 2019 BCSC 1417, reviewed the *PPPA* provisions on a procedural application for production of documents and cross-examination on affidavits. Justice Murray rephrased the purpose concisely:

> [2] The purpose of the *Act* is to enhance public participation by protecting expression on matters of public interest from defamation litigation which is brought to stop people from talking: Hansard, (February 13, 2019) at 6974. Lawsuits brought to silence or punish one's critics have come to be known as Strategic Lawsuits Against Public Participation (SLAPP).

[57] There is no real distinction between the purposes expressed in the preamble to the *OCJA* Provisions, the excerpts from Hansard and from Murray J.'s concise statement in *Galloway*. The expressed purposes are very broad. They are similar to the obvious intent of the *PPPA* as disclosed in the wording of the *Act*. The *PPPA* is aimed at preventing SLAPP lawsuits and encouraging public participation in debate on matters of public interest. It provides a screening mechanism whereby the plaintiff is required to address the merits of the claim and show that the interests of the plaintiff outweigh the public interest in free and open debate.

[58] In most applications under the *PPPA*, the plaintiffs will be claiming some form of defamation or damage to reputation by the defendants. One of the questions that will arise will be the purpose or motive of the plaintiff in bringing the action. Plaintiffs will always argue that the actions were brought for the purpose of obtaining damages and protecting their reputations. Defendants will argue that the actions were designed to thwart or stifle discussion.

[59] However, the motive or purpose of the plaintiff is not a primary consideration in the tests set out in the *PPPA*. That issue was discussed by the court in *Pointes Protection*:

> [47] Nor does s. 137.1 invoke the abuse of process model favoured in the now repealed British Columbia Anti-SLAPP legislation. Aside from the discretionary damages provision in s. 137.1(9), s. 137.1 does not fix on the plaintiff's purpose or motive in bringing the claim as the determining factor, but instead assesses the potential merits of the claim and the effects of permitting the claim to proceed on competing components of the public interest. The emphasis on the litigation's effect over its purpose is said to provide a more streamlined and accurate assessment of the legitimacy of the claims: Anti-SLAPP Advisory Panel, at paras. 32-35. That said, the purpose of the lawsuit can be an important consideration on a s. 137.1 motion. If the motion judge determines that the plaintiff's actual purpose in bringing in the lawsuit was to "gag" the target of the lawsuit on a matter of public interest, it seems highly unlikely that the lawsuit would clear the public interest hurdle in s. 137.1(4)(b). [Footnote omitted.]

[60] The proper considerations for the court when applying the *PPPA* screening tests are set out in the provisions of the *Act*. Those assessments relate to the merits and effects of the plaintiff's claim balanced against the competing element of public

interest. The plaintiff's motives in commencing the action are not a consideration unless the court makes a specific determination that the action was brought to gag the defendant. In such a case, it would be difficult for the plaintiff to satisfy the other burdens set out in the *Act*.

[61] Because this type of application is usually a preliminary screening procedure with limited evidentiary material, in most cases it will be exceedingly difficult to make a finding that the plaintiff's motives were improper on the material available.

[62] In this case, as a preliminary matter, the plaintiff urges upon me that the circumstances of this action do not fit the purposes for which the *PPPA* was intended. He points to the fact that he is an individual, albeit an individual in an elected position. He is not the "powerful and wealthy" litigant anticipated by the Attorney General in the quote from Hansard above. Nor does this action have the hallmarks of "SLAPP" litigation. The plaintiff points to the decision in *Platnick* where the court stated:

> [99] The *indicia* of a SLAPP suit include:
>
> - a history of the plaintiff using litigation or the threat of litigation to silence critics;
> - a financial or power imbalance that strongly favours the plaintiff;
> - a punitive or retributory purpose animating the plaintiff's bringing of the claim; and
> - minimal or nominal damages suffered by the plaintiff.

[63] The plaintiff says that he has no history of using the threat of litigation and there is no imbalance of power between the two parties. He argues that he is simply an individual who is attempting to protect his reputation and seek damages for defamation. He says, to the contrary, the defendant was the president of a powerful union that represents more than 45,000 teachers in British Columbia.

[64] On the other side, the defendant argues that this action has all the hallmarks of a SLAPP litigation. He notes that he was the only named defendant despite the fact that multiple people and publications criticized the plaintiff in a manner that was similar to his statements. He argues that he was targeted in order to silence his

voice on this issue. He also argues that the timing of the commencement of the action is important. The Demand Letter was sent, and then published, in the heat of the plaintiff's campaign for re-election as a school board trustee. The action was filed eight days before the election. The defendant submits that the inference to be drawn from these facts is that the plaintiff was using the action as a tool in his election campaign.

[65] I am not satisfied that there is sufficient evidence to draw the inference or make the finding that the defendant urges upon me, nor do I think it would be appropriate to make that leap at this stage, based upon the available evidence.

[66] Turning to the plaintiff's argument, I do not accept his submission regarding the purpose and applicability of the legislation. There is no suggestion in the text of the *PPPA* that it is limited in application based on the circumstances of the parties. There is no part of the tests under s. 4 that inquire into the ability of the parties to fund litigation or pay damages. The tests to be applied relate to the merits of the action, the merits of the defences, and the balancing of interests. There is no provision for a pre-screening test to be applied before the screening process set out in s. 4 of the *PPPA* based on the financial circumstances of the parties.

[67] I now discuss the relevant elements of the *PPPA* and the tests set out in s. 4.

Threshold Test—Public Interest (s. 4(1)(b))

[68] Section 4 provides a two-stage process with the second step requiring the plaintiff to meet three separate requirements:

(a) First, the defendant/applicant must persuade the court that the action arises from an expression that relates to a matter of public interest.

(b) Second, if the first part of the test is satisfied, then the onus shifts to the plaintiff/respondent who must establish that:

i. There are grounds to believe that:

- the proceeding has substantial merit, and

- the applicant has no valid defence in the proceeding, and

ii. The harm suffered, or to be suffered, by the plaintiff/respondent from the defendant/applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

[69] The first part of the test under the *PPPA* is found in s. 4(1):

> **4** (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that
>
> (a) the proceeding arises from an expression made by the applicant, and
>
> (b) the expression relates to a matter of public interest.

[70] The onus on the defendant/applicant is to establish that the expression relates to a matter of public interest.

[71] As noted above, the defendant concedes that he made the impugned expression, and the plaintiff concedes that the issues that formed the background to the statements of the defendant were matters of public interest. Hence, the defendant has satisfied the first part of the test.

[72] Although the plaintiff's admission satisfies the initial onus on the defendant (public interest), Mr. Hansman filed material and made submissions on the other parts of the test. He says that the plaintiff's claim does not have substantial merit and that the defences advanced are valid. He did not make any submissions regarding the third part of the test (the balancing of interests between public expression and private rights).

[73] It should also be noted that, having satisfied the onus in s. 4, the defendant has very little remaining burden. There is, however, an implicit onus on the defendant to establish that there is at least one viable defence to the plaintiff's claim. As discussed in *Pointes Protection* at para. 83:

> [83] I would add two further observations with respect to the "no valid defence" requirement in s. 137.1(4)(a)(ii). That provision requires the plaintiff to satisfy the motion judge that there are reasonable grounds to believe that the defendant has "no valid defence" to the plaintiff's claim. The section would be unworkable if the plaintiff were required to address all potential defences and demonstrate that none had any validity. I think the section contemplates an evidentiary burden on the defendant to advance any proposed "valid defence" in the pleadings, and/or in the material filed on the s. 137.1 motion. That material should be sufficiently detailed to allow the motion judge to clearly identify the legal and factual components of the defences advanced. Once the defendant has put a defence in play, the persuasive burden moves to the plaintiff to satisfy the motion judge that there are reasonable grounds to believe that none of the defences put in play are valid.

[74] Thus, despite the apparent reversal of the onus in s. 4, there is some evidentiary burden remaining on the defendant to identify the legal and factual components of the defences on which they could rely, to the extent necessary for the court to be able to determine that the grounds for the defence exist. Once a defence is "in play" to that standard, the onus shifts to the plaintiff to establish that there are reasonable grounds to believe that none of the proffered defences are valid. The nature and extent of that burden is discussed below.

[75] Further, defendants also bear some onus to establish the value to the public of their forms of speech for the court to assess the balancing of interests that is required under the final part of the test.

The Plaintiff's Claim Has Substantial Merit (s. 4(2)(a)(i))

[76] Once the defendant has satisfied the requirements of s. 4(1), the analysis then moves to s. 4(2), and the onus shifts to the plaintiff:

> (2) If the applicant 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 satisfies the court that
>
> (a) there are grounds to believe that
>
> (i) the proceeding has substantial merit, and
>
> (ii) the applicant has no valid defence in the proceeding, and
>
> (b) 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.

[77] The first point to note is that the different parts of the test are conjunctive. The plaintiff must satisfy the court that there are grounds to believe his or her claim has substantial merit, and grounds to believe there are no valid defences, and the balancing of interests weighs in the plaintiff's favour.

[78] Although the analysis of this section requires separate considerations of the terms "satisfy", "grounds to believe", and "substantial merit", the overall burden on the plaintiff under s. 4(2)(a)(i) must be considered on the basis that it comprises all of those phrases together.

[79] First, it is clear that the plaintiff's evidentiary burden is not high. The hearing can be held at an early stage in the action in order to screen out the types of claims that are contemplated by the *PPPA*. Because it is a screening process, the plaintiff is not required to establish his or her case on a balance of probabilities. However, there is some limited weighing of the evidence by the chambers judge. The nature of the burden on the plaintiff was addressed in *Pointes Protection* which provides the following analysis:

(a) The screening process is not an alternate means to try the merits of the case, and it is not akin to a summary trial (para. 73).

(b) The screening process does not involve findings of fact, determinations of credibility, or any ultimate assessment of the merits of any element of the action (para. 74).

(c) The test to be applied is whether a trial judge could reasonably conclude that the plaintiff's case has substantial merit (para. 75).

(d) The timing of the application, and limits on cross-examination, mean that neither party will be putting their best foot forward (para. 76).

(e) The screening process is not appropriate to investigate credibility, competing facts, or the inferences to be drawn from them. It is not the

correct place for a “deep dive” or investigation into the merits of the claim (para. 78).

(f) The role of the judge on the screening application is to determine “whether it could reasonably be said, on an examination of the motion record, that the claim has substantial merit” (para. 79).

[80] The burden on the plaintiff is further modified by the phrases “grounds to believe” and “substantial merit”. The plaintiff must satisfy the court that there are “grounds to believe”. *Pointes Protection* considered the use of these phrases and set out the following analysis:

(a) The “grounds to believe” established by the plaintiff must be “reasonable” grounds to believe. The word “reasonable” is implicit. The concept of judicial decision-making is antithetical to decisions based on unreasonable or speculative grounds (para. 69).

(b) The use of the word “substantial” to modify “merit” means that there is more than “some chance” of success. It means that the claim is legally tenable and supported by evidence. The determination is whether those factors could lead a reasonable judge to conclude that the claim has a real chance of success (paras. 80-81).

(c) It is not sufficient for the plaintiff to argue that bare assertions in the pleadings should be taken at face value. The use of the words “grounds to believe” contemplates a limited weighing of the evidence (paras. 80-82):

> [82] … An evaluation of potential merit based on a “grounds to believe” standard contemplates a limited weighing of the evidence, and, in some cases, credibility evaluations. Bald allegations, unsubstantiated damage claims, or unparticularized defences are not the stuff from which “grounds to believe” are formulated. …

(d) Although the screening process is not a summary trial, the judge is able to weigh and dismiss allegations that have no merit or no chance of success at trial:

> [82] … Similarly, if on a review of the entirety of motion material, the motion judge concludes that no reasonable trier could find a certain allegation or piece of evidence credible, the motion judge will discount that allegation or evidence in making his or her evaluation under s. 137.1(4)(a). …

(e) Each allegation and piece of evidence should be reviewed to see whether a reasonable trier of fact could find it credible. If the motion judge determines that no reasonable trial judge or jury could find the allegation or evidence credible, then the plaintiff's overall claim must be evaluated without that evidence or allegation (para. 82).

(f) The standard is not whether the motion judge accepts the evidence, it is whether there are reasonable grounds to believe a reasonable trier could accept the evidence (para. 82).

[81] In addition, the court in *Pointes Protection* cautioned that judges must appreciate the very significant consequences to the plaintiff if the motion is allowed:

> [98] In making the determination required under s. 137.1(4)(b), the motion judge will bear in mind that the plaintiff has the onus under the legislation. In applying that burden, however, the motion judge must appreciate the very significant consequences to the plaintiff if the motion is allowed under s. 137.1(4)(b). The courtroom door will be closed on the plaintiff even though the claim may have ultimately succeeded on the merits. The Anti-SLAPP Advisory Panel envisioned this result only if the plaintiff had a "technically valid cause of action" and had suffered "insignificant harm". The language of s. 137.1(4)(b) does not contain those limitations. However, I think the Panel's words do describe the kind of case that should be removed from the litigation process through s. 137.1(4)(b).

[82] Based on this reasoning, the plaintiff argues that the burden on him is low. He alleges that he was defamed. The statements are not denied by the defendant. If those statements are found to have defamatory meaning, then he has established the legal and evidentiary basis of his cause of action. He argues that a reasonable

trier of the case could accept the evidence upon which he relies and make an award of damages. Hence, his action has substantial merit according to the test in s. 4.

[83] The plaintiff also argues, and I accept, that the *PPPA* does not alter the common law or create new defences in defamation claims: see *Pointes Protection* at para. 46. He argues, correctly, that if he establishes that the statements were defamatory, then they are presumed to be false, and damage is assumed: *Holden v. Hanlon*, 2019 BCSC 622.

[84] In his submissions, the defendant argues that the plaintiff has failed to provide any evidence that the impugned comments caused any substantial damage, or any damage, at all. He points to the fact that other critics made statements that, he argues, had a greater effect on the plaintiff. He also points to the fact that the plaintiff was re-elected in the 2018 election.

[85] In addition, Mr. Hansman argues that different parts of the amended notice of civil claim contain allegations that, he says, cannot be supported and could not reasonably be found by a trier of fact to be credible. In particular, he points to the alleged “smear campaign” that the plaintiff claims was undertaken by a group of people that included the defendant. Mr. Hansman says there is no evidence of any such conspiracy. He also says that certain of the allegations impute defamatory meanings to his comments that the words cannot reasonably bear. On this basis, he says that the claim does not have “substantial merit.”

[86] As noted, *Pointes Protection* indicates that the meaning of “substantial merit” is that the claim is shown to be legally tenable and supported by evidence which could lead a reasonable trier to conclude that the claim has a real chance of success. In this context, the word “substantial” does not require that the plaintiff’s claim, or damages, be “substantial” in respect of the damages that are expected. It only means that the claim is legally tenable and supported by the evidence, taking into account the early stage in the proceedings.

[87] As described above, the defendant criticizes several elements of the plaintiff's amended notice of civil claim. At this stage of the analysis I do not have to decide on the strength or weakness of any of the individual allegations in the pleadings. It does not matter, for this analysis, whether some of the allegations may not be accepted at trial. As noted in paras. 23-25, above, there are a range of statements by the defendant.

[88] What matters is that the plaintiff has alleged that the defendant made statements that were capable of defamatory meaning. In this hearing, the defendant acknowledged having made the impugned statements, that they were published, and that at least some of them were capable of defamatory meaning. As a result of the defendant's acknowledgement on these points, the elements of the test under s. 4(2)(a)(i) are established. The claim is legally tenable and supported by evidence. It is possible that a trier of the case could find that the plaintiff was defamed by the defendant's statements.

[89] On that basis, I find that that burden on the plaintiff under the first part of the test (s. 4(2)(a)(i)) has been met.

Reason to Believe There are No Valid Defences (s. 4(2)(a)(ii))

[90] The next stage of the test involves an assessment of the defences tendered by the defendant, and the arguments against those defences by the plaintiff. As noted above, there are no concessions by either party in respect of defences.

[91] Before arguing the merits of either of the defences proffered, the plaintiff argues that there are elements of this case that are important to be aired at trial so that this Court can comment on, and inform the public about, the limits on free speech in the context of public debate. He says that if this *PPPA* application sweeps this case "under the rug", then the public will be deprived of the court's guidance on this important issue.

[92] I reject that argument. First, Mr. Neufeld is making a claim for damages against an individual. The purpose of his action should be the restoration of his

reputation and the quest for damages from the defendant. He should not be seeking further publicity or public debate by way of this action when he alleges that his reputation has been damaged by the defendant's statements.

[93] Second, whatever the result of this application, the plaintiff was always going to obtain commentary from the court on the allegations and defences in this case. That commentary would either come from these reasons, or from the eventual trial if this application was to be dismissed.

[94] In this part of the test, the plaintiff must establish that there are grounds to believe that the defendant has no valid defences. The Ontario Court of Appeal made the following observations regarding this part of the test in *Pointes Protection* at paras. 83-84:

a) there is a tacit evidentiary burden on the defendant to advance "valid defences", including the legal and factual components of those defences (para. 83);

b) once the defendant has put a defence "in play", the "persuasive burden" shifts to the plaintiff to satisfy the court that there are reasonable grounds to believe that those defences are not valid (para. 83);

c) the word "valid" means successful (para. 84);

d) the plaintiff must establish that at trial, a trier "could conclude that none of the defences advanced would succeed" (paras. 83-84); and

e) the chambers judge should view the claim through the "reasonableness lens" to determine whether any of the defences might succeed (para. 84).

[95] For other parts of the screening process, it is stated that the burden on the plaintiff is low because of the nature of the application. However, by necessity, there is a shifting burden on the plaintiff under this subsection. The terms "persuasive burden" and "reasonableness lens" suggest that part of the test relates to a consideration of the strength of any defence that is put into play. It follows that the

burden on the plaintiff must be higher in circumstances where the defendant advances a strong argument that the facts and law support a particular defence. A shifting evidentiary burden is the only way for the court to consider whether there are "grounds to believe" that there is "no valid defence" to the claim. If the elements of a particular defence are established on the evidence before the chambers judge, there must be a higher standard on the plaintiff to meet the test in this subsection to satisfy the chambers judge that there are reasonable grounds to believe that the defence proffered by the defendant is not valid.

[96] Although the burden on the plaintiff may increase, the plaintiff needs only establish that a reasonable trier of fact "could conclude" that the defences would not succeed. The burden does not rise to a full balance of probabilities based on a full assessment of the evidence. Having said that, the test must have some applicability. The plaintiff cannot rely on pure speculation. The analysis must be based on what a reasonable trier of fact could find. Put another way, the legislature must have anticipated that there would be cases where s. 4(2)(a)(ii) would apply.

[97] I am also mindful of the cautions invoked in *Pointes Protection*. A finding for the defendant will lead to the dismissal of a possibly meritorious defamation claim. Further, the chambers judge should be careful to avoid taking a "deep dive" into the ultimate merits of the claim or the defences. This application is not a summary trial. It is a screening exercise. However, the fact that the legislation provides a test for "valid" defences means that legislature must have foreseen circumstances where the chambers judge would find that a defence would, in all likelihood, be successful at any reasonable trial. Otherwise, this subsection of the *PPPA* is meaningless.

[98] It is also important to keep in mind the particular shifting of the onus of proof in defamation claims. Once the required elements of the tort are established by the plaintiff, the onus shifts to the defendant to establish the defence. As stated in *Grant v. Torstar Corp*., 2009 SCC 61 at paras. 28-29:

> [28] 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. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism: see, e.g., R. A. Smolla, "Balancing Freedom of Expression and Protection of Reputation Under Canada's *Charter of Rights and Freedoms*", in D. Schneiderman, ed., *Freedom of Expression and the Charter* (1991), 272, at p. 282. (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous *per se*: R. E. Brown, *The Law of Defamation in Canada* (2nd ed. (loose-leaf)), vol. 3, at pp. 25-2 and 25-3.) The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.
>
> [29] If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

[99] In this case, the defendant puts forward two defences: qualified privilege and fair comment.

Qualified Privilege

[100] The elements of the defence of qualified privilege were set out by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 143:

> 143 Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. As Lord Atkinson explained in *Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334:
>
> > … a privileged occasion is … an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[101] From *Hill*, it is evident that the privilege attaches to the occasion. In the usual application of the defence, the defamatory words are spoken by a person with an interest or duty to make the communication, and it is made to a person who has a corresponding duty to receive it. Hence, statements to the news media, and hence to the public, would not fit within the usual application of the defence

[102] The plaintiff argues that qualified privilege is grounded in special relationships characterized by a duty to communicate the information and a reciprocal interest in

receiving it (*Grant* at para. 34). The defence is rarely available for widely circulated publications. The defendant's statements were published without limitation.

[103] The plaintiff further argues that the defence of qualified privilege does not apply because, he says, the statements exceeded the occasion. For example, the defendant commented that the plaintiff should not be anywhere near children. The inference to be drawn from this statement, he argues, is that the plaintiff is a danger to children. He also argues that the defendant's reference to "hate speech" suggested that the plaintiff had committed the criminal offence of hate speech as defined in the *Criminal Code*, R.S.C. 1985, c. C-46. The plaintiff asserts that these were extremely defamatory statements that far exceeded the occasion.

[104] The defendant cites *Douglas v. Tucker* (1951), [1952] 1 S.C.R. 275 and *Ward v. Clarke*, 2000 BCSC 979, rev'd 2001 BCCA 724 as examples of the proper analysis of the defence of qualified privilege. He says that the Facebook Post and the plaintiff's later speeches attacked the individuals and groups who created and promoted the SOGI 123 materials. He says that his comments were made in reply to Mr. Neufeld's posts and that they were all germane and reasonably appropriate. He argues that he had reasonable grounds for the statements that he made.

[105] The plaintiff, in response, submits that the decisions in *Douglas* and *Ward* were fact specific, involving "off the cuff" comments. In this case, he argues, the defendant made prepared statements on several different occasions.

[106] The problem that the defendant faces, in seeking to apply the reasoning in the *Douglas* and *Ward* cases on this application, is that the facts in those cases led to different results at different levels of court. They are, as the plaintiff noted, fact specific. Further, the defendant is proffering the defence in circumstances that are not "textbook" for qualified privilege. As noted, the usual application of the defence involves a statement to a limited audience, as opposed to general publication. It is evident that, although the defence may be successful at trial, a reasonable trial judge might reject it. Applying the defence of qualified privilege requires a "deep dive" into the merits and case law which would be inappropriate at this stage.

[107] Given that s. 4 is a screening process, and the burden on the plaintiff is relatively low, I find that there are grounds to believe that a reasonable trier of fact could find that the defence of qualified privilege was not applicable.

Fair Comment

[108] The requisite elements of the defence of fair comment were set out in the leading case on the defence, *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 [*WIC*] at para. 1:

> [1] …
>
> (a) the comment must be on a matter of public interest;
>
> (b) the comment must be based on fact;
>
> (c) the comment, though it can include inferences of fact, must be recognisable as comment;
>
> (d) the comment must satisfy the following objective test: could any man honestly express that opinion on the proved facts?
>
> (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice. …

[109] The defendant argues that his comments meet all of these criteria. He says that the context of his statements is important. He says:

a) that the debate between himself and the plaintiff related to a matter of public interest, being the SOGI 123 initiative and later, the school board election;

b) that in each case, the facts that formed the basis of the defendant's comments were contained in the plaintiff's Facebook Post;

c) that all of his statements were recognisable as comments;

d) that both he, and other people, could honestly express the opinions based on the Facebook Post; and

e) that there was no malice.

[110] Mr. Hansman further notes that, in each instance, the media sought him out for interviews about Mr. Neufeld's public statements. He argues that the audience would have known that he (Mr. Hansman) was the President of the BCTF, a member of the LGBTQ community, and a supporter of the SOGI 123 resources.

[111] Mr. Hansman argues that the facts in the present case are very similar to the facts in *WIC*. He notes that the "Culture Guard" rally, at which the plaintiff spoke (see para. 29 above), was organized by Ms. Kari Simpson, who was the plaintiff in *WIC*. The criticisms levelled at Mr. Neufeld by Mr. Hansman were along the same lines as the defamatory comments in *WIC*. As a result, the defendant argues, the reasoning of the Supreme Court of Canada in *WIC* hovers over the facts in this case.

[112] It is also clear that the Supreme Court's decision in *WIC* sought to achieve a similar balance in relation to the value of vindicating reputations, fostering public debate, preventing SLAPP suits, and protecting freedom of expression. Justice Binnie wrote for the majority:

> [15] The function of the tort of defamation is to vindicate reputation, but many courts have concluded that the traditional elements of that tort may require modification to provide broader accommodation to the value of freedom of expression. There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a defamation action. Investigative reports get "spiked", the Media Coalition contends, because, while true, they are based on facts that are difficult to establish according to rules of evidence. When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but in actions launched simply for the purpose of intimidation. Of course "chilling" false and defamatory speech is not a bad thing in itself, but chilling debate on matters of *legitimate* public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements.
>
> [Emphasis in original.]

[113] The background to *WIC* involved positions taken by Ms. Simpson, who had a public reputation as a vocal spokesperson opposed to positive portrayals of homosexuality. In 1999, she spoke out against any positive portrayal of a gay lifestyle in public schools. Mr. Mair took issue with her position in an on-air editorial. His comments were harsh. Among other analogies, he compared the implications of

her speech to that of Hitler against the Jews, or Governor George Wallace against the integration of schools.

[114] Ms. Simpson sued the radio station, claiming that, among other things, Mr. Mair's defamatory words were meant to convey that: she thought gay people should not be in public schools; she would condone violence toward gay people; she preaches hatred toward gay people; she would employ tactics against gay people similar to those used by Hitler, the Ku Klux Klan, and other bigots; and she was a dangerous bigot apt to cause harm to gay people.

[115] As noted by the Supreme Court of Canada, at para. 12, the trial judge in *WIC* found that the comparisons to Hitler and the KKK, among others, meant that Ms. Simpson would condone violence. Mr. Mair's statements were found to be defamatory. The trial judge also found that there was evidence that Mr. Mair proceeded with intrinsic malice toward Ms. Simpson, with "personal animosity" and a "desire to harm her reputation". However, "his malice was not a dominant motive for the offending editorial and so, did not defeat the defence of fair comment" (at para. 12).

[116] It should be immediately evident that the circumstances in *WIC* are analogous to the present action. The nature of the public debate, the allegations of defamatory meaning, the employment of the defence of fair comment, and the discussion of malice are very similar to the allegations in this case.

[117] Mr. Hansman's affidavit in support of the application sets out the background and context of his statements, and states that he honestly held the views that he expressed.

[118] The defendant further argues, in respect of the "honest belief" requirement, that the evidence in the news articles establishes that other people expressed the same opinions about the plaintiff. Hence, other people held, and expressed, their honest belief that the plaintiff was a person with characteristics along the lines that the defendant described in his impugned statements.

[119] As a result, in this application, the defendant argues that the reasoning in *WIC* is applicable to the facts in this case. He put forward the defence of fair comment. He argues a leading authority from the Supreme Court of Canada. That case was decided on very similar facts. He argues that the corresponding burden on the plaintiff, under s. 4(2)(a)(ii) to establish that fair comment is not a valid defence, is significant.

[120] In responding to the defendant's argument on the fair comment defence, the plaintiff can counter it by means of evidence that eliminates, or sheds doubt upon, the requisite elements of the defence. Alternatively, he can proffer evidence of malice (discussed below) or point to case law indicating that the defence may not succeed.

[121] I note, at the outset, that the plaintiff has tendered very little evidence in defence of this application. His affidavit material in response to this application is skeletal at best. His first affidavit is three paragraphs long. The first paragraph contains no relevant information about the alleged defamation. The affidavit continues as follows:

> 2. That, the public portrayal of me as a hateful, intolerant, homophobic, religious bigot and a threat to the safety of children commenced with the defendant's statement on October 24, 2017 as I have pleaded herein.
>
> 3. That, as to damages herein, the facts set out in paragraphs 46 and 47 of my Amended Notice of Civil Claim are true.

[122] For reference, paragraph 46 of the amended notice of civil claim alleges that the plaintiff has suffered damages to his reputation professionally, socially, and generally within his community, across Canada, and internationally. He also alleges to have suffered indignity, personal harassment, stress, anxiety, and mental and emotional distress.

[123] Paragraph 47 of the amended notice of civil claim describes specific incidents that, the plaintiff says, are examples of the stigmatization, humiliation, and isolation he has endured as part of the damages suffered because of the defendant's defamation. Paragraph 47 lists four incidents wherein entities unrelated to the

defendant or the BCTF took steps to exclude the plaintiff from certain activities and sought his resignation from the school board.

[124] The plaintiff's allegations in relation to paras. 46-47 of the amended notice of civil claim do not touch upon the issues related to the defence of fair comment.

[125] Mr. Neufeld's second affidavit is equally brief and does not touch on the merits of the case or the defence of fair comment.

[126] Hence, there is no evidence tendered by the plaintiff that would form the basis of an argument against the validity of the fair comment defence. I note the plaintiff's application for further disclosure of documents at the outset of these reasons. That issue is discussed below.

[127] In answer to the defence of fair comment, the plaintiff points to the Ontario Court of Appeal decision in *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163 which was decided under the *OCJA* Provisions. In that case, the motions judge allowed the defendant's application to dismiss the action on the basis that the defence of fair comment was likely to succeed. The Ontario Court of Appeal overturned the lower court, stating:

> [33] In my view, the motion judge erred in her analysis in one principal respect. The burden on the appellant under s. 137.1(4)(a)(ii) is not to show that a given defence has no hope of success. To approach s. 137.1(4)(a)(ii) in that fashion risks turning a motion under s. 137.1 into a summary judgment motion. Rather, all that the appellant need show is that it is possible that the defence would not succeed. As Doherty J.A. stated in *Pointes,* at para. 84:
>
> > The onus rests on the plaintiff to convince the motion judge that, looking at the motion record through the reasonableness lens, a trier could conclude that none of the defences advanced would succeed. If that assessment is among those reasonably available on the record, the plaintiff has met its onus.
>
> [34] In my view, a reasonable trier could conclude that the defence of fair comment would not succeed. It would be open to a trier to conclude that the statements made about the appellant – namely, that he supported terrorists – were uttered as statements of fact, not as statements of opinion. Further, even if the statements are viewed as opinion, a trier could also conclude that, on the available facts, a person could not honestly express that opinion based on the proved facts. The fact that a person supports a parent, whose child has committed a terrible act, does not make that person a supporter of

> the child's actions. A trier might also conclude that the respondent's repetition of the statements, after the appellant expressly disavowed support for terrorism, made the defence of fair comment unavailable.

[128] I note, for context, that the plaintiff, Mr. Lascaris, was a human rights advocate and a member of the shadow cabinet of the federal Green Party of Canada. The defendant published an article stating that the plaintiff "Advocates on Behalf of Terrorists". That statement was based on a one-sided interpretation of certain facts. In an interview less than a week later, the plaintiff confirmed his view that terrorism is an atrocity, and he condemned attacks by anybody on innocent civilians or civilian infrastructure. The defendant later re-published the same article via its Twitter account. Despite the clarification of his views, the plaintiff was removed from his position in the Green Party.

[129] The defendant, B'nai Brith Canada, applied under the *OCJA* Provisions to have Mr. Lascaris' action dismissed. The motion judge granted the defendant's application, stating that Mr. Lascaris had not met the evidentiary burden. In effect, the judge accepted that the defence of fair comment would likely succeed.

[130] The Ontario Court of Appeal, in the paragraphs quoted above, set out a number of scenarios wherein a trial judge or jury could find that the defence of fair comment would not apply.

[131] In answer to this application, and in reliance on *Lascaris*, the plaintiff argues that a reasonable trier of this case could find:

a) that the impugned statements were statements of fact; or

b) that no person could honestly express that opinion based on those proved facts; or

c) that repetition of the statements after the plaintiff clarified and modified his Facebook Post indicates that the defence was not available.

[132] However, the facts in *Lascaris* were significantly different from the current scenario, and the reasoning in that case was dependant upon the particular facts of that case. As noted above, the facts in this case are very similar to the facts in *WIC* where the statements were found to be comments and based on proven facts.

[133] The plaintiff further argues that the defendant could have countered his statements without attacking the plaintiff personally. However, the defence of fair comment applies in circumstances where the defendant's words were, in fact, defamatory. If the defendant had not attacked the plaintiff personally, then there would be no basis for a defamation action. Further, as discussed in *WIC*, very similar statements have been found to be comments, not statements of fact.

[134] The plaintiff also argues that there is no factual basis for any of the defendant's comments suggesting that the plaintiff was a bigot, or that he hated homosexuals and transgender people. As noted above, the defendant says that all of his comments were based on the fact of the plaintiff's Facebook Post. In that post, the plaintiff himself noted that, by posting his opinion, he risked being "labeled a bigoted homophobe." Hence, it is difficult, if not impossible, for him to argue that there was no factual basis for Mr. Hansman's comments. The same reasoning also applies to the requirement that any person could honestly express the same opinion.

[135] The burden on the plaintiff is to establish that a reasonable trier of this case at trial "could conclude that none of the defences advanced would succeed" (*Pointes Protection* at para. 84). Based on the analysis set out above, I find that, subject to a finding of malice (which I address below) the plaintiff has not met the evidentiary burden required of him. He has not met the persuasive burden of establishing that there are grounds to believe that a reasonable trier of the case could find that there were no valid defences.

[136] In assessing the plaintiff's arguments, it is not sufficient for the plaintiff to state that there may be a finding against the defendant without supporting that argument with evidence and law. Any such argument must be based on the "reasonableness lens" (*Lascaris* at para. 33). The legislature must have intended that this part of test

would be applicable in some circumstances. It is not sufficient that a plaintiff submit that the defendant may fail to prove some aspect of the defence at trial. In this case, as noted, the defendant will argue the *WIC* case at trial. The facts of this case are very close to the facts in *WIC*. The reasoning in *WIC* would apply to the trial of this action.

[137] I find that no reasonable trier of this case could distinguish the facts in this case from the facts in *WIC*. The defence of fair comment is valid.

Malice

[138] The plaintiff alleges that the defendant's statements were motivated by malice. Malice, if proven, can defeat an otherwise sound defence of fair comment or qualified privilege. The test for establishing malice was recently stated by Sharma J. in *Pan v. Gao*, 2018 BCSC 2137:

> [142] However, even if the defendant successfully invokes the fair comment defence, he may still be liable if the plaintiff can establish malice. Malice focuses on the personal motives of the defendant. The burden of proving malice is on the plaintiff: *WIC Radio* at para. 28. In *Smith v. Cross*, 2009 BCCA 529, Madam Justice Kirkpatrick summarized the circumstances in which a finding of malice can be made at para. 34:
>
> > A defendant is actuated by malice if he or she publishes the comment:
> >
> > i) Knowing it was false; *or*
> >
> > ii) With reckless indifference whether it is true or false; *or*
> >
> > iii) For the dominant purpose of injuring the plaintiff because of spite or animosity; *or*
> >
> > iv) For some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.

[139] In respect of both defences, the plaintiff pleads and argues that the defendant's statements were actuated by malice. He says that the evidence of malice can either be inferred from the statements themselves, or may be disclosed in the production of documents or an examination for discovery that have not yet occurred. As noted, the plaintiff filed no affidavit evidence that would support an inference or a finding of malice.

[140] Mr. Hansman argues that there is no evidence of any malice. First, he notes that the amended notice of civil claim alleges that his malice was indicated, in part, by his intended goal of seeing Mr. Neufeld removed from public office. Mr. Hansman argues that seeking the removal of a public official from office through democratic means is at the core of a democratic society and cannot be considered malice. I agree with that position to the extent that it applies to normal public debate. I question, without deciding, whether a deliberately false and extremely defamatory statement about a person running for public office could be considered malicious. However, as noted above, Mr. Hansman has put forward a very strong argument that his statements were protected by the defence of fair comment. One of the elements of that defence is "honest belief".

[141] Analysing the test articulated in *Pan*, I note that Mr. Hansman's affidavit sets out the background and context of his statements. His affidavit makes it clear that he did honestly hold the views that he expressed in the interviews. Hence, 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 whether they were true or false. It is also clear from his affidavit that his purpose in making the statements was to promote the use of the SOGI 123 materials and schools that were safe and inclusionary for transgender people. While it is possible that he might have held some degree of animus toward the plaintiff, absent Mr. Hansman providing a full admission of malice under cross-examination, it is not reasonable to foresee that a reasonable trier of the case would find that he was motivated by malice. As discussed below, the *Act* provides for parties to conduct cross-examination on affidavits within a *PPPA* application. The plaintiff did not take that step.

[142] Put another way, the plaintiff has not met the persuasive burden of establishing that a reasonable trier of fact could find that the defendant was motivated by malice.

[143] It follows that I find that there is no evidence of malice and no reasonable prospect that it will be established. The defence of fair comment is valid. Having failed to meet the test set out in s. 4(2)(a)(ii), the defendant's application should be allowed, and the action should be dismissed.

The Balancing of Interests (s. 4(2)(b))

[144] It follows from my reasoning above that the defendant's application should be allowed and the action be dismissed on the basis that there is a valid defence. As a result, the analysis of balancing interests under s. 4(2)(b) is not required.

[145] However, if my analysis set out above is incorrect, and if the balancing analysis were engaged, I find that the balancing of interests favours the defendant and that the public interest in protecting the defendant's expression outweighs the harm suffered, or to be suffered by the plaintiff.

[146] In coming to this conclusion, I note, on this issue, that the plaintiff was re-elected as a Chilliwack School Board Trustee. That is some evidence of the limited damage that he suffered.

[147] I note again that the plaintiff has not adduced any evidence apart from the bare assertions set out in his affidavit (see paras. 121–125 above) alleging that the negative public portrayal of him "commenced" immediately after the defendant's statement. By using the word "commenced" in his affidavit, the plaintiff attempts to establish a causal link between the defendant and the negative treatment that he has received from a number of different organizations.

[148] The plaintiff's affidavit also references two paragraphs from his amended notice of civil claim and says that the facts alleged therein are true.

[149] *Pointes Protection* states that the plaintiff has the onus of proving that there is a causal link between the defendant's expression and the damages claimed:

> [92] Equally important to the quantification of damages, the plaintiff must provide material that can establish the causal link between the defendant's expression and the damages claimed. Evidence of this connection will be

> particularly important when the motion material reveals sources apart from the defendant's expression that could well have caused the plaintiff's damages.

[150] The reasoning in *Pointes Protection* is clear that bald assertions of fact, unsupported by any evidence, are not sufficient. I put no weight on, and I discount completely, the allegations of fact in para. 47 of the amended notice of civil claim as referenced in the plaintiff's first affidavit. Based on the evidence before me, the fact that other entities, some governed by elected officials, took steps against Mr. Neufeld cannot be traced to Mr. Hansman's comments. It is clear from the news reports that other people and entities reacted negatively to Mr. Neufeld's position on the SOGI 123 issue. 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.

[151] The allegations in para. 46 of the amended notice of civil claim simply repeat the plaintiff's allegation that he has suffered damage.

[152] As a result, this Court is left with precious little evidence from the plaintiff that can be weighed as part of the balancing of interests.

[153] I further note that evidence of the damages suffered would be solely in the knowledge or possession of the plaintiff. He had the opportunity to provide that evidence for this hearing.

[154] The plaintiff points to case law supporting his position on damages. He relies on *Wenman v. Pacific Press Ltd.*, 1991 CanLII 270 (B.C.S.C.). In that case, the plaintiff, a Member of Parliament, made comments as a witness in a criminal trial. The Province newspaper published an editorial under the headline "MP MUST STAY ON SIDE OF LAW". The editorial expressed the opinion that Mr. Wenman should not be a Member of Parliament and should be ashamed of his statements in court. The editorial was found to contain defamatory material, and Mr. Wenman was awarded damages of $50,000 for the injury to his reputation.

[155] Mr. Neufeld also argues that the nature and circumstances of the defamation will increase the damages in this case. He points to the *Holden*, where Dardi J. noted the following factors:

> [292] A similar list of relevant factors was identified in *Leenen v. Canadian Broadcasting Corp.* (2000), 2000 CanLII 22380 (ON SC), 48 O.R. (3d) 656 (Ont. S.C.J.) at para. 205, aff'd (2001), 54 O.R. (3d) 612 (Ont. C.A.), leave to appeal ref'd, [2001] S.C.C.A. No. 432:
>
> a) the seriousness of the defamatory statement;
>
> b) the identity of the accuser;
>
> c) the breadth of the distribution of the publication of the libel;
>
> d) republication of the libel;
>
> e) the failure to give the audience both sides of the picture and not presenting a balanced view;
>
> f) the desire to increase one's professional reputation or to increase ratings of a particular program;
>
> g) the conduct of the defendant and defendant's counsel through to the end of trial;
>
> h) the absence or refusal of any retraction or apology; and
>
> i) the failure to establish a plea of justification.

[156] The plaintiff argues that Mr. Wenman's damages were substantial in 1991 dollars and would be greater if his action was decided in 2019 or 2020. The plaintiff says that his submissions on damages at trial will be based, in part, on the award in *Wenman* as well as the reasoning in *Holden*. He notes that the facts in *Wenman* occurred before the advent of the internet. He says that the defendant's statements were published to a much broader audience and, as a result, the prospect of damages is increased. On this basis, he says that the quantum of damages exceeds the concept of "nominal" damages.

[157] The Ontario Court of Appeal in *Pointes Protection* stated, at para. 90, that it will "often suffice" if there is sufficient evidence to draw a causal connection between the challenged expression and damages that are more than "nominal". The court also noted that the plaintiff cannot be expected to present a fully developed damages brief.

[158] However, the plaintiff presents no evidence, apart from one paragraph in his affidavit, that could be said to establish that he has suffered any damage that can be causally linked to the defendant's statements. As noted, the affidavit says that the negative treatment "commenced" with the defendant's first statement. It is clear that other organizations with whom the plaintiff interacted had a negative reaction to his Facebook Post. One of those organizations was the Chilliwack School Board. As noted above, I discount the allegations of a causal relationship between the defendant's statements and the reaction of other organizations.

[159] I noted above that the defendant did not make submissions on the balancing aspect of the *PPPA*. However, the second side of the equation that must be balanced against the merits of Mr. Neufeld's claim is the public interest in protecting the actual expression that is the subject matter of the lawsuit. In this respect, there is a further burden on the defendant, as noted in *Pointes Protection*:

> [93] Turning to the other side of the balancing exercise in s. 137.1(4)(b), the public interest in protecting the defendant's freedom of expression, the motion judge must assess the public interest in protecting the actual expression that is the subject matter of the lawsuit. On a general level, the importance of freedom of expression, especially on matters of public interest, both to the individual and to the community, is well understood: see *Grant v. Torstar Corp.*, at paras. 32-57. However, if the defendant asserts a public interest in protecting its expression beyond the generally applicable public interest, the evidentiary burden lies on the defendant to establish the specific facts said to give added importance in the specific circumstances to the exercise of freedom of expression.

[160] In this case, the plaintiff's allegations of defamation include many of the defendant's statements. Viewed objectively, many of the defendant's statements commented on the need for inclusive and safe schools, or did not mention the plaintiff. Those statements deserve significant protection. The entirety of the debate revolved around an issue that the plaintiff concedes is an important one.

[161] Hence, were I tasked with attempting to balance the plaintiff's potential damages against the public interest in this debate, I would find in favour of the public debate on the evidence before me. As noted, the plaintiff submitted almost no evidence of damage suffered.

The Plaintiff's Application for Further Discovery of Documents

[162] As noted at para. 6 of these reasons, the plaintiff seeks to have his application for further production of documents from the defendant heard at the same time as the defendant's application under the *PPPA*. The plaintiff made further submissions in November 2019 arguing that recent decisions, delivered since the hearing, supported his application in this regard.

[163] The plaintiff's argument, as I understand it, is that the production of further documents, such as emails and texts from the defendant, could uncover facts that would expose evidence of the defendant's malice toward the plaintiff. I do not understand that any potential documents in the possession of Mr. Hansman could be relevant to any other issue in the proceeding.

[164] I note, at the outset, that there is a procedural issue within the *PPPA* that the plaintiff must address. The *PPPA* does not allow for further steps to be taken in the action (or "proceeding") once an application under s. 4 is served. Section 5 states:

> **No further steps**
>
> 5 (1) Subject to subsection (2), if an applicant serves on a respondent an application for a dismissal order under section 4, no party may take further steps in the proceeding until the application, including any appeals, has been finally resolved.
>
> (2) Subsection (1) does not apply to an application for an injunction.

[165] The plaintiff argues that two recent cases have commented upon the availability of other steps once the *PPPA* application has been served.

[166] First, the plaintiff cites the decision of Murray J. in *Galloway*. In that decision, Murray J. allowed the plaintiff's application for the production of documents that the plaintiff requested during the cross-examination of the defendant on his affidavit. Justice Murray ruled that the plaintiff's requests were valid and the documents should be disclosed before the hearing of the defendant's *PPPA* application.

[167] *Galloway* does not assist Mr. Neufeld. In *Galloway*, the plaintiff was pursuing the cross-examination of the defendant on his affidavit. The affidavit was filed in the

application. The *PPPA* provides certain steps that can be taken within the application. One such step is cross-examination on an affidavit. During that cross-examination, the plaintiff requested documents. The parties then fought over whether the production of the documents sought during the cross-examination was a step in the application, or a step in the proceeding. Justice Murray ruled that it was a step in the application and directed that the production to occur before the hearing of the *PPPA* application.

[168] Conversely, in this case, Mr. Neufeld did not avail himself of any of the procedures under the *PPPA*. Instead, he sought to proceed with a step in the action: his application for production of documents.

[169] As noted, s. 5 of the *PPPA* requires a stay of all steps in the proceeding. The decision in *Galloway* does not affect the interpretation of that section.

[170] The plaintiff also relies on the decision in *Zoutman v. Graham*, 2019 ONSC 4921. He notes that in *Zoutman*, the court allowed the plaintiff's summary trial application to proceed at the same time as the defendant's anti-SLAPP application.

[171] The circumstances in *Zoutman* are distinguishable from the current case. In *Zoutman*, the plaintiff advised the defendant that he intended to set his defamation claim down for a summary trial. He then assembled his material and had a fully formed evidentiary basis for the summary trial. Two months after receiving notice of the summary trial, the defendant brought his anti-SLAPP application.

[172] It is clear that on the facts, the court was concerned that the defendant was using the anti-SLAPP application to forestall the plaintiff's ability to seek judgment. Although the court allowed the two applications to be heard at the same time, the court dismissed the anti-SLAPP application on the basis that the defendant did not meet the first part of the test (whether it was a matter of public interest).

[173] The reasoning in *Zoutman* indicates that the court should not allow a frivolous anti-SLAPP application to derail other meaningful steps in the action. To the extent that it allowed two applications to proceed at the same time, it does not assist

Mr. Neufeld. I note that the court dealt with the anti-SLAPP application first and dismissed it. Presumably, if that application had merit, the action would have been dismissed before the plaintiff's summary trial was heard.

[174] In addition to the issues discussed above, I also note that any documents the plaintiff seeks from the defendant would be in the nature of a fishing expedition. There is no evidence or indication that the defendant shared his views about the plaintiff with anyone by email or text or otherwise in writing. In effect, the plaintiff's application for documents is made in the hope that there may be something in the documents that provides a foundation for his allegation of malice. There is no evidence that such documents exist.

[175] I further note that the best result that the plaintiff could obtain, if further documents were disclosed, would be the ability to establish, or argue, that Mr. Hansman acted with malice. If established, that would negate the defence of fair comment. However, it would not address the balancing of interests that I discussed earlier. In other words, in the best-case scenario for Mr. Neufeld, he could establish malice, but it would not affect the balancing of interests. His action would still be dismissed.

[176] On that basis, I decline to grant the plaintiff's application for further disclosure of documents.

Summary

[177] This action arises out of significant philosophical differences regarding the propriety of the Ministry of Education's SOGI 123 materials. However, the outcome of this application has nothing to do with the "correctness" of either party's position on that issue.

[178] Rather, this is a decision under the new *PPPA* legislation, which allows for the dismissal of an action if certain criteria are met. The plaintiff commenced a defamation action against the defendant in relation to a matter of public interest. The defendant concedes that some of his words could be capable of defamatory

meaning. However, he argues that there is strong precedent from the Supreme Court of Canada, on very similar facts, stating that the defence of fair comment would apply to his statements. I have found that, viewing the facts through the "reasonableness lens", no reasonable trier of this case could distinguish the facts in this case from the facts in *WIC*.

[179] I have further found that the *PPPA* requires me to balance the seriousness of the harm suffered by the plaintiff and the public interest in continuing the proceeding against the public interest in protecting the defendant's expression. The plaintiff has an interest in claiming damages and clearing his good name. However, the public has an interest in protecting expressions that relate to public debate. In balancing those interests, I find that the interest in public debate outweighs the interest in continuing the proceeding on these facts.

[180] On the basis of the evidence before me and the analysis set out above, I find that the defendant has established the necessary grounds for a dismissal of the plaintiff's action against him under the *PPPA*.

[181] The defendant's application is granted, and the action is dismissed.

Costs

[182] On the issue of costs, the plaintiff's counsel sought an adjournment to address the defendant's claim that he is entitled to costs on a full indemnity basis under s. 7 of the *PPPA*. I grant that adjournment on the issue of costs. If the parties are unable to reach a resolution on that issue, they may appear before me for further submissions.

"A. Ross J."

No. S35152
Chilliwack Registry

In the Supreme Court of British Columbia

Between

BARRY NEUFELD

Plaintiff

and

GLEN HANSMAN

Defendant

ORDER MADE AFTER APPLICATION

[Rule 22 3 of the Supreme Court Civil Rules applies to all forms.]

BEFORE	) THE HONOURABLE) MR. JUSTICE ROSS)	)))	26/Nov/2019

ON THE APPLICATION of the Defendant, Glen Hansman, coming on for hearing at Vancouver, B.C. on July 11 and August 06, 2019 and on hearing Robyn Trask and Carey D. Veinotte, Counsel for the Defendant, and Paul Jaffe, Counsel for the Plaintiff;

THIS COURT ORDERS that:

1. Judgment is reserved until this day;

2. The Application of Defendant Hansman dated April 23, 2019 is granted;

3. The Action of the Plaintiff against the Defendant, herein, is dismissed; and,

4. The Parties be at liberty to address the matter of costs on such further appearance as may be determined.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

"Paul Jaffe"

Signature of lawyer for the Plaintiff
Paul Jaffe

Signature of lawyer for the Defendant
Carey D. Veinotte

By the Court

Digitally signed by Danielle Maarhuis

Digitally signed by Ross, J

Registrar

No. S35152
Chilliwack Registry

In the Supreme Court of British Columbia

Between

BARRY NEUFELD

Plaintiff

and

GLEN HANSMAN

Defendant

ORDER MADE AFTER APPLICATION

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Neufeld v. Hansman,*
2021 BCCA 222

Date: 20210609
Docket: CA46586

Between:

Barry Neufeld

Appellant
(Plaintiff)

And

Glen Hansman

Respondent
(Defendant)

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated November 26, 2019 (*Neufeld v. Hansman*, 2019 BCSC 2028, Chilliwack Docket S35152).

Counsel for the Appellant, appearing via videoconference:	P.E. Jaffe
Counsel for the Respondent, appearing via videoconference:	M.J. Sobkin R.P.M. Trask
Place and Date of Hearing:	Vancouver, British Columbia November 25–26, 2020
Place and Date of Judgment:	Vancouver, British Columbia June 9, 2021

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Voith

Summary:

The appellant was a public school trustee who made negative comments about how a sexual orientation and gender identity program was being implemented in BC schools. The respondent, the then-head of the BC Teachers' Federation, criticized the comments when interviewed by media. The appellant brought a defamation claim, and the respondent applied to have it dismissed under the Protection of Public Participation Act. The chambers judge dismissed the claim, finding there was likely a valid defence of fair comment. The appellant challenges the dismissal.

Held: Appeal allowed. The chambers judge erred in assessing whether there was likely a valid defence of fair comment: the case at hand was distinguishable from WIC Radio Ltd. v. Simpson, as the context and identity of the parties materially differed. The defence of fair comment must be considered for each separately pleaded publication. An application under the PPPA does not prevent a party from seeking documents, which the appellant sought as relevant to proof of malice. The judge erred in weighing the competing public interests. Damages are presumed in defamation, and in cases of concurrent defamation committed by multiple sources, the plaintiff is not required to prove an exclusive causal link. When weighing the interest in allowing the action to proceed, the subject matter of the expressions must be distinguished from the expressions themselves. Finally, the weighing exercise must consider not only the harm to the plaintiff but the public interest in continuing the proceeding. The judge failed to consider the chilling effect the respondent's expression could have on public discourse.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

Introduction

[1] The appellant, Barry Neufeld, is a public school trustee who, in a Facebook post, made negative comments about the way SOGI 123, a program designed to teach children about sexual orientation and gender identity, was being implemented in schools. The respondent, Glen Hansman, the then-president of the BC Teachers' Federation, was highly critical of Mr. Neufeld's statements when interviewed by the media. Mr. Neufeld commenced an action in defamation against Mr. Hansman, but it was dismissed before trial under the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 [*PPPA*]. Mr. Neufeld appeals the dismissal.

[2] The action underlying this appeal arises out of significant philosophical differences about the use of the Ministry of Education's SOGI 123 materials, but, as the chambers judge aptly observed, the application before him had nothing to do

with the "correctness" of either party's position on that issue. The outcome of this appeal likewise turns only on whether the judge erred in his interpretation and application of the *PPPA*. For the reasons that follow, I respectfully conclude that he did so err. I would therefore set aside the order and reinstate the defamation proceeding.

The Protection of Public Participation Act

[3] The *PPPA* came into force in March 2019. The Attorney General described the *Act* as "intended to protect an essential value of our democracy, which is public participation in the debates of the issues of the day." Of particular concern were strategic lawsuits brought by the wealthy and powerful to shut down public criticism. In addressing the purpose of the *PPPA,* he said:

> 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: British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 4th Sess., No. 198 (14 February 2019) at 7018 (Hon. David Eby).

[4] Section 4 of the *PPPA* authorizes a person who has been sued over an expression to apply to have the action dismissed if the expression relates to a matter of public interest and certain conditions are met. The provision reads as follows:

> **Application to court**
>
> **4** (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that
>
> (a) the proceeding arises from an expression made by the applicant, and
>
> (b) the expression relates to a matter of public interest.
>
> (2) If the applicant 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 satisfies the court that
>
> (a) there are grounds to believe that
>
> (i) the proceeding has substantial merit, and

(ii) the applicant has no valid defence in the proceeding, and

(b) 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.

[5] Unlike other pre-trial applications to dismiss an action, such as under Rule 9-5 (striking pleadings) and Rule 9-6 (summary judgment), the *PPPA* can prevent a plaintiff with a valid cause of action from proceeding with their suit as long as the public interest in protecting the defendant's expression outweighs the public interest in allowing the plaintiff to proceed: *Galloway v. A.B.,* 2020 BCCA 106 at para. 55.

[6] In applying s. 4 of the *PPPA*, the judge relied heavily on two Ontario Court of Appeal decisions, *1704604 Ontario Ltd. v. Pointes Protection Association,* 2018 ONCA 685 [*Pointes CA*] and *Platnick v. Bent,* 2018 ONCA 687 [*Bent CA*], that addressed an almost identical provision in the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1. The judge did not have the benefit of the Supreme Court of Canada's judgments in those cases, which were released prior to the hearing of this appeal.

[7] In *1704604 Ontario Ltd. v. Pointes Protection Association,* 2020 SCC 22 [*Pointes SCC*] and *Bent v. Platnick,* 2020 SCC 23 [*Bent SCC*], the Supreme Court confirmed there are four steps to the analysis. First, the defendant has the burden of establishing that the proceeding against them arises from an expression that relates to a matter of public interest. Once the defendant establishes that point, the burden shifts to the plaintiff for the next three steps. The plaintiff faces dismissal of their action unless they satisfy the motion judge of the following: first, that there are grounds to believe the action has substantial merit; second, that there are grounds to believe the defendant has no valid defence to the action; and third, that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the defendant's expression. The Supreme Court in *Pointes* described the last step as the core of the analysis, allowing the court to scrutinize "what is really going on" in the particular case before them and to open-endedly engage with the

overarching public interest implications that the statute, and anti-SLAPP legislation generally, seeks to address.

[8] With that general review of the legislative framework, I return to the particulars of the present case.

Background

[9] The judge summarized the background of the defamation action this way:

> [14] In 2016, the *Human Rights Code*, R.S.B.C. 1996, c. 210 [*HRC*] was amended to include "gender identity or expression" as a prohibited ground of discrimination. Sexual orientation has been a protected ground under the *HRC* since 1992.
>
> [15] Shortly after the 2016 amendment, the Ministry of Education issued an updated Ministerial Order, requiring that school boards include reference to "gender identity and expression" in their codes of conduct, in addition to the already required references to other prohibited grounds under the *HRC*. That update was announced by the Ministry on September 7, 2016.
>
> [16] A group of organizations collaborated to prepare the SOGI 123 resources. That group included the Ministry of Education, UBC Faculty of Education, the BCTF, and members of the communities representing Lesbian, Gay, Bisexual, Transgender, and Queer ("LGBTQ") groups. The materials were drafted with the stated goal of having age-appropriate tools for teaching about sexual orientation and gender identity available for teachers of children in Kindergarten through Grade 12.

[10] The judge stated there was public debate about the use of the SOGI 123 materials, but the appellant says there was no evidence to support that finding—to the contrary, there had been no public debate or debate by any school board in BC about the program before he raised the issue. He did so on October 23, 2017, by way of the Facebook post, which reads in full:

> Okay, 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 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 [to] choose to change gender is nothing short of child abuse. But now the BC Ministry of Education has embraced the LGBTQ lobby and is forcing this biologically absurd theory on children in our schools. Children are being taught that heterosexual marriage

> 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.]

[11] There was immediate reaction from major media outlets, which published several online articles. That same day, Mr. Hansman was interviewed and commented about Mr. Neufeld and his post.

[12] Two days after the Facebook post, Mr. Neufeld issued a press release stating in part:

> My post on Facebook has created a lot of controversy and first of all, I want to apologize to those who felt hurt by my opinion, including members of the Chilliwack Board of Education. I am critical of an educational resource, not individuals. Those who have worked with me for over 24 years know that I DO believe in inclusion and a safe learning environment for all of our students: that they should be protected from all forms of bullying and intimidation.
>
> I believe that in a free and democratic society, there should be room for **respectful** discussion and dissent. I firmly believe that implementation of the SOGI 123 resources needs to be reviewed by engaging parents and teachers in conversation on this topic before full implementation.
>
> [Emphasis as appears in original.]

Both men continued to publicly and bluntly express their views over the following year.

[13] The notice of civil claim identifies 11 specific publications in which Mr. Hansman allegedly made defamatory remarks. Mr. Hansman admitted having made all of the statements and that they were published. At the hearing of the *PPPA* application, he also admitted that at least some of the statements were capable of defamatory meaning, although he did not identify which statements. To provide context, four of the eleven impugned expressions are set out below:

1. On April 10, 2018, in an interview with The Star Vancouver newspaper Mr. Hansman said:

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.

[Emphasis added.]

2. On April 12, 2018, Mr. Hansman spoke to City News1130 saying:

BCTF president Glenn Hansman says the trustee "tiptoed quite far into hate speech" and sent a disturbing message to both students and parents.

Hansman says school trustees and boards of education are responsible for ensuring student safety, and he believes that's something Neufeld failed to do.

"Whether it's a transphobic comment, or a racist one or a misogynistic one, that simply cannot stand because public schools welcome all students, regardless of their race, their culture, their sexual orientation or their gender identity."

[Emphasis added.]

3. On April 13, 2018, Mr. Hansman was quoted by CBC radio and on CBC's world online publication:

The president of the British Columbia Teachers' Federation says a Chilliwack school trustee who made controversial LGBT comments shouldn't be "anywhere near students" and that's why the BCTF has filed a human rights complaint against him.

The complaint says that Barry Neufeld's alleged "hateful" public comments about trans people have created an unsafe work environment for teachers and students, as the province moves to make students of all orientations feel safer in schools.

…

Hansman says the law is well established and clear and Neufeld should know better.

[Emphasis added.]

4. On September 16, 2018, Mr. Hansman gave another interview to City News1130 which did not expressly identify Mr. Neufeld but which is claimed or in respect of him:

"It is extremely problematic to have somebody who is running as a school trustee continuing to spread hate about LGBTQ people – especially trans people – and also be out there, making vile comments about refugees and immigrants, as a group."

[Emphasis added.]

[14] Mr. Neufeld pleaded that Mr. Hansman's statements, both expressly and by innuendo, were understood by the public to mean that he:

i. promoted hatred;
ii. committed hate speech;
iii. was actuated by hatred of certain students;
iv. was discriminatory against gay and/or transgender students;
v. promoted hatred toward gay and/or transgender students in the school system;
vi. made it unsafe for students in the school system;
vii. was unfit to hold public office as a school board trustee;
viii. violated ethical and/or legal duties applicable to school board trustees;
ix. presents a safety risk to students;
x. has bigoted views which threaten the safety and inclusiveness in schools;
xi. has lied to the public about what SOGI 123 includes;
xii. is a religious bigot who imposes his religious views on some students in a manner which makes it unsafe for such students;
xiii. is racist, discriminatory, sexist, misogynist, transphobic and/or homophobic;
xiv. has violated the rights of students under the Canadian Charter of Rights and Freedoms and BC Human Rights Code;
xv. regards people who support transgender students as child abusers;
xvi. is an outlier and part of a vanishing breed of racists;
xvii. published knowingly false statements to injure the public interest; and
xviii. is unfit to be a school board trustee because of his age.

The Hearing Below

[15] The judge began by addressing Mr. Neufeld's preliminary argument that the circumstances of the case did not meet the traditional indicia of a SLAPP suit, that is:

(a) a history of the plaintiff using litigation or the threat of litigation to silence critics;

(b) a financial or power imbalance that strongly favours the plaintiff;

(c) a punitive or retributory purpose animating the plaintiff's bringing of the claim; and

(d) minimal or nominal damages suffered by the plaintiff.

[16] Mr. Neufeld argued that he was simply an individual attempting to protect his reputation and seeking damages for defamation against a defendant who was the president of a powerful union representing more than 45,000 teachers in BC.

[17] The judge rejected that submission, concluding there was no suggestion in the text of the *PPPA* that it was restricted to cases bearing traditional SLAPP characteristics.

[18] Because Mr. Neufeld admitted Mr. Hansman's expression related to a matter of public interest, the judge began with the second step in the s. 4 analysis—whether the claim had substantial merit. He concluded that it did, saying:

> [86] As noted, *Pointes Protection* indicates that the meaning of "substantial merit" is that the claim is shown to be legally tenable and supported by evidence which could lead a reasonable trier to conclude that the claim has a real chance of success. In this context, the word "substantial" does not require that the plaintiff's claim, or damages, be "substantial" in respect of the damages that are expected. It only means that the claim is legally tenable and supported by the evidence, taking into account the early stage in the proceedings.
>
> …
>
> [88] What matters is that the plaintiff has alleged that the defendant made statements that were capable of defamatory meaning. In this hearing, the defendant acknowledged having made the impugned statements, that they were published, and that at least some of them were capable of defamatory meaning. As a result of the defendant's acknowledgement on these points, the elements of the test under s. 4(2)(a)(i) are established. The claim is legally tenable and supported by evidence. It is possible that a trier of the case could find that the plaintiff was defamed by the defendant's statements.
>
> [Emphasis added.]

[19] Moving to the third step, the judge considered the two defences relied on by Mr. Hansman: qualified privilege and fair comment. He observed that privilege attaches to the occasion upon which a communication is made, not to the communication itself, and noted Mr. Hansman was relying on the defence in circumstances that did not fit the generally recognized characteristics of a privileged occasion. The judge concluded there were "grounds to believe that a reasonable

trier of fact could find that the defence of qualified privilege was not applicable": at para. 107.

[20] However, the judge found that a trier of fact would inevitably conclude that the defence of fair comment was valid, relying heavily on the Supreme Court of Canada's decision in *WIC Radio Ltd. v. Simpson,* 2008 SCC 40 [*WIC*]: at para. 137. The judge found *WIC* was indistinguishable from the present case and, finding no reasonable prospect of malice being established, dismissed the claim on this basis: at para. 147.

[21] Although the judge's finding on the validity of the defence of fair comment was sufficient to dismiss the action, he went on to the final consideration under s. 4, finding that the public interest in protecting Mr. Hansman's expressions outweighed the harm suffered by Mr. Neufeld, who had "submitted almost no evidence of damages suffered": at paras. 16 and 152.

Issues

[22] Mr. Neufeld identifies several errors in the judge's reasoning which can be conveniently addressed under two main grounds of appeal:

1. Did the judge err in his assessment of whether there were grounds to believe the defence of fair comment would not succeed at trial because he:

    (a) failed to consider the defence in relation to each of the 11 publications;

    (b) assumed that *WIC* was determinative;

    (c) found that malice could only be established by an admission; and

    (d) assumed that the *PPPA* prohibited applications for documents.

2. Did the judge err in his weighing of the competing public interests because he:

(a) required Mr. Neufeld to prove damages and assumed causation weighed against Mr. Neufeld because others had also made critical comments;

(b) failed to consider the public interest in the type of expression used, focusing instead on the subject matter of the expression; and

(c) failed to consider that the public interest in protecting an expression on a matter of public interest was lessened where that expression could have a chilling effect on expression on the other side of the debate.

Analysis

1. Did the judge err in his assessment of whether there were grounds to believe the defence of fair comment would not succeed at trial?

[23] The question of whether the chambers judge could have found that the defence of fair comment would not succeed raises a question of mixed fact and law. Therefore, I approach this ground of appeal mindful that the standard of review is deferential unless the judge made an extricable error of law or a palpable and overriding factual error: *Pointes CA* at para. 66.

[24] As the Supreme Court of Canada explained in *Pointes,* the plaintiff has the burden of showing that there is a basis in the record and the law—taking into account the stage of the proceeding—for finding that there is no valid defence: at para. 39. In *Bent*, the Supreme Court described this as “the defence not weighing more in favour of the defendant”: at para. 103. What is involved is not a determinative adjudication of the existence of the defence. Introducing too high a standard of proof into what is a preliminary assessment might suggest that the outcome is being adjudicated rather than the likelihood of an outcome: *Pointes SCC* at para. 37.

[25] In my respectful view, the judge made errors in principle in his assessment of this step, to which I turn now.

(a) Failure to address each of the 11 publications pleaded

[26] The judge worked from a summary of the type of comments made by Mr. Hansman rather than addressing the specific expressions in issue. As this Court observed in *Weaver v. Corcoran,* 2017 BCCA 160 at para. 83: "where separate publications are pleaded as independent causes of action, absent referability or other inextricable linkage, the meaning of each should be determined independently, in the immediate context in which the words are used" (emphasis added).

[27] The defence of fair comment must also be considered for each of the separate publications pleaded: Roger D. McConchie & David A. Potts, *Canadian Libel and Slander Actions*, (Toronto: Irwin Law, 2004) at 258. In my view, the judge's failure to consider the specific expressions led him to overlook the constituent elements of the fair comment defence as applied to each expression. For example, the judge did not ask whether Mr. Hansman's statements were recognizable as comments based on factual foundations. The ultimate determinant of whether words are comment or fact is how they would strike the ordinary, reasonable reader: Alastair Mullis & Richard Parkes, eds., *Gatley on Libel and Slander*, 12th ed. (London: Sweet & Maxwell, 2013) at ch. 12.8. If a trier characterizes statements as facts rather than comments, the fair comment defence will not succeed: *Bondfield Construction Company Limited v. The Globe and Mail Inc.,* 2019 ONCA 166 at para. 17.

[28] The comment must also explicitly or implicitly indicate, at least in general terms, the facts on which the comment is based. The facts must be sufficiently stated or otherwise known to listeners so that they are able to make up their own minds on the merit of the comments and opinions expressed. It is not enough for the defendant to identify, after the event, facts that could support their comments. If the factual foundation is unstated or unknown, the fair comment defence is not available: *WIC* at para. 31. The Supreme Court of Canada in *WIC* described "a properly disclosed or sufficiently indicated (or so notorious as to be already understood by the audience) factual foundation as an important objective limit to the fair comment defence": at para. 34.

[29] In my view, there are grounds to believe that Mr. Hansman will not be able to establish that the facts relied on to support the following comments about Mr. Neufeld were either stated in the publications or so notorious as to be known to readers and listeners:

- That he promotes hatred;
- That he creates a school environment for both teachers and students that is discriminatory and hateful;
- That he spreads hate about LGBTQ people—especially transgender people; and
- That he makes vile comments about refugees and immigrants as a group.

Although Mr. Hansman denies that his comments about refugees and immigrants referred to Mr. Neufeld, I conclude there are grounds to believe that Mr. Neufeld could establish this as part of his burden in establishing defamation.

[30] I note that the judge placed an inordinate burden on Mr. Neufeld by requiring him to provide evidence on the fair comment defence to establish there was no basis for the defamatory comments. It was sufficient for Mr. Neufeld to rely on the 11 impugned publications.

[31] In summary on this point, and with great respect to the judge, he erred by not considering whether each of the publications included statements that were recognizable as comments founded on identifiable facts. There are grounds to believe that Mr. Hansman's defence of fair comment is not valid for at least some of the expressions in issue in the action.

(b) Assumption that WIC was determinative of the fair comment defence

[32] The defence of fair comment is available if the defendant establishes the following, as set out in *WIC* at para. 1:

(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 recognizable as comment;

(d) the comment must satisfy the following objective test: could anyone honestly express that opinion on the proved facts?

(e) even though the comment satisfies the objective test, the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice.

[33] The judge relied heavily on the Court's ruling on the fair comment defence in *WIC* to find that Mr. Neufeld had not met his burden of establishing grounds to believe that the defence of fair comment would fail, as he had tendered very little evidence on either the merits of the case or the defence of fair comment: at paras. 121–124. The judge concluded *WIC* could not be distinguished from the present case and would inevitably lead a trier of fact to conclude that the defence of fair comment was valid: at para. 137.

[34] In my view, the judge erred in so concluding. Although the two cases deal with similar subject matter and the competing interests of free speech and protection of reputation, they differ in material ways.

[35] The first point of distinction is the identity of the defendant. In *WIC*, the defendant, Rafe Mair, was a well-known and often controversial commentator on matters of public interest in BC. He hosted a talk show designed to provoke controversy, described by the Supreme Court as "a shock jock show, as much entertainment as journalism": *WIC* at paras. 3 and 47. Mr. Mair's listeners expected to hear extravagant editorial opinions. In contrast, Mr. Hansman was the president of a professional union of 45,000 teachers speaking in an official capacity about a school trustee.

[36] Second, Mr. Mair's commentary in *WIC* clearly identified, in the single publication in issue, the basis of his editorial comment. The record in the present case is much more complex, and, as I have noted, there are grounds to believe that the facts were not clearly stated or the statements were not recognizable as comment for at least some of the publications. In contrast, the trial judge in *WIC* found that the defendant had proved that every element of the factual foundation was either stated or publicly known, that Mr. Mair was aware of them all, and that they were all substantially true: *WIC* at para. 34.

[37] Third, when Mr. Mair broadcast his comments, the plaintiff, Kari Simpson, was a well-known social activist with a public reputation as a leader of those opposed to schools teaching acceptance of a gay lifestyle. She was described as someone who "relished her role as a public figure" and as "the person associated by the media with the anti-gay side": *WIC* at paras. 4 and 7. In contrast, at the time of Mr. Neufeld's Facebook post, there was no evidence that he was associated with an "anti-LGBTQ side" or that the views he held were so notorious that listeners or readers would know the contents of his position.

[38] Fourth, the context of the expressions in *WIC*, namely, an editorial opinion piece, meant that Mr. Mair's listeners understood his expressions to be comment, not statements of fact: *WIC* at para. 27. The interviews in which Mr. Hansman made his statements were not as clear-cut.

[39] Finally, it is worth noting that the court's ruling on the fair comment defence in *WIC* was based on a full trial. In contrast, the judge in the present case was assessing the potential success of the defence at a very early stage of the proceeding, prior to disclosure of documents and examinations for discovery.

[40] In summary on this point, in my view, the judge erred in concluding that the reasoning in *WIC* would preclude a trier of fact from finding a defence of fair comment in the present case.

(c) Proof of malice & production of documents

[41] The judge recognized that malice can defeat an otherwise sound defence of fair comment if the plaintiff can prove that the defendant published the comment in any one of the following circumstances:

(a) Knowing it was false;

(b) With reckless indifference as to whether it is true or false;

(c) For the dominant purpose of injuring the plaintiff because of spite or animosity; or

(d) For some other dominant purpose that is improper or indirect.

[42] However, the judge concluded there was "no prospect of a finding that the defendant made the statements, either knowing them to be false or with reckless indifference" because Mr. Hansman's affidavit made it clear that he honestly held the beliefs he expressed: at paras. 117 and 141. He considered that "absent Mr. Hansman providing a full admission of malice under cross-examination, it is not reasonable to perceive that a reasonable trier of the case would find that he was motivated by malice": at para. 141.

[43] In my view, there are two errors in this analysis. First, to the extent that the judge understood Mr. Hansman to have expressly stated he had an honest belief in the defamatory expressions published, that was an error of fact. His affidavits do not contain that assertion.

[44] Second, it is an error in principle to suggest that, once a defendant explains and asserts a belief in their comments, malice can only be proved by a "full admission on cross-examination." To the contrary, malice may be gleaned from the nature of the words themselves and the context in which the statements were made: *Salager v. Dye & Durham Corporation,* 2018 BCSC 438 at para. 149. Further, Mr. Neufeld sought to establish malice through production of communications between Mr. Hansman, the local branch of the BCTF, and several other parties that

Mr. Neufeld pleaded had been a part of a "smear campaign." Mr. Neufeld made a demand for production of that category of documents on February 19, 2019, which the defendant refused on March 5. On April 1, the plaintiff filed an application to compel production of those documents before the June 11 and 12 examinations for discovery. Mr. Hansman filed the *PPPA* application on April 23, taking the position that no further steps could be taken in the action, including the document production motion, until the *PPPA* application had been determined.

[45] Mr. Neufeld renewed his application for document production as part of the *PPPA* hearing, seeking an adjournment of the *PPPA* motion until the documents had been produced. The judge refused to entertain that application, concluding that he did not have jurisdiction to do so once a *PPPA* application was filed, pointing to s. 5 of the *PPPA*:

> **No further steps**
>
> **5** (1) Subject to subsection (2), if an applicant serves on a respondent an application for a dismissal order under section 4, no party may take further steps in the proceeding until the application, including any appeals, has been finally resolved.
>
> (2) Subsection (1) does not apply to an application for an injunction.

The judge concluded that, in the process provided for in the *PPPA,* documents could be ordered in relation to cross-examination on affidavits but not independent of that step.

[46] The judge did not have the benefit of this Court's decision on the issue in *Galloway,* which came to the contrary conclusion:

> [46] At the threshold is the question of the court's authority to contemplate the making of document disclosure orders as part of the process leading to the hearing and disposition of a dismissal application under s. 4 of the *PPPA*.
>
> [47] That authority cannot be doubted. It is expressly conferred by Rule 22-1(4)(c). It is an independent discretion to order production whether or not it is requested in the context of a cross-examination on a deponent's affidavit.
>
> [Emphasis added.]

[47] Although the judge decided he could not order production of documents, he expressed the view that, in any event, Mr. Neufeld's application amounted to a

fishing expedition because there was no evidence that the documents he sought existed. However, Mr. Neufeld identified three specific examples of documents he had obtained that had not been produced by Mr. Hansman. Further, Mr. Hansman had not denied the existence of such documents; rather**,** he objected to production based on relevance, privilege, and not having possession and control. In addition, Mr. Hansman acknowledged at para. 16 of his amended response that he "worked with members of the BCTF to make their concerns about the plaintiff's statements and the Facebook post known to the public and to school board officials".

[48] Finally, the judge was of the view that even if the documents established malice on the part of Mr. Hansman, that would only negate the defence of fair comment and would not affect the weighing of interests in the final stage of the s. 4 assessment, which the judge said would go against Mr. Neufeld regardless, "so his action would still be dismissed": at para. 175. To the extent that this resulted in a more cursory review of the merits of the application to produce documents, the judge erred in principle. The existence of malice is also a relevant factor to the weighing of the competing interests required at the last stage of the s. 4 analysis: *Pointes SCC* at para. 75. I turn now to that step.

2. Did the judge err in his assessment of the competing public interests?

[49] The final step under s. 4(b) requires the judge to consider whether the harm to the plaintiff is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting the defendant's expression. Deference is owed to a judge's weighing of these competing interests, absent an identifiable legal error or a palpable and overriding error of fact: *Pointes CA* at para. 97.

[50] As noted above, the judge, in conducting this part of his assessment, did not have the benefit of the Supreme Court of Canada's decisions in *Pointes* and *Bent*. Nor did he have the assistance of the defendant, who chose not to make submissions on this issue. For the reasons that follow, I am of the view that the judge erred in his assessment of the competing public interests.

(a) The judge's assessment of harm and causation

[51] Establishment of harm is of principal importance if the plaintiff is to meet their burden under s. 4(2)(b). The statutory language requires them to show the existence of harm and that the harm was suffered as a result of the defendant's expression. In my respectful view, the judge failed to give full effect to the presumption of damages in defamation and wrongly assumed causation would be difficult to establish because others had made similar comments about Mr. Neufeld.

[52] The judge repeatedly noted that Mr. Neufeld had not adduced evidence of harm other than bare assertions in his affidavit: at paras. 147, 152–153, and 158. The judge cited *Pointes CA* as standing for the proposition that "bald assertions of fact, unsupported by any evidence, are not sufficient," especially where the motion materials reveal sources apart from the defendant's expression that could well have caused the damages: at paras. 149–150. However, *Pointes* involved an action for damages for breach of contract and must be read in that context.

[53] In that case, the plaintiff wanted to develop a subdivision in Sault Ste. Marie. The defendants, who opposed the development on environmental grounds, brought an application for judicial review of the city council decision approving the development. While that application was pending, the plaintiff appealed to the Ontario Municipal Board from another city council decision refusing to amend the city's official plan to accommodate the development. Before the OMB appeal could be heard, the parties settled the judicial review proceeding. The settlement agreement provided that, in any future legal proceedings relating to the development, the defendants would not take the position that the decision of the conservation authority "was illegal or invalid or contrary to the provisions of the *Conservation Authorities Act,* R.S.O. 1990 c. C.27": *Pointes SCC* at para. 88. In the course of the OMB hearing of the plaintiff's appeal, one of the defendants testified that, in his opinion, the proposed development would cause substantial environmental damage. The OMB dismissed the appeal, and the development did not proceed. The plaintiff started an action against the defendants for breach of contract, alleging they had breached the terms of the settlement agreement by

giving evidence at the OMB hearing about the potential environmental impact of the development. The defendants applied to strike out the action under the Ontario equivalent of the *PPPA*, succeeding on that application in the Court of Appeal.

[54] In the circumstances of *Pointes,* it was highly significant that the plaintiff could not provide any evidence of losses flowing from the defendant's testimony at the OMB hearing. As Doherty J.A. described it, the plaintiff's theory was opaque: it did not lay the failure to obtain the development approval at the defendant's feet, and without evidence of damages, the plaintiff's claim for harm caused by the defendant was "weak indeed": *Pointes CA* at paras. 121–123.

[55] In contrast, general damages are presumed in a defamation case. The plaintiff bears no obligation to prove actual loss or injury: *Weaver* at para. 70; *Pan v. Gao,* 2020 BCCA 58 at para. 13.

[56] The defendant submits that the magnitude of the damages in a defamation case will be important nonetheless in assessing whether the harm to the plaintiff is sufficiently serious to outweigh the public interest in protecting the public expression, relying on *Bent SCC* at para. 144. I agree with that submission. However, the Supreme Court in *Bent* also observed that harm is not synonymous with monetary damages, saying:

> [146] In addition, reputational harm is eminently relevant to the harm inquiry under s. 137.1(4)(b). Indeed, "reputation is one of the most valuable assets a person or a business can possess": *Pointes Protection*, at para. 69 (citing "agreement" with the words of the Attorney General of Ontario at the legislation's second reading). This Court's jurisprudence has repeatedly emphasized the weighty importance that reputation ought to be given. Certainly, "[a] good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws": *Hill*, at para. 107; see also *Botiuk*, at paras. 91-92.
>
> [Emphasis added.]

[57] Although Mr. Neufeld was re-elected as a trustee, a point the judge took to suggest the limited nature of the damages he suffered, the potential for loss of his position was only one type of harm: at para. 146. Mr. Neufeld claimed he had been prevented from attending meetings and events open to other Trustees as a result of

the defamation. General damages in defamation are intended to compensate the plaintiff for loss of reputation, injury to feelings, such as embarrassment and anxiety, and to console the plaintiff and to vindicate them so that their reputation may be re-established: *Bent SCC* at para. 148.

[58] Mr. Neufeld identified several factors recognized in the jurisprudence as contributing to the damages suffered, including the office held by the accuser, the breadth of the distribution of the comments, and the repetition of the comments for over a year.

[59] The judge recognized that the plaintiff cannot be expected to present a fully developed damages brief. Instead, he found it will often suffice if there is sufficient evidence to draw a causal connection between the challenged expression and damages that are more than nominal: at para. 157. However, the judge heavily discounted Mr. Neufeld's potential damages because others had made similar comments in response to his Facebook post: at para. 150. Although it may well be found that Mr. Hansman was not the sole cause of any harm to Mr. Neufeld's reputation, it must be remembered that "no definitive determination of harm or causation is required" at this stage of the inquiry: *Pointes SCC* at para. 71. Nor is causation an "all-or-nothing proposition": *Pointes SCC* at para. 72. As Mr. Neufeld points out, in cases of concurrent defamation committed by multiple sources, it would be virtually impossible for plaintiffs to prove an exclusive causal link to damages from the words of just one of the defamers. In *Gatley on Libel and Slander* at ch. 8.2, the authors describe the principle this way:

> If the claimant elects to sue one of them separately, it is no defence that the others are jointly liable with him, nor will such fact mitigate the damages recoverable …

(b) The judge did not consider the nature of the expression in weighing the competing interests

[60] In assessing the other side of the equation—the public interest in protecting the actual expression that is the subject matter of the lawsuit, the judge said:

> [160] In this case, the plaintiff's allegations of defamation include many of the defendant's statements. Viewed objectively, many of the defendant's

> statements commented on the need for inclusive and safe schools, or did not mention the plaintiff. Those statements deserve significant protection. The entirety of the debate revolved around an issue that the plaintiff concedes is an important one.
>
> [Emphasis added.]

[61] In my view, the judge failed to distinguish between the subject matter of public interest and the actual expression complained of. It must be remembered that the statutory provision requires weighing the public interest in protecting "that expression." This distinction is an important one. As the Supreme Court explained in *Pointes*, the term "public interest" is used differently in this part of s. 4 than it is in the first stage of the assessment, which requires the defendant to establish that the comment relates to an underlying matter of public interest. That initial assessment concerns only whether the expression is directed at a topic of public interest, not the quality of the expression or value of its content. In contrast, at the final stage of the analysis, where the protection of free expression is being weighed against permitting the action to continue, both the quality of the expression and the motivation behind it are relevant: *Pointes SCC* at para. 74. (The latter point underscores the judge's error in concluding that proof of malice would not be relevant to the ultimate weighing exercise, but only to the defence of fair comment.) The Court continued:

> [75] Indeed, "a statement that contains deliberate falsehoods, [or] gratuitous personal attacks . . . may still be an expression that relates to a matter of public interest. However, 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" (C.A. reasons, at para. 94, citing *Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785, 410 D.L.R. (4th) 380, at paras. 82-84 and 96-103, aff'd 2018 ONCA 690, 428 D.L.R. (4th) 568).
>
> [76] While judges should be wary of the inquiry descending into a moralistic taste test, this Court recognized as early as *R. v. Keegstra*, [1990] 3 S.C.R. 697, that not all expression is created equal: "While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(*b*)" (p. 760).
>
> [Emphasis added.]

[62] Mr. Neufeld did not complain about Mr. Hansman's statements concerning the need for inclusive and safe schools. Rather, Mr. Neufeld identified particular

statements referring to him as bigoted, transphobic, anti-immigrant, racist, misogynistic, and hateful. The weighing exercise required the judge to consider the statements identified as containing the defamatory sting and to weigh whether those statements deserved protection. By focusing on the subject matter and the many non-defamatory components of the publications, the judge fell into error.

(c) Failure to consider that the defendant's expression could have a chilling effect on free speech

[63] This case differs from *Pointes* and *Bent* because, unlike these cases, the "conduct" giving rise to Mr. Hansman's expression was also an expression relating to the same matter of public interest. As events unfolded, it appears the parties became protagonists in an ongoing debate about how sexual orientation and gender identity should be addressed in Chilliwack elementary and high schools. Although the statutory language refers to "the harm likely to have been or to be suffered by the plaintiff" as a result of the defendant's expression, it requires the judge to assess the public interest in continuing the proceeding. It is thus not only the harm to the plaintiff that is being weighed, but the public interest in vindicating a potentially meritorious claim: *Pointes SCC* at para. 63. That public interest is grounded in the important societal value of protecting reputation: *Bent SCC* at para. 146. Those who engage in public discourse should not do so only at the risk of sacrificing their reputation.

[64] The Supreme Court in *Pointes* and *Bent* emphasized the importance of the weighing stage of the analysis. In *Pointes,* the Court said:

> [62] As I have often mentioned in these reasons, this provision is the core of s. 137.1. The purpose of s. 137.1 is 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. While s. 137.1(4)(a) directs a judge's specific attention to the merit of the proceeding and the existence of a valid defence in order to ensure that the proceeding is meritorious, s. 137.1(4)(b) open-endedly engages with the overarching concern that this statute, and anti-SLAPP legislation generally, seek to address by assessing the public interest and public participation implications. In this way, s. 137.1(4)(b) is the key portion of the s. 137.1 analysis, as it serves as a robust backstop for motion judges to dismiss even technically meritorious claims if the public interest in protecting the expression that gives

> rise to the proceeding outweighs the public interest in allowing the proceeding to continue.
>
> [Emphasis added.]

Although the exercise is not tethered to classic indicia of SLAPP suits, it enables courts to scrutinize "what is really going on" in the particular case before them: *Pointes SCC* at para. 81. The Court identified a number of additional factors that may be considered in the weighing exercise, including:

> [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* expression 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.
>
> [Emphasis in original.]

[65] The judge in the present case did not 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.

[66] Accusations of hate speech may have both criminal and human rights connotations. Section 319(2) of the *Criminal Code* proscribes the wilful communication of any statement that "promotes hatred against any identifiable group." Similarly, s. 7(1)(b) of the BC *Human Rights Code,* R.S.B.C 1996, c. 210 states that a "person must not publish, issue or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that is likely to expose a person or a group or class of persons to hatred or contempt."

[67] "Hatred" also has a very narrow definition. In *Saskatchewan (Human Rights Commission) v. Whatcott,* 2013 SCC 11, the Court clarified that hatred is limited to only the most intense and extreme emotions of detestation and vilification, saying:

> [57] … "hatred" or "hatred or contempt" is to be interpreted as being restricted to those extreme manifestations of the emotion described by the words "detestation" and "vilification". This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects.

[68] Defamatory comments that accuse someone of committing hate speech can inflict serious reputational harm. The judge's error was in failing to consider the collateral effect that preventing Mr. Neufeld from defending himself from such serious accusations could have on other individual's willingness to express themselves on issues of public interest in future.

[69] Indeed, the risk of being tarred with negative labels (and corresponding self-censorship) is most pronounced for people who hold contentious opinions on hotly debated topics. As Prof. Jamie Cameron notes in "Giving and Taking Offence: Civility, Respect, and Academic Freedom" (2013) Osgoode Comparative Research in Law & Political Economy Research Paper No. 48 at 303, the risk of opprobrium is most acute for inflammatory expressions or opinions outside the mainstream:

> Freedom is fragile because those who seek its protection are often or invariably the ones who are least sympathetic. Their expressive activities invite attention and oversight because they are offensive, confrontational, and even abusive: they reject the standards the rest of us observe, and that offends our sensibilities. As much as we may disapprove of the content or manner of their expression, that is not reason enough to silence or punish their interventions. Unless and until they cross a threshold of harm that justifies a regulatory response, transgressions that are merely offensive must be tolerated and addressed by other means.

[70] Based on the record before this Court, there are aspects of the expressions used by both parties that fall short of what one would hope to find in the public discourse of those in positions of authority. Having said that, I recognize that freedom of expression is "the cornerstone of a pluralistic democracy" and that there must be room for views to be forcefully and even intemperately presented in the

public forum. A determination of whether the expressions in the present case are defamatory or defensible is not before this Court. Nothing in these reasons should be taken as prejudging the merits of the action. But in my view, in the circumstances of this case, Mr. Neufeld's claim deserves a trial on the merits and should not have been summarily screened out at this early stage under s. 4 of the *PPPA*.

Disposition

[71] I would accordingly allow the appeal, set aside the order, dismiss the s. 4 application, and reinstate the action. In keeping with s. 7(2) of the *PPPA*, I make no order as to costs of the *PPPA* application in the court below. The appellant is entitled to costs of the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Mr. Justice Voith"

COURT OF APPEAL FILE NO. CA46586

COURT OF APPEAL

BETWEEN:

BARRY NEUFELD

APPELLANT
(PLAINTIFF)

AND:

GLEN HANSMAN

RESPONDENT
(DEFENDANT)

ORDER

BEFORE:

The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Voith

Vancouver, British Columbia, June 9, 2021

THE APPEAL from the order of Mr. Justice Ross of the Supreme Court of British Columbia, dated November 26, 2019 and coming on for hearing on November 25 and 26, 2020;

AND ON HEARING Paul Jaffe, counsel for the appellant and Robyn Trask and Michael Sobkin, counsel for the respondent;

AND ON READING the materials filed herein;

AND ON JUDGMENT BEING PRONOUNCED ON THIS DATE;

THIS COURT ORDERS that the appeal is allowed.

AND THIS COURT FURTHER ORDERS that the order below, dated November 26, 2019, made under section 4 of the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 be set aside and the action reinstated.

AND THIS COURT FURTHER ORDERS that the appellant Barry Neufeld recover the costs of the appeal from the respondent Glen Hansman promptly after assessment.

APPROVED AS TO FORM:	BY THE COURT
paul jaffe	
Paul Jaffe, Counsel for the Appellant	Deputy Registrar
Robyn Trask	
Robyn Trask, Counsel for the Respondent	

ENTERED

JUL 21 2021

VANCOUVER REGISTRY

VOL 365 FOL 50

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Supreme Court of Canada

Cour suprême du Canada

No. 39796

January 13, 2022

BETWEEN:

Glen Hansman

Applicant

- and -

Barry Neufeld

Respondent

JUDGMENT

The application for leave to appeal from the judgment of the Court of Appeal for British Columbia (Vancouver), Number CA46586, 2021 BCCA 222, dated June 9, 2021, is granted with costs in the cause.

Le 13 janvier 2022

ENTRE :

Glen Hansman

Demandeur

- et -

Barry Neufeld

Intimé

JUGEMENT

La demande d'autorisation d'appel de l'arrêt de la Cour d'appel de la Colombie-Britannique (Vancouver), numéro CA46586, 2021 BCCA 222, daté du 9 juin 2021, est accueillie avec dépens suivant l'issue de la cause.

J.S.C.C.
J.C.S.C.

080

SUPREME COURT OF BRITISH COLUMBIA

JAN 6 2019 – Rule 3-1 (1)

SEAL CHILLIWACK REGISTRY

Amended pursuant to Rule 6-1 (1)(a)

NO. S35152

CHILLIWACK REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BARRY NEUFELD

PLAINTIFF

AND:

GLEN HANSMAN

DEFENDANT

AMENDED NOTICE OF CIVIL CLAIM

This action has been started by the Plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and

b) serve a copy of the filed response to civil claim on the Plaintiff.

If you intend to make a counterclaim, you or your lawyer must

a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and

b) serve a copy of the filed response to civil claim and counterclaim on the Plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the Plaintiff,

a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,

b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,

c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or

d) if the time for response to civil claim has been set by order of the court, within that time.

Claim of the Plaintiff

Part 1: STATEMENT OF FACTS

1. The plaintiff is a retired corrections, probation and restorative justice facilitation officer, having been employed in these capacities by the Province of British Columbia from 1981 to 2008. Since 1992, he has also served as an elected trustee on the school board of School Board District #33, (the "Board"), completing seven terms from 1992 to 2008 and from 2011 to the present. He resides in Chilliwack, BC.

2. The defendant, who resides in City of Vancouver, B.C. is a former teacher and is the President of the British Columbia Teacher's Federation, a trade union which represents teachers in the public school system of B.C. (hereafter the "BCTF").

3. During the plaintiff's career as a corrections, probation officer and restorative justice officer, he dealt with many people at various stages of the criminal justice system who had been victimized by intolerance, homophobia, racism, bullying and bigotry. In addition, over his lengthy service on the Board, he has supported

all efforts to advance tolerance and inclusivity in the school system.

4. For approximately two years, what has been referred to as a "teaching resource" called SOGI (Sexual Orientation Gender Identification) has been offered in the public schools as an anti-bullying program in the public schools of B.C.. Its stated objective is to foster tolerance and inclusiveness for children who, by reason of sexual orientation and/or gender identity, may face discrimination.

5. The importance of promoting tolerance and inclusivity in public schools has been well understood and uncontroversial in B.C. for many years. The ERASE (Expect Respect and a Safe Environment) Bullying program was implemented in 2012, well before SOGI, with the goal of ensuring that all students, regardless of gender, race, culture, religion or sexual orientation, feel safe, accepted and respected. The plaintiff has always supported ERASE which remains in effect.

6. Unlike ERASE, SOGI is founded upon a controversial and politicized ideology which is rooted in a belief that gender is a social construct rather than biological. SOGI promotes this theory as factual rather than the controversial perspective it is. It seeks to indoctrinate children to this "non-binary" perspective of gender by, among other things, curtailing use of such gender specific words as mothers, fathers, women, men, boys, girls, sons and daughters from common parlance.

7. In addition, SOGI promotes the possibility of teachers interacting with young children on such highly personal and sensitive subjects as "transitioning" and "gender reassignment" without parental input or knowledge. The plaintiff believes that this presents risk of far reaching adverse implications for children.

8. The plaintiff believes that the proper role of schools does not include seeking to influence children on such highly personal and sensitive matters as "transitioning" and "gender reassignment". He believes it is up to parents, not public sector unions, activists, politicians or other self- proclaimed "experts".

9. The plaintiff believes that SOGI effectively seeks to displace the role of parents. Furthermore, if a need to address sexual orientation or gender identity with children does arise, the parents are best able to determine the most appropriate approach on these subjects, with or without professional, assistance, as they so decide.

10. For roughly a year after SOGI was implemented, the militant nature of some activists and fear of hostile backlash had a chilling effect on meaningful debate about SOGI on school boards across B.C. Given that elected school boards are to provide a democratic means by which communities have input on what takes place within their schools and given the distinct mandates of public sector unions, the purpose of school boards is defeated if trustees are intimidated from openly addressing all matters which affect the schools.

11. In addition to freedom of thought, opinion and expression in Canada, the plaintiff's decision to speak out about SOGI was informed by his statutory and ethical duties which, as a school board trustee, he owed to the community. He relies on Part 4 of the School Act of British Columbia, RSBC 1996, Ch. 412 and the Code of Ethics for Trustees, Board of Education School District #33 (Chilliwack), Policy 205.

12. Despite the risk of harassment and vilification by certain activists, the plaintiff was eventually unwilling to remain silent about SOGI. On October 23, 2017, he publicly commented on Facebook, stating:

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 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 labelled 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 has 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 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. https://c-fam.org/.../parents-defeat-gender-ideology-paraguay/

13. As anticipated may happen, upon the plaintiff's above comments, certain activists, including the defendant embarked upon a campaign to vilify, harass, embarrass and defame the plaintiff through the media, including the facts set out below.

14. On October 24, 2017, the Vancouver Sun, British Columbia's largest paid circulation newspaper, published, both in print and to the world online through its internet wesbite, an article under the headline "Chilliwack school trustee slammed for comments about LGBTQ youth and anti-bullying curriculum", (https://vancouversun.com/news/local-news/chilliwack-school-trustee-slammed-for-comments-about-lgbtq-youth-and-anti-bullying-curriculum) which included the defendant statements as follows: [**emphasis** added]

"He [Neufeld] should step down or be removed,"

*"It's not OK. The public school system in this province and in Canada have the **obligation to ensure safe and inclusive** school environments for all kids **regardless of race, nationality, or religion**. They have to proactively address **sexism and misogyny**, they have to address **transphobia and homophobia and racism**.*

"And Mr. Neufeld, I'm doubtful that Mr. Neufeld did not know that. I'm doubtful that he's not aware if he's been around as a trustee for some time."

15. On October 24, 2017, the defendant made statements which were broadcast by Global News, a widely viewed television and radio broadcaster which also republishes and maintains its material online for global dissemination. His statements, under the online headline "Backlash after school trustee criticizes LGBTQ program" (https://globalnews.ca/video/3823083/backlash-after-school-trustee-criticizes-lgbtq-program) included: [**emphasis** added]

*"I'm always concerned when I hear **intolerant voices**...."*

*"regardless of **his bigoted views**.....he has responsibilities....for ensuring a safe and inclusive school..if he's not going to step down himself then the school board or somebody else needs to make that decision.....*

*....will either step down or **whether he likes it or not, members of the LGBTQ school community are here to stay**"*

16. On October 24, 2017, as published by Huffington Post, a well known news and opinion website/blog that entails both localized and international editions and under the headline "*Barry Neufeld, Chilliwack School Board Trustee, Slams B.C. Gender Inclusivity Program*", (https://www.huffingtonpost.ca/2017/10/24/barry-neufeld-chilliwack-school-board-trustee-gender-identity_a_23254253/), the defendant's statements, both as attributed and quoted, included the following: [**emphasis** added]

*"Glen Hansman, president of the B.C. Teachers' Federation, said Neufeld should resign because **he has violated his obligations** as a school board trustee to ensure that students and staff have a safe, inclusive environment.*

>>

If a transgender student chooses to have gender-affirming surgery, the school system is obligated under the B.C. Human Rights Code and the Charter of Rights and Freedoms "to respect that choice that children or youth have made," and to accommodate them, said Hansman.

*... and also to make sure that we're proactively taking steps to **make sure that they're safe while in school**. That is what the vast majority of the public expects."*

>>

*Hansman said trustees with **faith-based views** need to figure out how they'll work in a secular public school system.*

"If they're not... able to keep their views in check or keep them private, then they probably shouldn't be serving as trustee or working in the education system anymore."

...[chilliwack] is a very diverse community and it is not a place that actually agrees with comments like that..."

*"whether he likes it or not, **members of the LGBTQ community are here to stay**...."*

"school districts, including his, have the responsibility for providing safe and inclusive environments and he can not be saying things like this..."

"the courts have long settled these issues..." ,

*"**tolerance is age appropriate**"*

"teachers can not be making comments like that"

17. Subsequent to the immediate hostile reaction of the defendant and others to the the plaintiff's initial comments about SOGI, rather than be bullied into silence, the plaintiff posted these further comments on Facebook on October 25, 2017;

My post on Facebook has created a lot of controversy and first of all, I want to apologize to those who felt hurt by my opinion, including members of the Chilliwack Board of Education. I am critical of an educational resource, not individuals. Those who have worked with me for over 24 years know that I DO believe in inclusion and a safe learning environment for all of our students; that they should be protected from all forms of bullying and intimidation.

I believe that in a free and democratic society, there should be room for respectful discussion and dissent. I firmly believe that implementation of the SOGI 123 resources needs to be reviewed by engaging parents and teachers in conversation on this topic before full implementation.

18. On November 21, 2017, the plaintiff again explained his concerns about SOGI to a sizable crowd at the Evergreen Community Centre in Chilliwack. This event, received extensive media coverage through both local and regional media and, the plaintiff's entire speech was reproduced and archived online. (https://globalnews.ca/news/3874227/barry-neufeld-chilliwack-school-trustee-transgender/).

19. Notwithstanding that the plaintiff's motives for criticizing SOGI had been made clear, the defendant and other activists continued with the smear campaign they commenced on October 24, 2017.

20. On or about January 17, 2018, the defendant made statements to reporters for various community newspapers including the Fraser Valley News and the Agassiz Harrison Observer which statements, both as attributed and quoted, were published in the newspapers and also to the world online (at: http://fraservalleynewsnetwork.com/2018/01/17/chilliwack-teachers-association-weigh-in-on-barry-neufeld-call-for-non-confidence-for-entire-school-board/ and at https://www.agassizharrisonobserver.com/news/teachers-union-votes-for-non-confidence-in-school-board) / and included:[**emphasis** added]

*Hansman also added that teachers and educators will continue to rally together to fight **hatred**.*

*"Sometimes our beliefs, values, and responsibilities as professional educators are challenged by those who **promote hatred**. This is often the case when it comes to sexual health curriculum in schools and our efforts to ensure safe, inclusive schools for all students – including LGBTQ students," he said.*

21. On January 19, 2018 and in response to the continuing smear campaign, the plaintiff issued another public statement through the media, once again confirming his support for a diverse and pluralistic educational system and once again confirming the aspect of SOGI with which he disagrees. His media release stated:

Today the Chilliwack School Board and the Minister of Education requested my resignation. This was partly in response to the Human Rights Complaint filed against myself and the School Board by CUPE 411.

The media release by the Chilliwack School board is in error. I did not, and do not, oppose any changes to the BC Human Rights Code, in particular the recent inclusion of gender identity and expression as protected grounds, nor is anything I have said contrary to the Code. Moreover, I am interested and invested in all students receiving an excellent education regardless of their sexual orientation, gender identity, race, religion or other group identity. I support a safe environment for all students in our public education system, and I support a diverse and pluralistic education system, which includes children who come from homes with traditional family values or faith-based beliefs regarding marriage, sexuality and gender.

I have simply taken issue with one 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. Despite the pressure to resign, I believe that I must remain on the Board to be a lonely voice

protecting impressionable children who I believe will be confused and harmed, resulting in the recent phenomenon of increased occurrences of rapid onset gender dysphoria (ROGD) in at-risk children.

It is my duty as an elected School Board official to speak up when the best interests of children may be compromised. I will continue to do my duty as Trustee in this regard, while exercising my constitutional freedom of expression as a Canadian.

22. In early 2018, under direction of the defendant, the BCTF did without seeking approval from its members, file a complaint against the plaintiff at the BC Human Rights Tribunal. Its complaint effectively copied a complaint filed by the Canadian Union of Public Employees, Local 411, (CUPE), both unions alleging that the plaintiff had violated the BC Human Rights Code by creating an "unsafe" and "discriminatory" work environment for union members. Neither "complaint" identifies any actual individuals who allegedly felt unsafe or discriminated against.

23. As abusive and absurd as the above BCTF and CUPE human rights "complaints" are, upon filing them, the defendant and others immediately disseminated them to the public through the media, using their own complaints as an opportunity to defame the plaintiff as below indicated.

24. On April 10, 2018, The Star Vancouver newspaper, published, in both print and on its world wide online version at TheStar.com, an article under the headline "B.C. teacher's' union files human rights complaint against Chilliwack school trustee Barry Neufeld over allegations of transphobia" (https://www.thestar.com/vancouver/2018/04/10/bc-teachers-union-files humanrights- complaint-against-chilliwack-school-trustee- barryneufeld-over-allegations-of-transphobia.html) which included statements of the defendant, both as attributed and quoted, as follows: [**emphasis** added]

*The British Columbia Teachers' Federation has filed a **human rights complaint** against Chilliwack school trustee Barry Neufeld, alleging his **public comments about trans people have created an unsafe work environment** for teachers and **exposed trans people to hatred.***

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."*

>>

The complaint alleges Neufeld's statements about transgender people "have a discriminatory effect on the work environment for all teachers and a particularly discriminatory effect on teachers who are transgender." His comments, according to the document, have encouraged hateful comments about trans people on his Facebook wall, and thus exposed them to hatred.

As a school board member, Neufeld has a responsibility to uphold the Human Rights Code, Hansman said, which protects people from ***discrimination based on gender identity.***

"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.*

25. On or about April 12, 2018, the defendant spoke to News1130, a well established television and radio station with a substantial audience in B.C. which also publishes its programs on its world wide online website (https://www.news1130.com/2018/04/12/controversial-chilliwack-trustee-subject-human-rights-tribunal-complaint/). Under the headline "Controversial Chilliwack trustee the subject of Human Rights Tribunal complaint" the defendant's statements, both as quoted and attributed, included:[**emphasis** added]

BCTF President Glen Hansman says the trustee "tip toed quite far into ***hate speech****" and sent a disturbing message to both students and parents.*

Hansman says school trustees and boards of education are responsible for ensuring student safety, and he believes that's something Neufeld failed to do.

"Whether it's a ***transphobic*** *comment, or a* ***racist*** *one or a* ***misogynistic*** *one, that simply cannot stand because public schools welcome all students, regardless of their race, their culture, their sexual orientation or their gender identity."*

26. On or about April 13, 2018, the defendant's comments to a reporter were broadcast on CBC radio and also published to the world online by CBC under the headline "Controversial Chilliwack school trustee facing human rights complaint

from BCTF" (https://www.cbc.ca/news/canada/british-columbia/larry-neufeld-bctf-human-rights-complaint-lgbtq-1.4618756). The defendant's statements, both as quoted and attributed, included the following:[**emphasis** added]

> *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.*
>
> *The complaint says that Barry Neufeld's alleged **"hateful"** public comments about trans people have created an unsafe work environment for teachers and students, as the province moves to make students of all orientations feel safer in schools. Hansman says the law is well established and clear and Neufeld should know better.*

27. In addition to the defendant's direct false and defamatory statements, he and other activists orchestrated demonstrations to create an impression of public outrage against the plaintiff. This included mobilizing union members, arranging for transportation and working with the media to ensure coverage of these events. As with the BCHRT complaints, these orchestrated events were used as further opportunities to defame the plaintiff as below set out.

28. On April 22, 2018, the defendant gave another interview with CityNews 1130 which was broadcast on television and radio and also published to the world online at: https://www.citynews1130.com/2018/04/22/rallies-sogi-resource-planned-vancouver/ under the headline "Rallies for, against SOGI resource planned in Vancouver". His statements included:[**emphasis** added]

> *"When things were flaring up in the Chilliwack School District... because of the **hateful comments** made by Trustee Barry Neufeld there, it was really wonderful to see the parents, members of the community, grand parents and others come and say 'enough is enough,'*

29. On or about September 16, 2018, the defendant gave another interview Citynews 1130 which was broadcast and also published to the world online at: https://www.citynews1130.com/2018/09/16/bctf-school-trustee-refugees-lgbt/ under the headline "BCTF President and speaks out against anti-immigrant and

anti-LGBTQ school trustee candidates". The defendant's statements, both as attributed and quoted, included: [**emphasis** added]

*"It is extremely problematic to have somebody who is running as a school trustee **continuing to spread hate about LGBTQ people** — especially trans people — and also be out there, making **vile comments about refugees and immigrants**, as a group."*

>>

He is confident the majority of voters "are going to say no to this."

>>

*Hansman notes it still isn't easy for a gay or lesbian student to come out. "And like it or not, there's still **racism and misogyny** that exists in our school system."*

*"Anyone who is seeking to be a school trustee has to commit to eradicating those things, not **spreading hate and not spreading bigotry**."*

30. The defendant's direct attacks on the plaintiff took place concurrently with similar statements by other activists with whom the defendant collaborated in the smear campaign. This wider attack effectively republished and amplified the direct statements of the defendant as below set out.

31. Morgane Oger is a transgender activist and the vice president of the British Columbia New Democratic Party. Oger's own attack of the plaintiff, published concurrently with the defendant's, included:

a) As published in Oger's Twitter account (**Morgane Oger** @MorganeOgerBC) and reproduced in the Georgia Strait newspaper on October 25, 2017:

*"It'd be smart to apologize for **publishing hate speech** thoughtlessly. A person or organization has 6 months to file a human rights complaint."*

b) As published by the CBC on October 25, 2017:

*"....you [Neufeld] should know better than to quote a widely discredited pseudo- science source in order to **publish hateful material**."*

32. Rob Fleming is a politician who represents the riding of Victoria-Swan Lake in the Legislative Assembly of British Columbia and is presently the Minister of

Education. He also participated with the defendant in the smear campaign. His statements published in print and online to the world, included:[**emphasis** added]

i) Vancouver Sun, on November 23, 2017:

*"Fleming went on to say that Neufeld's "shameful behaviour" **would lead to suicide**, which he called unacceptable."*

*"As a society we cannot allow **discrimination against people** for who they identify as or choose to love. I applaud hundreds of parents, students and members of the community who rallied in support of SOGI and to stand up for inclusivity in our schools. It is crucial that we help to ensure all students feel welcome in B.C. Schools, regardless of who they choose to love or who they identify as."*

ii) Chilliwack Progress (Jessica Peters), January 9, 2018.

https://www.theprogress.com/news/chilliwack-board-of-education-asks-neufeld-to-resign/

*"..... All students **deserve to be welcomed, included and respected** in a safe learning environment **no matter their sexual orientation or gender identity."***

*"That's what SOGI 1-2-3 is all about—ensuring that students are able to be fully and completely themselves without being excluded or bullied. The **hurtful and offensive words and actions of Chilliwack School Trustee Barry Neufeld** continue to undermine this District and Ministry goal."*

>>>

*"While individuals are entitled to their opinions, Mr. **Neufeld has jeopardized student safety**, divided his school community, and acted against board and ministry policies," Fleming said.*

>>>

"In addition to Mr. Neufeld's continued and escalating disregard for Chilliwack students..."

iii) Chilliwack Progress, September 17, 2018:

(https://www.theprogress.com/news/video-education-minister-talks-sogi-123-and-the-chilliwack-school-board-election/),

*"Elected trustees are supposed to advocate for students **not hurt them.** In the same week that the Prime Minister of Canada announced an apology is coming for decades of **discrimination and persecution of the LGBTQ** community – Mr. Neufeld and 'Culture Guard' was **spreading the same bigoted views** that are part of Canada's painful past."*

33. The public demonstrations, as referred to at paragraph 26 above, included the display of placards and banners which republished and amplified the defendant's false and defamatory attack of the plaintiff, with signs that included the following wording:

"Transphobic School Trustee Must Go"

"Hate Cannot Educate"

"We Are Here For All Families"

"Love is My Family Value"

"Stop the Hate. Don't Discriminate"

"I love my Transgender Child"

"Barry Neufeld [picture of dinosaur] Must resign"

"We Love All Our Kids"

"Christians Support LGBT Kids."

34. The defendant's false and defamatory statements of the XXXX plaintiff, both on their own and in the context of the wider public attack as set out herein, meant, both expressly and by innuendo and were understood by the public to mean that the plaintiff:

i. promoted hatred;

ii. committed hate speech;

iii. was actuated by hatred of certain students;

iv. was discriminatory against gay and/or transgender students;

v. promoted hatred towards gay and/or transgender students in the school system;

vi. made it unsafe for students in the school system.

vii. was unfit to hold public office as a school board trustee;

viii. violated ethical and/or legal duties applicable to school board trustees;

ix. presents a safety risk to students;

x. has bigoted views which threatens safety and inclusiveness in schools;

xi. has lied to the public about what SOGI 123 includes;

xii. is a religious bigot who imposes his religious views on some students in a manner which makes it unsafe for such students;

xiii. is racist, discriminatory, sexist, misogynist, transphobic and/or homophobic;

xiv. the plaintiff has violated the rights of students under the Canadian Charter of Rights and Freedoms and BC Human Rights Code;

xv. regards people who support transgender students as child abusers;

xvi. is an outlier and part of a vanishing breed of racists;

xvii. published knowingly false statements to injure the public interest, and

xviii. is unfit to be a school board trustee because of his age.

35. In addition, the above statements of the defendant were intended to mean and were understood by the public to mean that the plaintiff committed criminal conduct, specifically:

i) that the plaintiff's public statements about SOGI were knowingly false and likely to cause injury to the public interest, and therefore, was conduct as proscribed under section 181 of the *Criminal Code of Canada;*

ii) that the plaintiff's public statements about SOGI were expressions of intolerance and hatred of gay and transgender children exposing them to a risk of harm and, therefore, was conduct as proscribed under section 319 of the *Criminal Code of Canada*.

36. The publication of the defendant's statements on the internet as above set out were immediately disseminated to all persons who visit the specific publication

online, to anybody who enters search terms in an internet search engine and to anyone who has been forwarded the publication or linked to it. It is impossible to ascertain how many people have and will see the subject statements and consequential blog comments, twitter comments, YouTube material and related republications. The spread of the defendant's defamatory messages is unlimited and republication by other people of his statements will be spread throughout the world wide internet indefinitely to an undefinable and unlimited number of people.

37. By reason of the defendant's false and defamatory statements, the plaintiff is now generally perceived to have made anti LGBTQ comments. For example, on September 28, 2018, the Chilliwack Progress newspaper published an article, both print and to the world online, at https://www.theprogress.com/news/a-chilliwack-familys-story-of-gender-identity-and-acceptance/ which included:

> *"Trustee Barry **Neufeld's written and spoken words against the LGBTQ community** have led to a move to ask him to resign, a B.C. Human Rights Complaints has been filed against him by the teachers' union, and the both the school board chair and the Minister of Education have had harsh words for his behaviour."*

38. The defendant's conduct as set out herein has been actuated by malice. His intention has been to silence the plaintiff and/or have him removed as a school board trustee, failing which, to prevent his re-election by destroying his reputation and by making an example of him, seeking to deter any other school board trustees from criticizing SOGI.

39. On September 19, 2018, the plaintiff did, through counsel, request the defendant to retract and apologize for his misconduct as set out above. On September 27, 2018, the defendant did, through counsel, indicate his refusal to retract or apologize.

40. The malice includes the BCTF's political agenda under direction of the defendant. Through its subsidiary, the Chilliwack Teacher's Association and in connection

with the October 20, 2018 school board trustee election, it seeks to effectively take over the Board by having trustees elected who will not debate and/or otherwise interfere with BCTF imperatives.

41. Under the headline "Chilliwack teacher's union publicly picks school board candidates" The Chilliwack Progress, both in print and to the world online (https://www.theprogress.com/news/chilliwack-teachers-union-publicly-picks-school-board-candidates/) did, on October 3, 2018, after misstating the plaintiff's position on SOGI yet again, publish this:

> *Despite calls for his [Neufeld] resignation, and denunciation for his inflammatory remarks by the school board chair, the BCTF, the Ministry of Education, as well as a complaint with the B.C. Human Rights Tribunal, he continues in this vein and a number of candidates have stepped forward with anti-SOGI platforms.*
>
> *"It was vital that the CTA endorse trustee candidates who solidly uphold the values of inclusion and diversity and who are committed to ensuring our schools are safe places to learn and work," the CTA statement said. "These values are enshrined in the British Columbia Human Rights Code."*

42. The Notice of Civil Claim herein was served on the defendant on October 12, 2018. On or about October 19, 2018, the defendant made statements published by the Chilliwack Progress newspaper both in print and online for global dissemination. His statements, both as attributed and quoted under the headline "Anti-SOGI Chilliwack school trustee files defamation lawsuit against BCTF president" (https://www.theprogress.com/municipal-election/ anti-sogi-chilliwack-school-trustee-files-defamation-lawsuit-against-bctf-president/) included: [emphasis added]

> *As for Hansman, when asked about the civil suit on Friday, he told The Progress he stands by his statements.*
>
> *"His other misogynist and problematic statements reported by Press Progress are also cause for alarm and not becoming of a school trustee," Hansman said.*

43. PressProgress is a relatively obscure website which publishes socialist propaganda on the internet. The defendant directed the public to an article it published online by on October 16, 2018 (https://pressprogress.ca/this-man-is-probably-the-worst- school-trustee-in-british-columbia/) for the purpose of effectively republishing his false and defamatory attack on the plaintiff, specifically, that the plaintiff was hateful of gay people, a misogynist and a religious bigot, supplemented with new false and defamatory assertions of being anti- Semitic and a supporter of Hitler.

44. Following the plaintiff's re-election to the Board on October 20, 2018, the defendant continued with his false and defamatory statements about him. As broadcast by CBC Radio on October 22, 2018 and also published online for global dissemination under the headline "Most anti-SOGI school trustee candidates fail to pick up seats" at https://www.cbc.ca/news/canada/british-columbia/anti-sogi-u candidate-results-1.4872462, the defendant's statements, both attributed and quoted, included: [**emphasis** added]

The BCTF has filed a human rights complaint against Neufeld, which will be proceeding this fall, according to Hansman.

*"**Hate and bigotry** have no place on school boards," said Hansman.*

45. The defendant's conduct from October 24, 2017and continuing at present in this matter, including his refusal to apologize, has been malicious, reprehensible, dishonest, high handed and arrogant, all of which has aggravated the plaintiff's damages and warrants an award of punitive damages against the defendant.

46. The plaintiff has suffered damages to his reputation professionally, socially and generally within his community, across Canada and internationally. In addition, his damages herein include suffering indignity, personal harassment, stress, anxiety along with mental and emotional distress.

along with mental and emotional distress.

47. The plaintiff's damages also include stigmatization, humiliation and isolation endured in his role as a school board trustee, examples of which include:

i) On January 18, 2018, the Board convened an emergency in camera meeting and voted to request the plaintiff's resignation as a trustee. The plaintiff refused to resign following which he was directed by the Chairman of the Board to stay away from all public schools in the district on the basis that the plaintiff created concerns for the safety of LGBTQ students;

ii) The Maple Ridge school board refused to host the annual BC School Trustee Association meeting in February, 2018, on the basis that, given the plaintiff's public image by that time, his attendance would violate the "Safe, Caring, and Healthy Schools" policy. The plaintiff refused the request to stay away and the annual meeting was then cancelled; and

iii) In June, 2018, the plaintiff was to deliver congratulatory speeches to the four different commencement events for the graduating classes of four high schools in as he had done in previous years. He was directed by the Board to not do this and furthermore prohibited from being on stage with other trustees to shake the hands of the graduating students, all because his presence supposedly made it unsafe for LGBTQ students.

iv) On December 11, 2018, the Board passed a motion excluding the plaintiff from school liaison duties which all of the other trustees perform and which he had performed over 23 years of prior service, all because his presence supposedly made it unsafe for LGBTQ students.

Part 2: RELIEF SOUGHT

1. General Damages;
2. Aggravated Damages;
3. Punitive Damages;
4. Interest pursuant to the *Court Order Interest Act*, R.S.B.C., 1996;

6. Such further and other relief as to this Honourable Court may deem just.

Part 3: LEGAL BASIS

48. The literal meaning of the defendants words was defamatory, tending to lower the plaintiff's reputation in the eyes of a reasonable person, bringing him into contempt, disrepute and ridicule in his community, across Canada and internationally.

49. In addition or alternatively, the inferential meanings or impressions left by the defendant's words were defamatory. (false innuendo)

50. In addition or alternatively, based upon extrinsic circumstances to which the public was fully exposed and which provided context, republication and amplification for the defendants statements, the meanings or impressions of such statements were defamatory. (legal innuendo)

51. In addition to provable and obvious damages, the misconduct of the defendant includes libel which is "actionable per se" by, inter alia, alleging the plaintiff to be unfit for public office, to be wilfully violating human rights and to have committed conduct which constitutes criminal offences.

52. The plaintiff relies on the provisions of the *Libel and Slander Act*, RSBC 1996, Ch. 263.

Plaintiff's address for service:
c/o Paul Jaffe, Barrister and Solicitor,
Suite 200-100 Park Royal,
West Vancouver, BC. V7T1A2

Fax number address for service: (604) 922-1666
E-mail address for service: jaffelawfirm@gmail.com

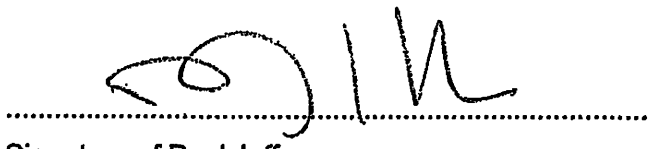
E-mail address for service: jaffelawfirm@gmail.com

Place of trial: Chilliwack, B.C.

The address of the registry is:

46085 Yale Road, Chilliwack, BC. V2P 2L8

Date: October 10, 2018 (original)



Signature of Paul Jaffe

[] Plaintiff [x] lawyer for Plaintiff

Rule 7-1 (1) of the Supreme Court Civil Rules states:

1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

a. prepare a list of documents in Form 22 that lists

i. all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

ii. all other documents to which the party intends to refer at trial, and

b. serve the list on all parties of record.

Appendix

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

The plaintiff was defamed and otherwise injured by the defendant.

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Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:
[] a motor vehicle accident
[] medical malpractice
[x] another cause
A dispute concerning:
[] contaminated sites
[] construction defects
[] real property (real estate)
[] personal property
[] the provision of goods or services or other general commercial matters
[] investment losses
[] the lending of money
[] an employment relationship
[] a will or other issues concerning the probate of an estate
[x] a matter not listed here

Part 3: THIS CLAIM INVOLVES:

[] a class action
[] maritime law
[] aboriginal law
[] constitutional law
[] conflict of laws
[x] none of the above
[] do not know

Part 4:

Sections 181 and 319 of the *Criminal Code of Canada*
School Act of British Columbia, RSBC 1996, Ch. 412
Libel and Slander Act, RSBC 1996, Ch. 263

AMENDED PURSUANT TO RULE 6-1(5)
ORIGINAL FILED 5 NOVEMBER 2018

No. 35152
Chilliwack Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BARRY NEUFELD

PLAINTIFF

AND:

GLEN HANSMAN

DEFENDANT

AMENDED RESPONSE TO CIVIL CLAIM

Filed by: The Defendant Glen Hansman (the "Defendant")

Part 1: RESPONSE TO AMENDED NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendant's Response to Facts

1. The facts alleged in paragraphs 4, 12, 14-18, 20, 24-26, 28- 29, 39, 42 and 44 of Part 1 of the Amended Notice of Civil Claim are admitted.

2. The facts alleged in paragraphs 2, 6-7, 10-11, 13, 19, 22, 23, 27, 30-32, 34-35, 37-38, 40, 43, 45-47 of Part 1 of the Amended Notice of Civil Claim are denied.

3. The facts alleged in paragraphs 1, 3, 5, 8-9, 21, 33, 36 and 41, of Part 1 of the Amended Notice of Civil Claim are outside the knowledge of the Defendant.

Division 2 – Defendant's Version of Facts

1. In answer to the facts alleged at paragraphs 6 and 7 of the Amended NOCC, the Defendant says, and the facts are, that SOGI 123 (as it is commonly known) is a collaboration between educators and stakeholders that provides resources to teachers and other educators to assist in the work of creating inclusive school environments for all students, including LGBTQ and transgender students. SOGI 123 is not controversial but rather enjoys broad support from the entire K-12 education community, including the Minister of Education, BC Teachers'

Federation (the "BCTF"), BC School Superintendents Association, BC School Trustees Association, BC Principals' and Vice-Principals' Association, CUPE BC, BC Association of School Business Officials, Federation of Independent School Associations, BC Confederation of Parent Advisory Councils, First Nations Education Steering Committee, First Nations Schools Association, and Métis Nation BC.

2. In answer to the facts alleged at paragraph 10 of the Amended NOCC, the Defendant says that, contrary to the claims of the Plaintiff, there was and continues to be an open and respectful discussion among various stakeholders regarding SOGI 123 and its place in the education system. It was, at all times, open to the Plaintiff and those who shared his views to join that discussion if they were willing to offer their views in an open and respectful manner, rather than in the manner in which the Plaintiff expressed those views on his Facebook page on October 23, 2017.

3. In answer to the facts alleged at paragraph 11 of the Amended NOCC, the Defendant says that nothing in Part 4 of the *School Act*, or in the Code of Ethics for Trustees of School District 33, created a positive duty on the Plaintiff, in his capacity as a school trustee in School District 33, to make use of Facebook or other social media to express his opinions and views regarding SOGI 123, or families with same-sex parents, or issues such as gender identity.

4. In answer to the facts alleged at paragraphs 13 and 19 of the Amended NOCC, and in answer to all of the allegations in the Amended NOCC, the Defendant denies that he embarked on any campaign, by himself or with others, as alleged or at all, to vilify or harass or embarrass or defame the Plaintiff. Rather, the Defendant offered his views and opinions as a teacher, a union leader and a citizen, on the words published by the Plaintiff on Facebook on May 23, 2017, (the "Facebook Post") and other statements made by the Plaintiff, and on the likely impact of the Facebook Post and other statements by the Plaintiff on students, including LGBTQ (lesbian, gay, bisexual, transgender and queer)

students and their families The Defendant did so because the Plaintiff held a position of influence in the school system, and had the power and ability to affect the lives and educational experiences of those students and their families, as well as those of teachers, including LGBTQ teachers

5. In further answer to the allegations at paragraph 19 of the NOCC, and the facts set out at paragraphs 17 and 18 of the Amended NOCC, the Defendant says the Plaintiff's claims and explanations regarding his purported motives for making the Facebook Post and his other statements did not repair or ameliorate the harms caused by the Plaintiff's Facebook Post and his other statements, or alter the Defendant's view of the impact and appropriateness of the Plaintiff's comments regarding SOGI 123, LGBTQ, same sex families and other related issues.

6. Additionally, and in further answer to the allegations at paragraphs 13 and 19 of the NOCC, and in answer to the whole of the Amended NOCC, on November 21, 2017, the Plaintiff was a keynote speaker at an event organized in Chilliwack by Culture Guard, an organization that describes itself as working "to ensure that our nation's statutes and concepts of "community values" used by agencies will reflect and protect the natural family, parental rights, the sanctity of life, liberty, respect, judicial accountability and the proper rule of law ... "

7. During that event, the Plaintiff described SOGI 123 as:

> "an institutionalization of codependency encouraging and enabling dysfunctional behaviour and thinking patterns" and the "codling and encouraging what I regard as the sexual addiction of gender confusion".

8. The Plaintiff also stated that using SOGI 123 resources amounted to "gaslighting" and an "attack on the foundation of the child's being which is child abuse". The Plaintiff also stated that "rushing into the use of puberty blockers, hormone therapy and gender reassignment is child abuse".

9. Additionally, and in further answer to the allegations at paragraphs 13 and 19 of the Amended NOCC, and in answer to the whole of the Amended NOCC, on or about December 18, 2017, the Plaintiff posted another discriminatory statement on his Facebook account, wherein he referenced his position as a school trustee stating, "My job description is that of policy maker. And the current emphasis is on inclusion. I do not want to give in to the self-serving agenda of the LGBTQ+ groups who want to be given priority as the most downtrodden of victims ... "

10. The Plaintiff went on to make additional discriminatory statements on the December 18, 2017 Facebook post, including the following:

> But the scary thing is that it has already demonized people of faith who believe that God created humans male and female: In the image of God. Here is my prophecy to the Church. If you don't get off your duffs and push back against this insidious new teaching, the day is coming (maybe it is already here) when the government will apprehend your children and put them in homes where they will be encouraged to explore homosexuality and gender fluidity. There already is a Special group foster home for LGBTQ+ kids in Red Deer, AB."

11. On September 19, 2018, the Plaintiff's counsel, Paul Jaffe, wrote to the Defendant demanding an apology for various statements that the Plaintiff alleged had been made by the Defendant (the "Jaffe Letter"). The Jaffe Letter included allegations about a number of statements that the Defendant did not in fact make, including that the Defendant had stated that the Plaintiff is "unfit to be a school trustee because of his age." The same day, the Valley Voice newspaper published a list of the statements contained in the Jaffe Letter, and reported that "incumbent School Board Trustee Barry Neufeld told The Voice that he's suing the BC Teachers' Federation (BCTF) President Glen Hansman for defamation of character".

12. In the wake of the Jaffe Letter, Defendant's counsel asked Mr. Jaffe for a number of clarifications concerning the allegations in his letter, so he could obtain instructions from his client, the Defendant, regarding the demand for an apology. None of the clarifications were forthcoming from the Plaintiff; none of the Defendant's counsel's questions were answered.

13. On November 02, 2018, the Plaintiff stated the following in a Facebook post:

> Glen Hansman has refused to apologize. He stands by his defamatory remarks. The BCTF is not used to losing. But I am determined! This time Mr. Hansman, you are going DOWN!

14. In answer to the allegations at paragraph 22 of the Amended NOCC, the complaint was filed by the BCTF and the Chilliwack Teachers' Association ("CTA") at the BC Human Rights Tribunal ("HRT") after consultation with Members of the BCTF and the CTA who felt that the Plaintiff's comments were discriminatory.

15. In answer to the allegations at paragraph 23 of the Amended NOCC, the Defendant says:

    a. The BCTF complaint to the HRT (the "HRT Complaint") was made in good faith with a view to addressing the harms caused by the Plaintiff's comments in the Facebook Post and in various public forums;
    b. The HRT Complaint was made on an occasion of absolute privilege; and, the Defendant's discussion of the HRT Complaint was made on an occasion of qualified privilege; and,
    c. In any event, the Plaintiff has not pleaded material facts at paragraph 23 of the NOCC, but rather argument and abuse, and the paragraph should be struck.

16. In answer to the allegations at paragraph 27 of the Amended NOCC, the Defendant admits that he worked with Members of the BCTF to make their concerns about the Plaintiff's statements and the Facebook Post known to the public and to school board officials, but denies that he caused or orchestrated public demonstrations in response to the Plaintiff's comments. Rather, the Defendant says members of the public who shared the Defendant's concerns about the Plaintiff's views and attitudes towards SOGI 123 and towards LGBTQ students made those feelings public of their own volition and in their own way.

17. In answer to the allegations at paragraphs 30-33 of the Amended NOCC, the Defendant says he played no role, directly or indirectly, in the statements made by Morgane Oger and Rob Fleming, or those contained on placards and banners made by members of the public, and denies that he is responsible or liable for the statements made by others.

18. In answer the allegations at paragraph 35 of the Amended NOCC, the Defendant denies that his words meant, or would be understood to mean that the Plaintiff had committed a criminal act, as alleged or at all.

19. In answer to the allegations at paragraph 37 of the Amended NOCC, the Defendant says that the Plaintiff's Facebook Post and his other statements were widely covered by the media and that the statements received responses, many of them critical of the Plaintiff, from many quarters. The perception that the Plaintiff made anti-LGBTQ comments originates in the Facebook Post and his other statements, and in the various and sundry responses thereto.

20. In answer to the allegations contained at paragraphs 38, 40 and 45 of the Amended NOCC, the Defendant admits that he advocated for the Plaintiff's removal as a school trustee, but did not do so out of malice or for any improper purpose. To the contrary, the Defendant honestly believed that the Plaintiff had breached his duty as a school trustee by making the Facebook Post and his

other statements, and through his attacks on SOGI 123 and its implementation, which had the reasonably foreseeable consequence of undermining the goal of ensuring that people from diverse groups, including LGBTQ students, could attend schools that were safe and respectful of them.

21. In answer to the allegations contained at paragraphs 42 and 43 of the Amended NOCC, the Defendant admits he made the statements set out at paragraph 42 of the Amended NOCC but denies that the statements were defamatory of the Plaintiff, but if they were, which is not admitted but denied, those statements were fair comment on matters of public interest, namely the litigation commenced by the Plaintiff against the Defendant, and certain Facebook posts made by the Plaintiff , which Facebook posts were reported on and reproduced on the Press Progress news website on October 16, 2017 (the "Press Progress Story")

22. In answer to the allegations contained at paragraph 43 of the Amended NOCC, the Defendant denies that his reference to the Press Progress Story was defamatory of the Plaintiff, or an attempt to "republish" either his views or the contents of the Press Progress Story.

23. In further answer to the allegations contained at paragraph 43 of the Amended NOCC, the Defendant says:

    a. that Press Progress is not an obscure website that "publishes socialist propaganda", but a media project created by the Broadbent Institute, a leading independent progressive organization;

    b. The Press Progress Story reported and commented on various Facebook posts the Plaintiff had made, and reproduced those Facebook posts in their entirety, as well as a CTV News story concerning protests against the Plaintiff, and other material concerning the Plaintiff and his opposition to SOGI 123.

24. In answer to the allegations contained at paragraphs 46 and 47 of the Amended NOCC, the Defendant says his comments regarding the Plaintiff's actions, including the statements made in the Facebook Post and elsewhere, did not

cause the damages, but in any event, those damages were self-inflicted and were the reasonably foreseeable result of the comments the Plaintiff made in the Facebook Page and other forums.

Division 3 – Additional Facts

The Vancouver Sun Complaint

1. In answer to the allegations at paragraph 14 of the Amended NOCC, the Defendant admits that he made the following comments, which were published by the Vancouver Sun on October 24, 2017:

    a. That he felt that the Plaintiff was "in a time warp";

    b. That, in his view, the Plaintiff should step down and/or be removed from his position as school trustee;

    c. That, in his view, it was not okay for the Plaintiff, as a school trustee, to make the statements the Plaintiff made on his Facebook page about SOGI 123, a program directed at making schools inclusive for LGBTQ students;

    d. That Canadian schools have an obligation to ensure safe and inclusive school environments for all kids, regardless of race, nationality, or religion, and to proactively address sexism and misogyny, transphobia and homophobia and racism; and,

    e. That, in his estimation, the Plaintiff knew or should have known of his obligations given his long service as a school trustee.

2. In answer to the allegations at paragraph 34 of the Amended NOCC, the Defendant denies the comments he made, considered in the context of the Defendant's other statements and the story as a whole, would be understood to convey the meanings alleged.

3. Instead, the Defendant says the words that are the subject of the Vancouver Sun Complaint meant and would be understood to mean, that, in the view of the Defendant:

    a. The Plaintiff wanted to impose on the school system in Chilliwack the values of a time when LGBTQ persons were discriminated against and shunned, and that to do so would be contrary to his obligations and duties as school trustee to ensure that there was a safe and inclusive environment for all kids, and to address sexism, transphobia and homophobia; and,
    b. The Facebook Post and other statements, which appeared to endorse the policies of homophobic and transphobic organizations and regimes, were so inconsistent with those duties and obligations that the Plaintiff should not be permitted continue to serve as a school trustee,

    and those meanings were true or substantially true.

The Global News Complaint

4. In answer to the allegations contained at paragraph 15 of the Amended NOCC (the "Global News Complaint"), the Defendant admits that he made various comments, including the words complained of by the Plaintiffs, in an interview with Global Television about the Facebook Post and the Plaintiff's other statements.

5. In answer to the allegations at paragraph 34 of the Amended NOCC, the Defendant denies that the words complained of, considered in the context of the Defendant's comments made to and broadcast by Global TV, could be understood to convey the meanings alleged.

6. Instead, the Defendant says the words meant and would be understood to mean that, in the view of the Defendant:

a. The Facebook Post and the Plaintiff's other statements reflected an intolerant and bigoted view of LGBTQ persons and students;
b. The expression of those views in the Plaintiff's capacity as a school trustee was so inconsistent with his duties as a school trustee, as described above, that he should no longer be allowed to serve as a school trustee;
c. The Facebook Post and other statements created an environment in which LGBTQ students, staff, and and/or teachers felt unsafe; or,
d. In the alternative, could reasonably be expected to create an environment where LGBTQ students, staff, and and/or teachers felt unsafe,

and those meanings were true or substantially true.

The Huffington Post Complaint

7. In answer to the allegations contained at paragraph 16 of the Amended NOCC, the Defendant admits he made various comments, including the words complained of by the Plaintiff, in an interview with the Huffington Post on October 24, 2017, for a story about the Plaintiff's Facebook Post, but denies those words bear the meanings alleged at paragraph 34 of the Amended NOCC.

8. Instead, the Defendant says the words that are the subject of the Huffington Post Complaint meant and would be understood to mean that, in the view of the Defendant, the views expressed by the Plaintiff in the Facebook Post:

a. Reflected an intolerant and bigoted view of LGBTQ persons and students,
b. Was an attempt by the Plaintiff to impose his religious views and values, on the public school system;

c. That his expression of those views in his capacity as a school trustee was so inconsistent with his duties as a school trustee, as described above, that he should no longer be allowed to serve as a school trustee;
d. Created an environment where LGBTQ students, staff, and and/or teachers felt unsafe; or,
e. In the alternative, could reasonably be expected to create an environment where LGBTQ where LGBTQ students, staff, and and/or teachers felt unsafe,

and those meanings were true or substantially true.

The Fraser Valley News/ Aggasiz Harrison Observer Complaint

9. In answer to the facts alleged at paragraph 20 of the Amended NOCC, the Defendant admits that he made the following comment, which appeared in the Fraser Valley News and Aggasiz Harrison Observer:

> "Sometimes our beliefs, values, and responsibilities as professional educators are challenged by those who promote hatred. This is often the case when it comes to sexual health curriculum in schools and our efforts to ensure safe, inclusive schools for all students – including LGBTQ students. Far from being deterred by such tactics, the BCTF and the Chilliwack Teachers' Association are continuing to work closely together to support LGBTQ members of our school communities, as required by law and policy."

but denies that those comments were made specifically made of and concerning the Plaintiff, or would be understood to refer specifically to the Plaintiff.

10. In the alternative, if the words would be understood to refer specifically to the Plaintiff, the Defendants denies those words bear the meanings alleged at paragraph 34 of the Amended NOCC.

11. Instead, the words complained of meant and would be understood to mean that the Plaintiff's views, as expressed in the Facebook Post and elsewhere, were likely to, and did, promote hatred of LGBTQ, students, and were likely to and did make schools less safe and less inclusive,

and those meanings were true or substantially true.

The Star Complaint

12. In answer to the allegations contained at paragraph 23 of the Amended NOCC, the Defendant admits he made the following comments, or words to that effect, to The Star Vancouver, which were published by the Star on April 10, 2018:

    a. "If Neufeld was a teacher, he would be removed from the school system";
    b. "For some reason, because his comments have been largely restricted to transphobic comments ... some are willing to give him a pass on this.";
    c. "Neufeld has a responsibility to uphold the Human Rights Code, which protects people from discrimination based on gender identity"; and,
    d. "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."

13. The Plaintiff says the words complained of are not defamatory of the Plaintiff.

14. In further answer to allegations contained in the Star Complaint, the Defendant says if the words are defamatory of the Plaintiff, which is not admitted but denied, they do not bear the meanings alleged at paragraph 34 of the Amended NOCC, but mean and would be understood to mean:

a. The Plaintiff had made transphobic comments that could reasonably be expected to create a school environment that is discriminatory and hateful towards transgender students and teachers;
b. The Plaintiff had made transphobic comments that had created a school environment that would be discriminatory and hateful towards transgender students and teachers; and,
c. The Plaintiff had a duty and obligation as a trustee to uphold the *Human Rights Code*, including a duty to protect students and teachers from discrimination on the basis of gender identity and had failed or neglected to satisfy that duty and obligation,

and those meanings are true or substantially true.

The 1st News 1130 Complaint

15. In answer to the allegations contained at paragraph 25 of the Amended NOCC, the Defendant admits that he made the following comments of and concerning the Plaintiff in an interview with News 1130 on April 12, 2018:

    a. [The Plaintiff] "tiptoed quite far into hate speech and sent a disturbing message to both students and parents"; and,
    b. "School trustees and Board of Education are responsible for ensuring students' safety and I believe that is something Neufeld failed to do."

16. The Defendant says the other words complained of were not specifically made of and concerning the Plaintiff, but rather referred to the duties of trustees generally not to make discriminatory statements that would make students feel unwelcome in the public school systems.

17. The Defendant denies that the words complained of in the News 1130 Complaint conveyed the meanings alleged at paragraph 34 of the Amended NOCC.

18. Instead, the Defendant says that words complained of meant, and would be understood to mean that:

    a. the Plaintiff's claims that SOGI 123 was a "weapon of propaganda" pushed by the "LGBTQ lobby" and "radical cultural nihilists" were likely to and did promote hatred of LGBTQ students, and caused alarm to those students and their parents; and,
    b. The Plaintiff, by making the comments he did about SOGI 123, its implementation and the motives of those who implemented and benefited from it, had failed to discharge his duty as a school trustee to ensure that students were safe and felt safe in public school,

and those meanings were true or substantially true.

The CBC Radio Complaint

19. In answer to the allegations at paragraph 26 of the Amended NOCC, the Defendant admits that, in an interview with CBC Radio on April 13, 2018, he said:

    a. The Plaintiff should not be anywhere near students;
    b. The Plaintiff had made hateful comments about transgender people, which created an unsafe work and learning environment for teachers and students; and,
    c. The Plaintiff knew or should have known that the law governing the duties of persons in the education system requires those persons to ensure that schools are safe and inclusive for all persons, including LGBTQ persons.

20. The Defendant denies that the words complained of at paragraph 26 of the Amended NOCC conveyed the meanings alleged at paragraph 34 of the Amended NOCC.

21. Instead the Defendant says the words complained of meant and would be understood to mean that:

    a. The Plaintiff's comments in the Facebook Post and elsewhere regarding transgender persons have created an unsafe work and learning environment for LGBTQ teachers and students; and,
    b. The Plaintiff was aware, or should have been aware of his duty as a school trustee to ensure all students and teachers had a safe workplace free from discrimination, but made his comments in breach of that duty,

and those meanings were true or substantially true.

The 2nd News 1130 Complaint

22. In answer to the allegations made at paragraph 28 of the Amended NOCC, the Defendant admits that he made the statement regarding the "hateful comments made by Trustee Barry Neufeld" to News 1130.

23. The Defendant denies that the words complained of convey any of the meanings alleged at paragraph 34 of the Amended NOCC.

24. Instead, the Defendant says the words meant, and would be understood to mean that, in making the Facebook Post and other statements, including references to SOGI 123 as a "weapon of propaganda" pushed by the "LGBTQ "lobby" and "radical cultural nihilists", the Plaintiff provoked hatred of LGBTQ persons, including students and teachers and that meaning was true.

The 3rd News 1130 Complaint

25. In answer the allegations made at paragraph 29 of the Amended NOCC, the Defendant says the words complained of were not published of and concerning the Plaintiff.

Fair Comment

26. In answer to the whole of the Amended NOCC, and in particular the words complained of at paragraphs 14-16, 20, 24-26 and 28, the Plaintiff says the words he spoke and that were published by the various media outlets were fair comment, made without malice on matters of public interest, including but not limited to:

    a. The operation of public schools, and the steps required to make those schools accessible and safe places for diverse population, including LGBTQ students and teachers;
    b. The roles, duties and obligations of elected officials in ensuring that public schools are safe, open and welcoming places for a diverse population, including LGBTQ students and teachers;
    c. The duties and obligations of elected officials in the public school system to refrain from imposing personal religious beliefs and social biases on the public school system, in respect for the rights of diverse and vulnerable groups, including LGBTQ student and teachers;
    d. The development and implementation of SOGI 123, and its role in making the school system safe, accessible, and respectful to diverse groups including, LGBTQ students and teachers; and,

    represented the Defendant's honestly held views and opinions based on the following true facts.

27. The Defendant's comments and views and opinions were based on the following true facts:

    a. In the Facebook Post, the Plaintiff had claimed SOGI 123 had "morphed into a weapon of propaganda to infuse every subject matter from K-12 with the latest fad, Gender Theory";

b. In the Facebook Post, Plaintiff endorsed the views of the American College of Pediatricians (the "ACEP"), an anti-gay medical group that has been listed as a hate group by the Southern Poverty Law Centre;

c. In particular, the Plaintiff endorsed the ACEP claim that addressing gender issues in children is child abuse. The Plaintiff also endorsed these views as his own, including twice during his speech at the Culture Guard event at Evergreen Community Centre on November 21, 2017 described herein;

d. The Plaintiff, in the Facebook Post, claimed the Ministry of Education and "LGBTQ lobby is forcing this biologically absurd theory on children" and suggested, by inference, the LGBTQ lobby were radical cultural nihilists;

e. In the Facebook Post, the Plaintiff commented that "[c]hildren are being taught that heterosexual marriages is [sic] no longer the norm" and that "increasing numbers of children are growing up with same sex parents", concluding that "I belong in country like Russia or Paraguay", regimes that are notoriously antagonistic to LGBTQ persons;

f. The views expressed by the Plaintiff in the Facebook Post and his other statements were widely reported and were likely seen by LGBTQ students in the Chilliwack School District;

g. During a speech at the Evergreen Community Centre on November 21, 2017, the Plaintiff referred to SOGI 123 as "child abuse" and made the other comments at that event described in paragraphs 6, 7 and 8 in Division 2 herein;

h. On December 17, 2018, the Plaintiff made further discriminatory comments on a Facebook Post which are described at paragraph 9 in Division 2 herein;

i. The Legislature has required and the Courts have confirmed that schools must act in a way that promotes respect and tolerance for all the diverse groups that they represent and serve, including LGBTQ students;

j. The Plaintiff, as a long-serving school trustee, knew or should have known of those obligations and duties;

k. In the past, teachers who have expressed anti-LGBTQ views outside the classroom have been disciplined and barred from teaching by regulatory bodies; and,

l. In the past, public school boards that have attempted to discriminate against LGBTQ students have been corrected by the courts.

Qualified Privilege

28. Further, or in the alternative, the words complained of by the Plaintiff were spoken by the Defendant on an occasion of qualified privilege, and were spoken without malice and with an honest belief in their truth.

29. Circumstances giving rise to the occasion of qualified privilege include, but were not limited to the following:

a. The Defendant is the President of the BCTF, which represents teachers in this Province, and is authorized by its officers and Members to speak on behalf the BCTF and its Members;

b. The BCTF took an active role in the development of the materials that form the main assets of SOGI 123;

c. Members of the BCTF are key actors in the implementation and use of the resources assembled for SOGI 123;

d. Contrary to the public statements by the Plaintiff that he was criticizing teaching materials and not attacking people, the Facebook Post and his other statements clearly attacked people, including members of the BCTF, by:

i. Characterizing the implementation and use of the SOGI 123 resources as "a weapon of propaganda to infuse every subject matter from K-12 with the latest fad; Gender Theory";

ii. Claiming the LGBTQ lobby (was) forcing this "biologically absurd theory on children in our schools";

iii. Describing those people using the SOGI 123 resource as "radical cultural nihilists"; and,

iv. Stating, "I belong in a country like Russia, or Paraguay, which recently had the guts to stand up to these radical cultural nihilists" when the Plaintiff knew those jurisdictions are extremely unsafe for LGBTQ people.

e. In light of the fact that his Members were being attacked by the Plaintiff, the Defendant had a duty, or an obligation, or an interest in replying to those attacks on behalf of the BCTF and its Members; and,

f. The Defendant's comments in reply to the Plaintiff's attack on the BCTF and its Members were germane and reasonably appropriate to the occasion that gave rise to the qualified privilege.

Part 2: RESPONSE TO RELIEF SOUGHT

1. The Defendant consents to the granting of the relief sought in paragraphs None of Part 2 of the Amended Notice of Civil Claim.

2. The Defendant opposes the granting of the relief sought in paragraphs 1-6 of Part 2 of the Amended Notice of Civil Claim.

3. The Defendant takes no position on the granting of the relief sought in paragraphs None of Part 2 of the Amended Notice of Civil Claim.

Part 3: LEGAL BASIS

1. Insofar as they bear the meanings as set out by the Defendant, the words complained of by the Plaintiff were true or substantially true.

2. The Defendant's statements were fair comment on matters of public interest made without malice and based on true facts.

3. In respect of the HRT Complaint, the Defendant's statements were made on an occasion of absolute privilege.

4. The Defendant's comments were made on an occasion of qualified privilege, without malice and were reasonably germane and appropriate to the occasion.

5. The Plaintiff has suffered no loss or damage that can properly be attributed to the Defendant.

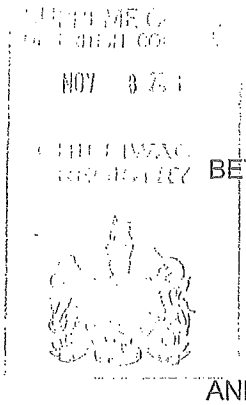
Defendant's address for service:	Taylor Veinotte Sullivan Barristers Suite 502 – 1168 Hamilton Street Vancouver, B.C. V6B 2S2 **Attention: Carey Veinotte**
Fax number address for service (if any):	N/A
E-mail address for service	cv@tvsbarristers.com
Date: November 05, 2018	Signature of **Carey Veinotte** ☒ lawyer for filing party

Rule 7-1(1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
  (a) prepare a list of documents in Form 22 that lists
    (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
    (ii) all other documents to which the party intends to refer at trial, and
  (b) serve the list on all parties of record.

Form 7 (Rule 3-6 (1))

NO. S35152
CHILLIWACK REGISTRY



IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BARRY NEUFELD

PLAINTIFF

AND:

GLEN HANSMAN

DEFENDANT

REPLY

1. In reply to paragraph 1 of the Response to Civil Claim (RCC), SOGI is, in fact, highly controversial within *"the entire K-12 education community"* if families with children attending public schools are considered part of that community rather than just the indicated public sector unions and government funded bodies.

2. In further reply to paragraph 1 of the RCC, the SOGI controversy was a dominant issue in Chilliwack and other school districts in British Columbia during the school board trustee elections held on October 22, 2018. Notwithstanding the ongoing smear campaign and endorsements by the BCTF and CUPE of pro-SOGI candidates, the plaintiff garnered the second highest vote total of 17 candidates seeking election to the Board. In addition, two other anti-SOGI candidates were elected as trustees in Chilliwack as were a number other anti-SOGI candidates in other school districts.

3. In further reply to paragraph 1 of the RCC, the present Government of Ontario has recently repealed the SOGI program in that province and, by so doing, kept a

campaign promise made clearly and repeatedly by the Progressive Conservative Party of Ontario throughout the provincial election campaign in Ontario in the spring of 2018.

4. In reply to paragraph 7 of the RCC, the quotes cited by the defendant are incomplete, absent context and misleading. The plaintiff's actual words at the November 17, 2017 meeting were as follows: [**emphasis** indicates portions quoted by defendant]

> *"For many years, I have worked with people who struggle with addiction. SOGI in my opinion is **an institutionalization of codependency: encouraging and enabling dysfunctional behaviour** and thinking patterns. Many of our students struggle with antisocial behavioural problems, substance abuse, eating disorders, various addictions: the list goes on. We confront that: sometimes gently and sometimes (in the case of addiction) assertively. Instead of **coddling and encouraging what I regard as the sexual addiction of gender confusion**, I believe children should be gently encouraged to be comfortable with their bodies, to accept their own biology, which can never be completely changed, and to love themselves. I believe that this is best done privately by the parents of their child, perhaps with the assistance of a psychotherapist, not their school teachers or peers. The message of SOGI is a subtle but powerful suggestion that perhaps there is something wrong with a child, that all children should consider rejecting their own gender identity.*

5. In reply to paragraph 8 of the RCC, the quotes cited by the defendant are also incomplete, absent context and misleading. The plaintiff was specifically referring to efforts to persuade children that they might actually be girls in male bodies or vice versa, as indicated by what he actually stated: [**emphasis** indicates portions quoted by defendant]

> *In kindergarten books like "Red: A Crayon's Story," educators perpetuate the lie that a child might actually be a girl in a male body or vice versa. This is **Gaslighting:** They **attack the foundation of a child's being which is child abuse**. This will have the effect of confusing children, disturbing their personal security and mental health. Furthermore, I consider rushing into the use of puberty blockers, hormone therapy and gender reassignment as child abuse."*

6. In reply paragraphs 9 and 10 of the RCC, the cited comments are incomplete, absent context and misleading. The plaintiff relies on the entirety of the stated social media posts to provide necessary context and meaning.

7. In reply to paragraph 12 of the RCC, through letter of Defendant's counsel (Dafoe) dated September 24, 2018, the Defendant requested particulars of the false and defamatory statements set out in counsel's (Jaffe) letter of September 18, 2018. However, from the nature of his misconduct alleged, the defendant clearly had no intention of retracting or apologizing for anything.

9. In reply to paragraph 13 of the RCC, and despite the futility of seeking a retraction and apology from the defendant, the plaintiff did, through counsel, provide particulars of two of the subject false and defamatory statements by email (Jaffe to Dafoe) dated September 24, 2018, which email stated, in part:

> " While your client knows very well what he has been publicly saying about Barry Neufeld, I hereby provide particulars of two of his many defamatory comments:
>
> April 12, 2018;
>
> *" [Neufeld] tip toed quite far into **hate speech**"*
>
> September 16, 2018:
>
> *"It is extremely problematic to have somebody who is running as a school trustee **continuing to spread hate** about LGBTQ people"*

9. Despite being provided with the above particulars, the defendant refused to retract or apologize of those comments and, on September 27, 2018, through counsel's letter, he confirmed that he:

> *".... will not be issuing an apology, and is prepared to defend the views, comments and opinions he expressed about Mr Neufeld's conduct and statements concerning SOGI 123 and....."*

Plaintiff's address for service:
c/o Paul Jaffe, Barrister and Solicitor,
Suite 200-100 Park Royal,
West Vancouver, BC. V7T1A2

Fax number address for service: (604) 922-1666
E-mail address for service: jaffelawfirm@gmail.com
Place of trial: Chilliwack, B.C.

The address of the registry is:

46085 Yale Road, Chilliwack, BC. V2P 2L8

Date: November, 8, 2018

"Paul Jaffe"

.....

Signature of Paul Jaffe

[] Plaintiff [x] lawyer for Plaintiff

Rule 7-1 (1) of the Supreme Court Civil Rules states:

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a. prepare a list of documents in Form 22 that lists

i. all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

ii. all other documents to which the party intends to refer at trial, and

b. serve the list on all parties of record.

No. S35152
Chilliwack Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BARRY NEUFELD

PLAINTIFF

AND:

GLEN HANSMAN

DEFENDANT

NOTICE OF APPLICATION

Name of Applicant : The Defendant Glen Hansman ("Mr. Hansman" or "the Applicant")

To: The Plaintiff, Barry Neufeld ("Mr. Neufeld" or the "Respondent")

TAKE NOTICE that an Application will be made by Mr. Hansman to the Master at the Courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia, on Wednesday, May 1, 2019 at 9:45 a.m. or at such other date and time as is set by Supreme Court Scheduling for the Orders set out in Part 1 below:

Part 1: ORDERS SOUGHT

1. That the following paragraphs of the Amended Notice of Civil Claim (the "Amended NOCC") be struck out: 22-23, 27, 30-33, 34iii, xi, xiv, xvii, and xviii, 35, and 42-43;

2. That Mr. Neufeld identify which words in paragraph 24 of the NOCC he claims:

    a. Were published by the Defendant; and

    b. Are defamatory of the Plaintiff;

3. That Mr. Neufeld's Reply filed November 8, 2018 be struck out in its entirety; or, in the alternative, that the Plaintiff be at liberty to file an Amended NOCC incorporating the allegations set forth in the Reply within fourteen (14) days of the making of the Order herein.

Part 2: FACTUAL BASIS

Notice of Civil Claim

1. In his Amended NOCC, Mr. Neufeld claims Mr. Hansman made defamatory statements about Mr. Neufeld to various media outlets, which outlets then published those statements.

2. The statements made by Mr. Hansman about Mr. Neufeld concerned, *inter alia,* statements previously made by Mr. Neufeld, including a Facebook post, about a collection of educational resources known as SOGI 123, and the use and promotion of those materials as a resource in BC schools.

3. Mr. Hansman admits making those statements and raises defences to Mr. Neufeld's claims in his Response to Civil Claim.

4. Mr. Neufeld also makes reference, at paragraphs 22-23 of the Amended NOCC, to a complaint filed against him at the BC Human Rights Tribunal (the "HRT Complaint") by the BC Teachers' Federation (the "BCTF").

5. Mr. Hansman is currently the President of the BCTF and, as a Teacher, is also a member of the BCTF. However, Mr. Hansman is not personally a complainant in the HRT Complaint.

6. At paragraph 23 of the Amended NOCC, Mr. Neufeld alleges that the HRT Complaint is "abusive and absurd", but has not pled any facts that disclose a cause of action against Mr. Hansman insofar as the HRT Complaint is concerned.

7. At paragraph 24 of the Amended NOCC, Mr. Neufeld complains about a story published on April 10, 2018 by the Star Vancouver newspaper, which describes the gravamen of the HRT Complaint and contains comments by Mr. Hansman about Mr. Neufeld in the context of the HRT Complaint.

8. In setting out the words complained of in the Amended NOCC, Mr. Neufeld underlines some words for "emphasis". In paragraph 24 of the Amended NOCC, the words underlined include both words that appear to be quoted from the HRT Complaint and words spoken by Mr. Hansman in interviews with the Star Vancouver.

9. In paragraph 27 of the Amended NOCC, Mr. Neufeld claims that Mr. Hansman organized protests against him, and at paragraph 33, alleges that persons at those protests "republished" Mr. Hansman's "false and defamatory attacks" on Mr. Neufeld by the use of picket signs.

10. At paragraphs 29-31 of the Amended NOCC, Mr. Neufeld alleges that Mr. Hansman's actions took place concurrently and in collaboration with other "activists", and names Morgan Oger, who is described as, *inter alia*, "a trans-gender activist" and, BC Education Minister Rob Fleming, as among those with whom Mr. Hansman collaborated.

11. Mr. Neufeld goes on to claim that "[T[his wider attack effectively republished and amplified the direct statements of the Defendant" concerning the Plaintiff. On that basis, Mr. Neufeld seeks to hold Mr. Hansman liable for the statements of these individuals.

12. At paragraph 34 of the Amended NOCC, Mr. Neufeld claims that the words published by the Defendant on various occasions bore certain meanings. He does not identify which words in which publications complained of resulted in which of those meanings.

13. At paragraph 35 of the Amended NOCC, Mr. Neufeld alleges that the Defendant's statements "were intended to mean and were understood by the public to mean" that the Plaintiff had committed criminal conduct, in violation of the following sections of the *Criminal Code*, R.S.C. 1985 c.C-46: sections 181 (False News) and 319 (Public Incitement of Hatred).

14. At paragraphs 42-and 43 of the Amended Notice of Civil Claim, Mr. Neufeld alleges that Mr. Hansman "directed the public to" an article published by Press Progress, an online news and commentary publication established by the Broadbent Institute, regarding various Facebook Posts made by the Plaintiff, "for the purpose of effectively republishing his (i.e. the Defendant's) false and defamatory attack" on the Plaintiff.

15. At paragraph 50 of the Amended NOCC, the Plaintiff pleads a "legal innuendo" citing "extrinsic circumstances to which the public was fully exposed" but fails to identify those extrinsic circumstances, as required by Rule 3-7(21).

Mr. Neufeld's Reply dated November 8, 2018

16. In paragraphs 1-3 of his Reply, Mr. Neufeld attempts to proffer evidence - argument really - to the effect that SOGI 123 is, as he has claimed in his public statements and the Amended NOCC, "controversial".

17. In paragraphs 4-6 of his Reply, Mr. Neufeld complains about the manner in which Mr. Hansman, in his Response to Civil Claim, has set out various public statements made by the Plaintiff.

18. At paragraphs 7-9 of his Reply, Mr. Neufeld takes issue with Mr. Hansman's pleading in his Response regarding Mr. Neufeld's demand for an apology, and an exchange between counsel that followed that demand, arguing that "the defendant [Mr. Hansman] clearly had no intention of apologizing for anything".

19. This matter has been set for a Trial in December 2019. In setting the Trial, the Plaintiff served a Jury Notice upon the Defendant. Claims in defamation are exempt from the provisions of Rule 12-6(5) which permit the Court to refuse a jury Trial.

Part 3: LEGAL BASIS

1. Our Court of Appeal recently noted, "In defamation actions, pleadings are "exceptionally important. This is due in part to the serious nature of defamation allegations and the significance of context in assessing them in an appropriately informed, well-balanced way. Traditionally, defamation pleadings have attracted a more critical evaluation than those in other causes and have been held to a higher standard regarding the precision with which material facts must be pleaded. This enhanced judicial scrutiny is justified based on the need to avoid unwarranted 'fishing expeditions' and the critical importance of the Defendant knowing clearly the case to be met."

Weaver v. Corocoran, 2017 BCCA 160 at paras. 64-65

2. Both the Amended NOCC and the Reply contain pleadings that are inconsistent with the Rules regarding pleadings generally, and the law regarding pleadings in defamation

actions in particular. In order to prevent fishing expeditions during the discovery process, and to ensure that the action proceeds to trial in a fair and economical manner, the Defendant seeks to strike the offending pleadings pursuant to Rule 9-5.

3. Rule 9-5(1) and (2) of the Supreme Court Civil Rules provide:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs;
>
> (2) No evidence is admissible on an application under subrule (1)(a).

4. In applications brought under Rule 9-5(1)(a), only the pleadings can be considered. Under the other subsections of Rule 9-5; the applicant may present evidence to the Court. While the facts pleaded by the Respondent are assumed to be true, such allegations may be subject to a skeptical analysis; the assumption does not mean that allegations based upon speculation, assumption or unconnected to real pleaded facts must be taken as true.

Singh v Nielsen, 2016 BCSC 2420 at para. 7

5. A claim will be struck if it is plain and obvious that it discloses no reasonable cause of action.

Knight v. Imperial Tobacco Canada Ltd, 2011 SCC 42 at para. 1

6. The question of whether particular words are capable of conveying a particular defamatory meaning is a question of law, not one of fact.

Milne v. Capital Regional District, 2015 BCSC 1163

7. In assessing the meanings alleged by the Plaintiff, the Court must determine if the words published are reasonably capable of bearing each of the defamatory imputations suggested by the Plaintiff in its pleading. It is an error of law for the Court to determine that issue *en bloc*.

Laufer v. Bucklaschuk, 1999 CanLII 5073 at paras. 25-35 (MB CA)
Weaver v. Corcoran, 2017 BCCA 160 at para. 83

8. In assessing if the words complained of can bear the meaning pled by the Plaintiff, the Court will not consider the intention of the Defendant, or the subjective opinion of the Plaintiff. Rather the Court will consider the sense in which the words would reasonably have been understood by an ordinary person in the light of generally known facts.

Lawson v. Baines, 2011 BCSC 326 at para 39

9. In assessing meaning Courts will recognize that, "Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naive. One must try to envisage people between these two extremes and see what is the most damaging meaning that they would put on the words in question...what the ordinary man, not avid for scandal, would read into the words complained of must be a matter of impression".

Lewis v. Daily Telegraph Ltd., [1963] 2 All E.R. 151 (H.L.),
as cited in *Lawson v. Baines*, *supra*

DISCUSSION

Paragraphs 22-23 of the Amended NOCC

10. In these paragraphs, Mr. Neufeld attacks the BCTF's HRT Complaint as "absurd and abusive", and complains that the HRT Complaint by the BCTF was filed "without seeking approval from its members".

11. While Mr. Hansman has answered these allegations, the paragraphs should be struck.

These pleadings amount to a collateral attack on the HRT Complaint, the contents of which are subject to and are published on an occasion of absolute privilege.

12. Additionally, these paragraphs disclose no reasonable claim and are unnecessary and vexatious. In these paragraphs, the Plaintiff invites the Court to consider and rule on the propriety of the HRT Complaint, a matter which is fully within the jurisdiction of the Human Rights Tribunal. The pleading also seeks to attack and interfere with the internal operations of the BC Teachers' Federation, a society which is not a party to this proceeding.

13. Accordingly, these paragraphs should be struck pursuant to Rules 9-5(1)(a)(b) and (d).

Paragraph 24 of the Amended NOCC and generally

14. In this paragraph, and elsewhere in the Amended NOCC, Mr. Neufeld underlines words for "emphasis". It is not clear from the pleading whether the "emphasis" means the words underlined are words that Mr. Neufeld says bear the defamatory sting alleged by him, as is common in a defamation pleading, or if some other purpose is intended.

15. In paragraph 24 in particular, the underlined words include words published by the Star Vancouver that describe the contents of the HRT Complaint (which description, if fair and accurate, is published by the Star Vancouver on an occasion of qualified privilege, and is not published by Mr. Hansman), as well as words spoken by Mr. Hansman, for which he may be held responsible.

16. The pleading in these paragraphs is confusing and should be struck pursuant to Rules 9-5(1)(a) and (b). In the alternative, Mr. Neufeld should be ordered to provide the particulars sought and indentify which words were (a) published by Mr. Hansman; and, (b) are defamatory of Mr. Neufeld.

Paragraphs 30-32 of the Amended NOCC

20. In these paragraphs, Mr. Neufeld seeks to make Mr. Hansman liable for words spoken or published by others. He seeks to do so by pleading that, "[t]he defendant's direct attacks on

the plaintiff took place concurrently with similar statements by other activists" and claiming that Oger and Fleming have "effectively republished and amplified" the statement(s) of Mr. Hansman."

21. As Professor Raymond E. Brown has noted in his text, "Republication has a special meaning in the law of defamation". Republication involves the "voluntary republication of precisely the same information by an independent third party" [emphasis added].

Brown on Defamation, Second Edition at p. 7-42. ("*Brown*")

22. The general rule governing publication of defamatory materials is that each person is responsible for his or her own words and not for their repetition by others. There are exceptions to the general rule but the law is clear that those exceptions must be precisely pleaded.

Speight v. Gosnay (1891), 60 L.J. Q.B. 231 at 232
Cohl v. Donovan (1996), 18 O.T.C. 18 at para. 22 (Ont. Gen. Div.)
Jordan v. Talbot, [1998] O.J. No. 1876 at para. 3 (Gen. Div.)

23. Mr. Neufeld has not pleaded any of those exceptions and the Defendant says that none apply in these circumstances.

24. Those exceptions only apply when the information repeated is substantially the same, so the "sum and substance of the original charge remains or at least part of the sting of the original charge is conveyed".

Brown, supra at 747

25. In this case, neither Oger nor Fleming have "republished" the words of Mr. Hansman as that term is used in defamation law because neither published precisely the same information as Mr. Hansman.

26. The words spoken by Oger and Fleming and pleaded by the Defendants in the Notice of Civil Claim, reflect similar concerns about the Plaintiff as those raised by Mr. Hansman in his public statements, but they are not a republication of those statements. Instead, Oger and Fleming have offered their own critiques of Mr. Neufeld's comments and actions, and have done so in their own words.

27. If Mr. Neufeld believes the words Oger and Fleming have spoken are defamatory of him, it is open to him to bring an action against them. It is not open to Mr. Neufeld to sue Mr. Hansman for things others have said about Mr. Neufeld.

28. Accordingly, the pleadings at paragraphs 30-32 of the Amended NOCC disclose no cause of action in defamation against Mr. Hansman and are vexatious and embarrassing and should be struck pursuant to Rules 9-5(1)(a)(b) and (c).

Paragraphs 27 and 33 of the Amended NOCC

29. In these paragraphs, Mr. Neufeld seeks to hold Mr. Hansman liable for picket signs used in public demonstrations against the position taken by Mr. Neufeld about SOGI 123, alleging that the demonstrators "republished and amplified the defendant's false and defamatory attack".

30. As is the case with paragraphs 30 and 32 of the Amended NOCC, there is no republication as that term applies in defamation law, and therefore the protestors, and not Mr. Hansman are liable for any defamatory publication. In this instance, the pleading is further flawed; it is clear that none of the words published are defamatory of Mr. Neufeld. The only sign that mentions him by name calls only for his resignation and suggests that he is a dinosaur. Most of the other signs are simply supportive of transgender and LGBTQ children, which may be a rebuke of Mr. Neufeld's views, but does not amount to an attack on his reputation.

31. The pleadings at paragraphs 27 and 33 do not disclose a cause of action against Mr. Hansman; and are unnecessary and vexatious and should be struck pursuant to Rule 9-5(1)(a), (b), and (c).

Paragraph 34 of the Amended NOCC

32. At paragraph 34 of the Amended NOCC, Mr. Neufeld attributes various meanings to the words he has complained of. As noted above, whether those words are capable of the meanings alleged is a question of law and the Court must act as a gatekeeper, particularly in cases to be heard by a jury.

33. The Defendant says it is plain and obvious that the words complained of and set out in the Amended NOCC cannot bear the following meanings alleged by Mr. Neufeld in paragraph 34 of the Amended NOCC:

    i. That Mr. Neufeld committed hate speech (para. 34ii);

    ii. That Mr. Neufeld was actuated by hatred of certain students (para. 34iii);

    iii. That Mr. Neufeld has lied about what SOGI 123 includes (para 34xi);

    iv. That Mr. Neufeld has violated the right of students under the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code* (para 34xiv);

    v. That Mr. Neufeld published knowingly false statements to injure the public interest (para. 34xvii);

    vi. That Mr. Neufeld is unfit to be a school trustee because of his age (para. 34xvii).

34. Accordingly, those subparagraphs should be struck.

Paragraph 35 of the Amended NOCC

35. It also plain and obvious that the words complained of by the Plaintiff in the Amended NOCC are not capable of meaning that Mr. Neufeld committed criminal acts, and specifically the two offences cited at paragraph 35: section 181 of the *Criminal Code* (False News) and Section 319 of the *Criminal Code* (Public Incitement of Hatred).

36. In assessing that claim, a reasonably intelligent and well-informed person with a layperson's understanding of criminal law would appreciate that, first, s.181 was found to be unconstitutional more than 25 years ago, and that second, none of the words set out in the Amended NOCC make any reference to false news.

37. Similarly, a reasonably intelligent and well-informed person with a layperson's understanding of criminal law would be able to distinguish between an allegation that Mr. Neufeld had made statements that Mr. Hansman viewed as hateful and that "tiptoed" into hate speech, and allegation that he had wilfully sought to incite hatred in others that

would result in a breach of the peace, or that he had wilfully promoted hatred against a group, as required by s. 319. That person would likely also be aware of their hate speech provisions in the BC *Human Rights Code*, and would understand, that in this context , it was those provisions they were referencing in respect of Mr. Neufeld.

Paragraphs 42-43 of the Amended NOCC

38. It is not clear in these paragraphs whether the Plaintiff is claiming that Mr. Hansman, by his reference to the Press Progress story regarding Mr. Neufeld's history of Facebook posts, is republishing the Press Progress story or republishing his own comments regarding the Plaintiff. In any event, neither claim is accurate, as a matter of law, for the reasons set out above, and the pleading does not disclose a reasonable cause of action, and is vexatious, unnecessary and embarrassing and should be struck pursuant to Rule 9-5(1)(a), (b), and (d).

Reply Paragraphs 1-3

39. Rule 3-6(2) provides: "A reply that is a simple joinder of issue must not be filed or served".

40. Rule 3-7(1) provides: "A pleading must not contain the evidence by which the facts alleged in it are to be proved".

41. In his Reply, Mr. Neufeld offends both these Rules, seeking to respond to Mr. Hansman's denial that SOGI 123 is controversial (a denial by which the issue was joined) and further pleads evidence to make that point. The paragraphs offend Rule 3-6(2) and Rule 3-7(1) and should be struck.

Reply paragraphs 4-6

42. In these paragraphs, Mr. Neufeld argues that Mr. Hansman's quotation of Mr. Neufeld's remarks are "incomplete, absent context and misleading", a pleading that is in the form of an argument, rather than a statement of fact. It also amounts to pleading evidence. In essence, Mr. Neufeld further seeks to deny Mr. Hansman the right to identify the words of Mr. Neufeld that raised concerns with Mr. Hansman, and that led Mr. Hansman to make the comments and statements he did, which Mr. Hansman is entitled to do as part of his defence.

Reply paragraphs 7-9

43. At paragraph 39 of his Amended NOCC, Mr. Neufeld referred his demand for an apology and retraction, and the refusal of Mr. Hansman to provide either, relying on that refusal as one basis for his claim for punitive damages.

44. The fact that Mr. Hansman declined to make an apology is admitted in his responsive pleadings. Accordingly, the issue of the apology had been joined, the Reply is argumentative, and unnecessary and contrary to Rule 3-6(2). It should be struck.

Part 4: MATERIAL TO BE RELIED ON

1. The pleadings filed herein; and,

2. Such other material as the Applicant may advise and the Court may allow.

The applicant estimates that the application will take one-half day

[*Check the correct box.*]

☒ This matter is within the jurisdiction of a master.

☐ This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

  (i) you intend to refer to at the hearing of this application, and

  (ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

  (i) a copy of the filed application response;

  (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

  (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: March 6, 2019

Signature of Christopher M. Dafoe

☐ applicant ☒ lawyer for applicant

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs ..... of Part I of this notice of application

[ ] with the following variations and additional terms:

.....

.....

.....

Date: ....

Signature of [ ] Judge[ ] Master

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APPENDIX

[*The following information is provided for data collection purposes only and is of no legal effect.*]

THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts.

[utilized only in cases of urgency – its use dispenses with the need to prepare a separate Order]

ENDORSEMENT PURSUANT TO BC SUPREME COURT RULE 13-1(4)

ORDER MADE in the terms of this Notice of Motion this day of Month, 20 .

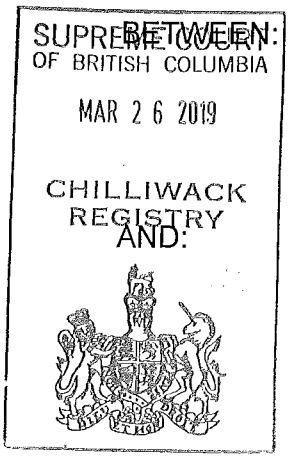
Order endorsed pursuant to Rule 13-1(4).

_____

Form 33 (Rule 8-1 (10)

NO. S35152
CHILLIWACK REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA



BETWEEN:

BARRY NEUFELD

PLAINTIFF

AND:

GLEN HANSMAN

DEFENDANT

APPLICATION RESPONSE

Application response of the Plaintiff BARRY NEUFELD

THIS IS A RESPONSE TO the notice of application of the Defendant, filed March 7, 2019.

Part 1: ORDERS CONSENTED TO

The Plaintiff consents to granting of the orders set out in the following paragraphs of Part I of the notice of application: NIL (but see Part 3 below)

Part 2: ORDERS OPPOSED

The Plaintiff opposes the granting of orders set out in paragraphs 1, 2 and first part of item 3 of Part I of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Plaintiff takes no position on the granting of the orders set out in the following paragraphs of Part I of the notice of application: The alternative relief under item 3, that is, that the plaintiff be at liberty to file a further amended NCC to incorporate the allegations set out in the Reply within 14 days of the date of the order.

Part 4: FACTUAL BASIS

1. For this application, the allegations set out in the subject pleadings are deemed factual. The pleadings specify the words complained of, the publication particulars, the relevant extrinsic facts and fully discloses the case to be met.

2. The proceedings are at an early stage. Examinations for discovery are set for June 11 and 12, 2019. A 10 day trial is set to commence on December 2, 2019.

3. It is not plain and obvious that any allegations of the plaintiff are bound to fail nor are any particular parts of the pleadings herein, if found to be defective, incapable of amendment.

4. The defendant's conduct was actuated by malice. (ANCC para. 38)

5. The defamation was conveyed "*...both expressly and by innuendo and....*" (ANCC, para. 34). Both false innuendo and legal innuendo are pleaded (ANCC paras. 49 and 50).

6. The defendant collaborated with others in a smear campaign. (ANCC para. 30),

7. The defendant's defamatory statements were published over the same period that similar statements from other activists were published. This is key to the factual matrix and an extrinsic fact affecting the impact of the defendant's statements.

8. The defendant has, to date, produced only a superficial List of Documents. It fails to include, for example, a substantial body of such relevant documents relating to his communications with the media and with collaborators in the smear campaign.

Affidavit of J. Thorsell,
Ex. A Defendant's List of Documents, Feb. 14, 2019

9. The plaintiff's demand for an amended list has been refused.

Affidavit of J.Thorsell,

Ex. B Jaffe letter, Feb. 19, 2019
Ex. C Dafoe letter, March 5, 2019

10. The present case does not seek to challenge any decision of the BC Human Rights Tribunal nor does it in any way interfere with that process. The defendant is not a party in the HRT proceedings and the outcome of those proceedings is immaterial to the defamation claim.

11. The instigation of HRT proceedings in April, 2018 enabled the defendant to reactivate the smear campaign. As pleaded, (ANCC, para. 23), "... *the defendant and others immediately disseminated [the complaints] to the public through the media, using their own complaints as an opportunity to defame the plaintiff as below indicated.*"

12. In addition to various headlines in April, 2018, the HRT proceedings became regularly mentioned in the defendant's ongoing assertions of bigotry, intolerance, discrimination and hatred. Regardless of how devoid of merit the HRT prosecution may be, it is highly stigmatizing, especially for somebody like a school board trustee. To the degree innuendo may be required in deriving defamatory meaning from certain words used by the defendant, the public's awareness of such extrinsic facts as the HRT proceedings may provide it.

Affidavit of J. Thorsell
Exhibit D copies of media publications

13. Paragraph 6 of the ANCC states that SOGI is founded upon a controversial and politicized ideology. The defendant has denied this. Such fact is an important part of the factual matrix giving context to the statements of both parties and necessary to determine the defendant's motives and impact of his conduct.

14. In addition, as alleged at paragraph 11 of the ANCC, the plaintiff's decision to speak out about SOGI accorded with his ethical duty, as a school board trustee, to express the widely held concerns within his community.

15. Paragraph 36 of the ANCC alleges the virtually unlimited scope and indefinite republication and spread of the defendant's defamatory comments on the internet.

16. The Reply sets out relevant facts which, while replying to unanticipated and factually inaccurate allegations in the RCC, constitute neither joinder nor an argument of the case. However, the plaintiff does not oppose the alternative relief sought by the defendant, that is, granting liberty to incorporate the impugned Reply allegations be in a further amended NCC.

17. The ANCC (para. 35) specifies two sections of the Criminal Code of Canada that describe the type of misconduct attributed to the plaintiff. The defendant's protracted attack of the plaintiff included such statements as:

Para. 20: he "promoted hatred"

Para. 24: "...his comments "...exposed them [trans people] to hatred."
"...he is creating a school environment... that is discriminatory and hateful,"

Para. 25: he "....tip toed quite far into hate speech"

Para. 26: his "hateful" public comments about trans people have created an unsafe work environment

Para. 29: he was "...continuing to spread hate about LGBTQ people "

Part 5: LEGAL BASIS

1. Expression which tends to lower a person's reputation in the estimation of right-thinking members of society generally, or to expose a person to hatred, contempt or ridicule, is defamatory.

Lawson v. Baines, 2011 BCSC 326, at para. 28,
(referring to the SCC in Cherneskey)

2. There can be no serious question that the pleaded statements of the defendant in this matter are defamatory of the plaintiff. As this Court has noted

"Clearly allegations of dishonesty or moral fault are particularly damaging

to public officials who rely on public trust to perform their duties effectively."

Wilson v. Switlo, 2011 BCSC 1287, per Punnet J., at para. 154

3. As Rule 1-3 (a) states:

"The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."

4. If, at this early stage, any part of the pleadings is found to be defective, then, other than any part which has been proven to be so hopeless as to be "bound to fail", permitting amendment will advance the objective of the Rules.

5. As this Court noted in another defamation case:

"The power to strike out a pleading on the ground that it discloses no reasonable cause of action should be exercised only where the case is absolutely beyond doubt: McNaughton v. Baker (1988), 25 B.C.L.R. (2d) 17 (C.A.). In a defamation action, where the pleadings are of particular importance, the court may grant leave to amend the pleadings rather than striking out the action."

Dhami et al v. CBC et al, 2001 BCSC 1811 per Slade J. at para. 12

6. A defamation claim may appear at odds with the general rule against pleading evidence and argument. This is because a plaintiff who pleads innuendo must provide a detailed account of the extrinsic facts that give the impugned words their extended meaning.

Reimer v. Dr. A.R. Boyco Optometric Corporation, 2012 BCSC 860 (paras. 19-20)

7. The above common law rule has been codified. Rule 3-7 (21) (a) states, in part:

"In an action for libel or slander,
(a) if the plaintiff alleges that the words or matter complained of were used in a derogatory sense other than their ordinary meaning, the plaintiff must give particulars of the facts and matters on which the plaintiff relies in support of that sense,.... "

8. However, in the present case, there are a great deal of facts as yet unknown by the plaintiff and with the refusal of the defendant to produce relevant documents.

this could take a while. On this matter, our Court of Appeal has noted:

> *"More recently, courts have applied greater flexibility when analyzing defamation pleadings, at least in the early stages of a proceeding. While the need for enhanced scrutiny and precise pleadings remains, it is recognized that plaintiffs may be unable to provide full particulars of allegations prior to discovery. For this reason, where a plaintiff pleads a prima facie case of defamation, including all reasonably available particulars of defamatory material, the pleadings may stand despite a lack of detailed facts outside the plaintiff's knowledge:....."*
>
> *Weaver v. Corcoran et al.*, 2017 BCCA 160, per Dickson JA, at para. 65

9. As to paragraph 24 of the ANCC: It sets out a brief portion of a media article. It is not confusing. The URL is provided which provides the full article providing whatever further parts of the article the defendant may wish to see.

10. Announcing the BCTF's commencement of HRT proceedings in the spring of 2018 facilitated a flurry of defamatory statements about the plaintiff, including that he exposed trans-people to hatred, made transphobic comments, discriminated based on gender identity and made schools discriminatory and hateful. Such imputations are all obviously defamatory and no further particulars are required.

11. In another case and on upholding a refusal to order a plaintiff to explain what portions of a particular publication were defamatory, the Court of Appeal (Esson J.A.) approved the reasoning of the judge below:

> *"The plaintiff's claim is that the material published is, in its entirety, defamatory. Breaking it down into segments to be taken separately will not in this case advance the cause of justice. That is not what R. 134 is about. It is to enable the parties to get to trial on an issue. The issue is quite clear in the present ease without particulars."*
>
> *Bank of B.C. v. CBC*, 1986 CanLII 984 (BCCA), at para. 7

12. In the same judgment, the Court of Appeal went on to state (para. 17):

> *"...to require the plaintiff to "chop up" this relatively brief and straightforward report in the manner proposed would result in an intolerable degree of semantic complexity which would serve no useful purpose."*

13. Herein, the defendant acted with malice (ANCC para. 38) and his conduct included collaboration with others in a smear campaign. As stated in another defamation case in which a defendant sought to strike similar allegations:

> *[36]... In the law of defamation, malice may be shown if it is proven that the defendant used the occasion at issue for some wrong or improper purpose or indirect motive: Raymond E. Brown, ed., The Law of Defamation in Canada, 2d ed. (Scarborough, Ont.: Carswell, 1994). An improper purpose or indirect motive includes, amongst other things, engaging in a course of action for one's own benefit or advantage, or for the purpose of harassing or intimidating the plaintiff..*
>
> *.... The plaintiff submits that the defendants made the alleged defamatory statements for the improper purpose of perpetuating "an ongoing campaign of vilification and incitement of hatred in which the Canadian Jewish Congress is engaged in competition with other Jewish groups to raise funds to combat alleged anti-Semitism and to create fear and apprehension about free speech or political views they do not like."*
>
> *[37] Though this alleged improper purpose may be seemingly difficult to prove, an application under Rule 19(24) does not afford an appropriate forum in which to engage in a detailed examination of the strengths and weaknesses of the plaintiff's case. The sole question is whether, assuming that all the facts the plaintiff alleges are true, the plaintiff can present a question fit to be tried. Accordingly, the court must decide if the "improper purpose" as alleged by the plaintiffs, if proved, could establish malice. The court may only strike a pleading pursuant to Rule 19(24)(a) if it is "plain and obvious" that the pleading does not disclose a reasonable claim of malice. In other words, if the "improper purpose" alleged by the plaintiff is potentially able to serve as the basis for a claim of malice, it should not be struck.*
>
> *[38] In the case at bar, I find that the "improper purpose" as alleged by the plaintiffs, if proved, could establish malice, consequently, I am not prepared to strike paragraph 9 of the statement of claim.*

Citizens For Foreign Aid Reform Inc. v. Canadian Jewish Congress and Michel Elterman [1999] B.C.J. No. 2160, per Romily J. at paras 36-8

14. As to issues of republication, this Court recently stated [my emphasis]:

> *[88] To prove the publication element, the plaintiff must prove that the defendant has, **by any act**, conveyed the defamatory meaning concerning the plaintiff to a third party, who has received it: Crookes v. Newton, 2011 SCC 47 at para. 16.*
>
> *[89]....*

[90] The general rule is that a person is responsible only for his or her own defamatory publication, and not for the republication by others. ***There are three exceptions to this general rule****: (i) where he or she is authorized, or intended that the person to whom he or she published the words would repeat or republish them to some third person; (ii) where the repetition or republication of the words to a third person was the natural and probable result of the original publication, and;....."*

Level One Construction Ltd. v. Burnham, 2018 BCSC 1354, per Sharma J.

15. In another defamation case, after citing the general rule that people are not liable for republication of their comments by others, this Court put it this way:

[78] However, there are ***several exceptions*** *to this rule. The defendant may intend or authorize another to publish a defamatory communication on his or her behalf. Secondly, a defendant may publish it to someone who is under some moral, legal or social duty to repeat the information to another person. Thirdly, a defendant may be liable if the repetition was the natural and probable result of his or her publication. These rules apply only where the information repeated is the same or substantially the same so that the sum and substance of the original charge remains. Once the requirements have been satisfied, the plaintiff is entitled to recover damages from the defendant both for the original publication and for the republication by the person to whom it was initially published.*

Pritchard v. Van Nes, 2016 BCSC 686, per Saunders J.

16. In addition to republishing of the defendant's comments, (such as signs attributing hatred of LGBTQ people to the plaintiff), the activities of protesters and others mentioned in the pleadings are extrinsic facts which potentially affect how the defendant's statements were understood by the public.

17. Throughout the smear campaign, the defendant attributed statements to the plaintiff which he never expressed. On such false attributions, the defendant declared the plaintiff to be unfit to be a school board trustee, stating, *inter alia*, "*He [Neufeld] should step down or be removed*" (ANCC, para. 14)

18. These facts resemble those in another defamation case in which a defendant falsely attributed statements to a Member of Parliament on the basis of which

he was denounced as unfit to hold elected office. As the Court noted:

> *The defendant quoted the plaintiff as saying --unequivocally -- that the anti-abortionists were justified in breaking the law to save the unborn. Mr. Wenman did not utter those words or words substantially similar. He neither stated that breaking the law is permissible as the headline clearly implied nor that he believed the anti-abortionists were justified in breaking the law. By imputing those statements to Mr. Wenman, a Member of Parliament who is sworn to uphold the laws of Canada, the words are clearly defamatory.*
>
> *Wenman v. Pacific Press,* [1991] B.C.J. No. 186, per Allan J.

19. Misconduct such as inciting hatred towards trans gender people is clearly capable of being understood as criminal conduct. For example, the Criminal Code of Canada contains these provisions:

Public incitement of hatred

•319(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

- *(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or*
- *(b) an offence punishable on summary conviction.*

•Wilful promotion of hatred

•(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- *(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or*
- *(b) an offence punishable on summary conviction.*

Definition of identifiable group *(Under section 318)*

(4) In this section, identifiable group means any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability.

20. Whether the public has any knowledge of specific provisions of the Criminal Code is immaterial. As this Court has noted:

> *[142] Brown at 4-163 and 4-164 emphasizes that defamation on the basis of alleged criminal conduct does not require a technical description of the crime in question:*
>
> *... [I]t is defamatory to charge someone with a criminal act or*

omission. The accusation need not describe the crime in a precise and technically correct way, or be phrased in language sufficient to meet the technical necessities of a statute or the requisites of an indictment. Nor is it necessary to specify the particular offence, or to refer to it by name. The criminal charge may be made by way of implication or insinuation. It is sufficient if the words convey the idea that a person is guilty of acts constituting a crime.

Wilson v. Switlo, 2011 BCSC 1287, per Punnet J.

Part 6: MATERIAL TO BE RELIED UPON

1. Affidavit #1 of Jacqueline Thorsell, made 25/03/2019

2. Such further material as the Respondent may advise and the Court may permit.

The application respondent estimates that the application will take 1-2 days.

[X] The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Date: 25/03/2019

.....

Signature of lawyer for application respondent

PAUL JAFFE

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Form 32 (Rule 8-1 (4))

NO. S35152
CHILLIWACK REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BARRY NEUFELD

PLAINTIFF

AND:

GLEN HANSMAN

DEFENDANT

NOTICE OF APPLICATION

Name of applicant: THE PLAINTIFF, Barry Neufeld

To: THE DEFENDANT, Glen Hansman

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, B.C. on 26/04/2019 at 9.45 am. for the order(s) set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. Pursuant to Rule 7-1 (13) and (14), the defendant shall, within 10 days from the date of this order, deliver an Amended List of Documents identifying all documents that are or have been in the defendant's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and all documents the defendant intends to refer at trial, including such documents or classes of documents, such as:

i) notes, memos, faxes, emails or any other documents relating to communications with persons associated with various media relating to the subject of this litigation;

ii) notes, memos, faxes, emails or any other kind of documents reflecting BCTF's internal communications about how public opposition to SOGI will be dealt with, including documents reflecting deliberation, input, strategy planning, resolutions and other such material;

iii) documents relating to organizing and/or collaborating with other individuals or organizations, including other activists, politicians, members of the public, the BC Human Rights Tribunal and pro-SOGI candidates in the school board election campaign in the fall of 2018;

iv) internal BCTF communications reflecting communications, deliberation and input from union members and others relating to the defendant's decision to instigate a complaint about the Plaintiff at the BC Human Rights Tribunal; and

v) documents reflecting communications from anybody about the plaintiff's public comments on SOGI, including from persons claiming to feel unsafe and/or discriminated against and/or otherwise affected.

2. Pursuant to Rule 7-1 (8), the defendant shall deliver an Affidavit verifying his (Amended) List of Documents by no later than 10 days from the date of this order.

3. Pursuant to Rule 14-1, the defendant shall pay the costs of this application in any event of the cause.

Part 2: FACTUAL BASIS

1. Examinations for discovery are set for June 11 and 12, 2019. A 10-day trial is set to commence on December 2, 2019.

2. The plaintiff alleges that the defendant's conduct was actuated by malice (ANCC 38) when he "... embarked upon a campaign to vilify, harass, embarrass and defame the

plaintiff through the media,....." (ANCC, para. 13) and that he collaborated with others in a smear campaign (ANCC para. 30).

3. The defendant's defamatory statements about the plaintiff were published over the same period that similar statements about the plaintiff by other persons were published.

4. The defendant has produced only a superficial List of Documents. It fails to include a substantial body of relevant documents relating to his communications with others about the plaintiff, including his communications with the media and with other persons collaborating in the smear campaign.

Affidavit #1 of J. Thorsell,
Ex. "A" – Defendant's List of Documents, Feb. 14/19

5. Examples of documents obtained by the plaintiff but missing from the defendant's List of Documents include:

   i) The defendant's email dated October 24/17 to B. Larson and others in which, *inter alia*, he states the plaintiff promotes hate;

   ii) The defendant's email of January 4/18 to B. Churcher implying that the plaintiff endorses jailing, killing and torturing LGBTQ people; and

   iii) The defendant's email of September 20/18 to unknown recipients, equating the plaintiff's views with racist, misogynist, homophobic, transphobic and other discriminatory views.

Affidavit #2 of J. Thorsell,
Ex. "A" – copies of the above emails

6. The defendant (ARNCC paragraph 16) concedes that he "worked with" members of the BCTF on the subject of the plaintiff's Facebook comments. His List of Documents, however, does not include any documents at all relative to this "work".

7. Disclosure of dealings between the defendant and others is vital to establishing the alleged misconduct, including whether he was acting with malice and establishing the precise content and scope of his defamation. Key facts relative to his alleged collaboration with others in the conduct of the smear campaign are impossible to prove without disclosure.

8. Evidence of CUPE internal communications about the plaintiff exist as they must exist within the BCTF. Furthermore, CUPE instigated its HRT complaint without seeking input from the membership.

Affidavit #2 of J. Thorsell,
Ex. "B" - CUPE Press Release, Jan. 15/18

9. Upon BCTF's instigation of the HRT proceedings in April, 2018, the defendant reactivated the smear campaign. As pleaded, (ANCC, para. 23), "... *the defendant and others immediately disseminated [the complaints] to the public through the media, using their own complaints as an opportunity to defame the plaintiff as below indicated.*"

Affidavit #1 of J. Thorsell,
Ex. "D" - copies of media publications

10. On February 19, 2019 and pursuant to Rules 7-1 (10) and (11), the plaintiff issued a demand for an Amended List of Documents.

Affidavit #1 of J.Thorsell,
Ex. "B" – Jaffe letter, Feb. 19/19

11. On March 5, 2019, the defendant indicated his refusal to produce an Amended List of Documents.

Affidavit# 1 of J.Thorsell,
Ex. "C" – Dafoe letter, March 5/19

Part 3: LEGAL BASIS

1. Rule 7-1 (1) requires production of:

(a) (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact".
(ii) all other documents to which the party intends to refer at trial,.....

2. Rule 7-1 (10) states:

If a party who has received a list of documents believes that the list omits documents or a class of documents that should have been disclosed under subrule (1) (a) or (9), the party may, by written demand, require the party who prepared the list to
(a) amend the list of documents,
(b) serve on the demanding party the amended list of documents,

and
(c) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

3. Rule 7-1(11) states:

> If a party who has received a list of documents believes that the list should include documents or classes of documents that
> (a) are within the listing party's possession, power or control,
> (b) relate to any or all matters in question in the action, and
> (c) are additional to the documents or classes of documents required under subrule (1) (a) or (9),
> the party, by written demand that identifes the additional documents or classes of documents with reasonable specifcity and that indicates the reason why such additional documents or classes of documents should be disclosed, may require the listing party to
> (e) amend the list of documents,
> (f) serve on the demanding party the amended list of documents, and
> (g) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

4. Rule 7-1 (12) states:

> A party who receives a demand under subrule (10) or (11) must, within 35 days after receipt, do one of the following:
> (a) comply with the demand in relation to the demanded documents;
> (b) comply with the demand in relation to those of the demanded documents that the party is prepared to list and indicate, in relation to the balance of the demanded documents,
> (i) why an amended list of documents that includes those documents is not being prepared and served, and
> (i) why those documents are not being made available;
> (c) indicate, in relation to the demanded documents,
> (i) why an amended list of documents that includes those documents is not being prepared and served, and
> (ii) why those documents are not being made available.

5. Rule 7-1(13) states:

> If a party who receives a demand under subrule (10) or (11) does not, within 35 days after receipt, comply with the demand in relation to the demanded documents, the demanding party may apply for an order requiring the listing party to comply with the demand.

6. Rule 7-1(14) states:

> On an application under subrule (13) or otherwise, the court may
>
> (a) order that a party be excused from compliance with subrule (1), (3), (6), (15) or (16) or with a demand under subrule (10) or (11), either generally or in respect of one or more documents or classes of documents, or
>
> (b) order a party to
>
> (i) amend the list of documents to list additional documents that are or have been in the party's possession, power or control relating to any or all matters in question in the action,
>
> (ii) serve the amended list of documents on all parties of record, and
>
> (iii) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

7. As to different approaches to disclosure in Rule 7-1, this court recently noted:

> *The distinction between the two types of disclosure provided for under Rule 7-1 is stated in Global Pacific as follows:*
>
> *The question is whether a document can properly be said to contain information which may enable the party requiring the document either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, or if it may have either of those two consequences. Therefore, it is acknowledged that the initial disclosure under Rule 7-1(1) relates to a materiality requirement, but that a party can apply to the court, as the defendant did here, for broader disclosure pursuant to Rule 7-1(14).*

Lower v. Investment Industry Regulatory Organization of Canada 2019 BCSC 175, at para. 45

8. Regarding Rule 7-1(11), as noted by Master Muir:

> *[22] There is a considerable difference between Rules 7-1(1) and 7-1(11). Rule 7-1(1) is limited to production of documents that "could be used by any party to prove or disprove a material fact", whereas Rule 7-1(11) has been referred to as the second-tier of document disclosure, and requires production of documents that "relate to any or all matters in question in the action".*

Cambie Forming Ltd. v. Accuform Construction Lt., 2017 BCSC 127 at para. 22.

9. It is clear that there is a substantial body of documents reflecting particulars germane to the issues herein. Such documents reflecting are exclusively within the possession and control of the defendant.

"...it is recognized that plaintiffs may be unable to provide full particulars of allegations prior to discovery. For this reason, where a plaintiff pleads a prima facie case of defamation, including all reasonably available particulars of defamatory material, the pleadings may stand despite a lack of detailed facts outside the plaintiff's knowledge ....."

Weaver v. Corcoran et al., 2017 BCCA 160, per Dickson JA, at para. 65

10. As to affidavits of documents, as noted by Mr. Justice Abrioux in *Araya v. Nevsun* 2019 BCSC 262 at para 19:

[19] With regards to affidavits of documents, I accept Nevsun's summary of the applicable principles which include:

(a) in Foundation Co. of Canada Co. v. District of Burnaby, [1978] B.C.J. No. 557 (S.C.) at para. 7, Justice Legg (as he then was) stated the following:

> *...When some documents which are significant to the defence or claim of one party, have, for whatever reason, been omitted from any list delivered under Rule 26(1), in the absence of any adequate explanation or reason for such omission, an order directing the delinquent party to deliver an affidavit verifying the list of discovered documents ought, in my view, to be made.*

(b) furthermore, if there are plain and obvious gaps in document disclosure that suggest the search for documents may have been less diligent than required, a party may be required to produce an affidavit verifying their list of documents, or verifying any further or amended list they might consider appropriate to produce pursuant to R. 7-1(1): Sysco Victoria Inc. v. Wilfert Holdings Corp., 2011 BCSC 1359 at para. 28. Equally, an order may also be made when the opposing party has displayed a "dilatory or casual attitude" to document production: Gardner v. Viridis Energy Inc., 2012 BCSC 1816 at para. 52.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of J. Thorsell, made 25/03/2019,
2. Affidavit #2 of J. Thorsell, made 31/03/2019,
3. The pleadings herein, and
4. Such other material as the plaintiff may advise.

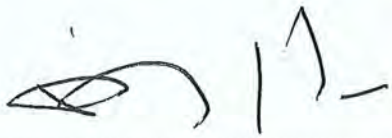
The applicant(s) estimate(s) that the application will take 2 hours.

[x] This matter is within the jurisdiction of a master.

[ ] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,
(b) file the original of every affidavit, and of every other document, that
(i) you intend to refer to at the hearing of this application, and
(ii) has not already been filed in the proceeding, and
(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
(i) a copy of the filed application response;
(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).



Date: April 1, 2019

.....
Signature of PAUL JAFFE, lawyer for applicant

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs..... of Part 1 of this notice of application

[ ] with the following variations and additional terms:

.....

.....

.....

Date: .....[*dd/mmm/yyyy*].....

.....
Signature of [ ] Judge [ ] Master

Appendix

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

[X] discovery: comply with demand for documents
[X] discovery: production of additional documents
[ ] other matters concerning document discovery
[ ] extend oral discovery
[ ] other matter concerning oral discovery
[ ] amend pleadings
[ ] add/change parties [ ] summary judgment [ ] summary trial
[ ] service
[ ] mediation
[ ] adjournments
[ ] proceedings at trial
[ ] case plan orders: amend
[ ] case plan orders: other
[ ] experts

No. S35152
Chilliwack Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BARRY NEUFELD

PLAINTIFF

AND:

GLEN HANSMAN

DEFENDANT)

APPLICATION RESPONSE

Application Response of: The Defendant, Glen Hansman (the "Application Respondent")

THIS IS A RESPONSE TO the Notice of Application of the Plaintiff, Barry Neufeld filed April 1, 2019.

Part 1: ORDERS CONSENTED TO

The application respondent(s) consent(s) to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms:

1. None

Part 2: ORDERS OPPOSED

The Application Respondent opposes the granting of the Orders set out in paragraphs 1-3 of Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondent takes no position on the granting of the Orders set out in paragraphs None of Part 1 of the Notice of Application.

Part 4: FACTUAL BASIS

1. On October 24, 2017, the Plaintiff, a school trustee in School District 33 (Chilliwack), made

an incendiary post on his Facebook page, attacking teaching materials adopted by the Ministry of Education and SD 33 with the goal of making schools a safer and more accepting place for lesbian, gay, bisexual, transgender and queer ("LGBTQ) students). In the post, the Plaintiff called the SOGI materials a "weapon of propaganda" and described those who created and distributed them as "radical cultural nihilists."

2. The post immediately attracted the interest of news media in Chilliwack and across the Lower Mainland.

3. The news media sought comments from a wide variety of sources, including from the Defendant, who was serving as the President of the BC Teachers' Federation ("BCTF). In interviews with, *inter alia*, the Vancouver Sun, Global News and the Huffington Post, the Defendant offered his views on the Plaintiff's Facebook Post and on the Plaintiff's fitness to serve as school trustee.

4. On October 25, 2017, the Plaintiff offered a form of apology, but thereafter, renewed his attacks on the SOGI materials, allying himself with groups such as Culture Guard, a group established by notorious anti-LGBTQ activist Kari Simpson.

5. In the course of this controversy, the media turned to the Defendant for comments on various matters of public interest, including comments about a complaint filed by the BCTF against the Plaintiff.

6. On September 19, 2018, the Plaintiff, through counsel demanded the Defendant retract and apologize to him. The demand, which was leaked to a local website the same day, did not cite specific publications by the Defendant, but only listed defamatory imputations that he had alleged the Plaintiff had made in his comments.

7. The Plaintiff commenced this action on October 12, 2018. In his pleadings, he has sought to hold the Defendant liable for statements made by non-parties, including BC's Education Minister, and for protest signs made by people opposed to the Plaintiff's position on SOGI.

8. The Plaintiff has also alleged a "smear campaign" involving the Defendant and others.

9. In this application, the Plaintiff relies on the "smear campaign", which in its substance amounts to claim in conspiracy unsupported by facts or particulars, in seeking a broad array of documents, including internal BCTF communications, communication with media and other third parties.

10. On March 7, 2019, the Defendant brought an application to strike parts of the Plaintiff's Notice of Civil, which application was scheduled to be heard on April 26, 2019 (the "Pleadings Application").

11. In his response to the Defendant's application filed March 26, 2019, the Plaintiff provided an estimate of 1-2 days for the hearing of the Defendant's application.

12. The Plaintiff has set down his application for the same day as the Plaintiff's application, and had provided a time estimate of two hours.

13. On April 23, 2019, the Defendant served the Plaintiff with an application pursuant to s.4 of the *Protection of Public Participation Act*, SBC, 2019, c.3 seeking to dismiss the Plaintiff's claim (the "PPPA" Application").

14. Section 5 of the *Protection of Public Participation Act* provides as follows:

> **5** (1)Subject to subsection (2), if an applicant serves on a respondent an application for a dismissal order under section 4, no party may take further steps in the proceeding until the application, including any appeals, has been finally resolved.

Part 5: LEGAL BASIS

1. As a result of the service of the PPPA Application on the Plaintiff on April 23, 2019, both the Pleadings Application of the Defendant and this Application are stayed and cannot be heard until after the PPPA Application has been resolved, including any appeals. Accordingly, both applications should be adjourned until after the PPPA Application has been resolved, including any appeals.

2. Even if the pleadings application and the documents application are not stayed by virtue of the PPPA Application, which is not admitted, the Defendant's Pleadings Application should be heard prior to the Plaintiff's documents application, since any changes in the Notice of

Civil Claim ordered by the Court may alter the scope of the document production obligations of the Defendant.

Part 6: MATERIAL TO BE RELIED ON

1. The pleadings filed herein.

The Applicant Respondent estimates that the application will take 5 minutes.

[Check whichever one of the following boxes is correct and complete any required information]

☒ The Application Respondent has filed in this proceeding a document that contains the Application Respondent's address for service.

☐ The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is: _____

Date: April 23, 2019

Christopher M. Dafoe
Signature of ☐ Application Respondent
☒ lawyer for Application Respondent

No. S35152
Chilliwack Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BARRY NEUFELD

PLAINTIFF

AND:

GLEN HANSMAN

DEFENDANT

NOTICE OF APPLICATION

Name of applicant: The Defendant, Glen Hansman

To: The Plaintiff, Barry Neufeld

TAKE NOTICE that an Application will be made by the Applicants to the presiding Judge at the Courthouse at 800 Smithe Street , in the City of Vancouver, in the Province of British Columbia, on July 4, 2019 at 9:45 a.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. That the Claim of the Plaintiff against the Defendant be dismissed, pursuant to section 4 of the *Protection of Public Participation Act,* SBC, 2019, c.3.

2. That the Plaintiff pay the Defendant his costs on a full indemnity basis, pursuant to section 7 of the *Protection of Public Participation Act,* SBC, 2019, c.3.

3. That, pursuant to s. 5 of the *Protection of Public Participation Act,* SBC, 2019, c.3 that, once this application is served on the Plaintiff, no party may take any further step in this action until this Application is resolved, including any appeal.

Part 2: FACTUAL BASIS

1. The Plaintiff, Barry Neufeld, is an elected trustee of the Chilliwack Board of Education, School District No. 33. Trustees are elected to serve as members of the Board of Education and oversee the plans, policies and budgets of the School District. The *School Act* sets out school trustees' responsibilities.

2. On October 23, 2017, Trustee Neufeld took to the social media website Facebook and made the following post on his publicly available Facebook page:

> "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 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 [sic] a bigoted homophobe, I have to say that I support traditional family values and I agree with the College of Paediatricians [sic] that allowing little children to choose to change gender is nothing short of child abuse. But now the BC Ministry' of Education has 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 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.
>
> (the "Facebook Post")

3. Within hours, various news media had reported on the Facebook Post and, as news media are expected to do, sought comments from people and groups for their reaction to the Facebook Post.

4. In the days that followed, news media published comments about the Facebook Post from a variety of people, including other Chilliwack school trustees; a group representing lesbian, gay, bisexual, transgender and queer (LGBTQ) people; local parents, and others.

5. One of the people interviewed by news media about the Facebook Post was the

Defendant, Glen Hansman. At the time (October 2017), Mr. Hansman was the President of the British Columbia Teacher's Federation, the trade union that represents all public school teachers in British Columbia (the "BCTF").

6. In his role as President of the BCTF, Mr. Hansman is frequently called on by 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.

7. The term SOGI, which Trustee Neufeld used in the Facebook Post, is an acronym that refers to sexual orientation and gender identity.

8. In 1992, sexual orientation was added to the *Human Rights Code* as a protected ground of discrimination. The *Code* was updated again in 2016 when the terms "gender identity or expression" were explicitly added as protected grounds. Prior to that, individuals alleging discrimination on the basis of gender identity or expression had their claims addressed under the grounds barring discrimination on the basis of sex.

9. Shortly after the *Code* was amended to include "gender identity or expression", an existing Ministerial Order on standards for school codes of conduct was updated to require that school boards include "gender identity or expression" in their codes of conduct. The BCTF supported this update to the *Provincial Standards for Codes of Conduct Order* and Mr. Hansman was present for the press conference with the Minister of Education on September 7, 2016.

10. The BCTF is a partner in the "SOGI 123" collaboration, which includes a website developed to share SOGI-inclusive tools and resources. The other partners include the ARC Foundation, the Ministry of Education, UBC Faculty of Education and LGBTQ community organisations.

11. The SOGI 123 materials were developed in consultation with various stakeholder groups, with the with goal of making schools safer and more inclusive places for all children, and in particular those children who may have been historically ignored or ostracized because of their sexual orientation or gender identity.

12. The SOGI 123 materials aim to achieve this goal by presenting information about sexual orientation and gender identity issues to students in K-12 in an age-appropriate manner. The SOGI 123 materials are, and were at material times, publicly available on a website found at the URL https://www.sogieducation.org/.

13. In addition to his role as the President of the BCTF, and as a public supporter of SOGI 123, Mr. Hansman's views on the Facebook Post may have been of interest to news media because he has been a teacher in British Columbia for 12 years, and identifies as a gay man, and therefore has both experienced and observed the discrimination and other challenges faced by LGBTQ youth in schools.

14. On October 24 and 25, 2017, Mr. Hansman was interviewed by, among others, reporters from the Vancouver Sun, Global News, and the Huffington Post. Some of the comments he made were republished and/or broadcast by those media outlets, either in verbatim form or in paraphrase, and those comments are among the words spoken or published by Mr. Hansman that Trustee Neufeld complains of in this Action.

15. On October 25, 2017, Trustee Neufeld made another post on his Facebook page, in which he apologized to "those who felt hurt by my opinion" and claimed that "I am critical of an educational resource and not individuals". He also claimed that "Those who have worked with me for over 24 years know that I DO believe in inclusion and a safe learning environment for all of our students".

16. On November 21, 2017, Mr Neufeld appeared and spoke at a rally at the Evergreen Cultural Centre in Chilliwack. The rally was organized by Culture Guard, a group founded by Kari Simpson, a notorious anti-LGBTQ activist, and was attended by supporters of Culture Guard and opponents of SOGI-inclusive schools. The rally was also attended by protestors opposed to Culture Guard's agenda and to Trustee Neufeld's position on the SOGI and LGBTQ issues.

17. The controversy that the Facebook Post started continues to the present day.

18. The issue of SOGI-inclusive schools and Trustee Neufeld's reaction to it, has been raised repeatedly at Chilliwack school board meetings, both by school trustees in the

course of their meetings and by parents, teachers and other citizens during the time allotted at school board meetings for questions from the public. The debates and discussions have extended beyond Chilliwack.

19. The BCTF and the Canadian Union of Public Employees ("CUPE"), both unions whose members work in the Chilliwack school district, have filed complaints about Trustee Neufeld's public statements with the BC Human Rights Tribunal (the "BCHRT"). Mr. Hansman was interviewed about the BCHRT complaint. His comments about the BCHRT complaint are among the publications that the Plaintiff complains of in this Action.

20. The SOGI-123, move to more inclusive schools and Trustee Neufeld's opposition to these development were among the defining issues in the Chilliwack school board election held in October 2018.

21. In anticipation of the election, Trustee Neufeld and others formed an anti-SOGI slate of seven school board candidates to run together in the election scheduled for October 20, 2018.

22. In that election, the anti-SOGI slate elected three candidates, including Trustee Neufeld. The anti-SOGI slate fell short of holding a majority on the school board after a recount did the slate had demanded not change the result for the final seat on the school board.

23. On September 19, 2018, during the run-up to the election, Trustee Neufeld, through his counsel, sent Mr. Hansman a letter demanding that he retract his comments and apologize to Trustee Neufeld (the "Demand Letter"). The Demand Letter did not identify particular publications or statements made by Mr. Hansman, but rather claimed that Mr. Hansman and "other activists embarked on a campaign of harassment, intimidation and vilification" of Trustee Neufeld and set out various allegations that Mr. Hansman was said to have made about Trustee Neufeld in the course of that campaign.

24. On the same day that the Demand Letter was delivered, and before Mr. Hansman had responded, the Demand Letter was published in the Valley Voice News, an online

publication focussed on the Fraser Valley, which reported that it had been notified by Trustee Neufeld that he was suing Mr. Hansman for defamation.

25. Trustee Neufeld filed the Action herein on October 12, 2018, just over a week before the school board election.

26. In his Notice of Civil Claim, Trustee Neufeld seeks to hold Mr. Hansman liable, not only for comments Mr. Hansman made about Trustee Neufeld, his opposition to SOGI 123, SOGI-inclusive schools, and his fitness for public office, but also for comments concerning Trustee Neufeld made by other persons, including BC. Education Minister Rob Fleming, transgender activist Morgane Oger, and unnamed protesters who, at meetings and rallies, carried signs critical of Trustee Neufeld.

27. Mr. Hansman filed his Response to Civil Claim on 5 November 2018.

28. On January 2, 2019, Trustee Neufeld filed an Amended Notice of Civil Claim. The amendments were a reference to a media release Trustee Neufeld published in January 2018, and comments made by Mr. Hansman in October 2018 concerning the defamation action commenced by Trustee Neufeld, a report by the Press Progress news website concerning other controversial statement made by Trustee Neufeld on his Facebook page, and the results of the Chilliwack School Board elections.

29. In his Amended Response to Civil Claim filed on 23 January 2019, Mr. Hansman pleads fair comment, qualified privilege and justification.

30. A 10-day jury trial is scheduled for December 2019 in the Chilliwack Courthouse.

Part 3: LEGAL BASIS

1. The *Protection of Public Participation Act*, SBC 2019, c.3 (the "Act") received Royal Assent on March 25, 2019. Section 2 of the Act provides that it applies in respect of proceedings commenced on or after May 15, 2018.

2. While the *Act* is new to British Columbia, it is modelled on legislation that has been in force in Ontario since 2015.

3. In Ontario, the legislation is found at s.137.1 of Part VII of the *Courts of Justice* RSO, 1990 c. C. 43. The provisions of that legislation have been cited in at least 74 decisions since they came into force, including 16 decisions of the Ontario Court of Appeal, six of which were heard by a single division of the Court of Appeal, and were released together on August 30, 2018.

4. The Uniform Law Conference of Canada also adopted a model version of the *Act*, with commentary.

5. The Ontario legislation contains a clause that speaks to its purpose:

> (a) to encourage individuals to express themselves on matters of public interest;
>
> (b) to promote broad participation in debates on matters of public interest;
>
> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and,
>
> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

6. While the BC *Act* does not include a statement of purpose, the Attorney General of British Columbia echoed those purposes in introducing the Bill for second reading in February 2019. The Attorney General said:

> This is a bill that is intended to protect an essential value of our democracy, which is public participation in the debates of the issues of the day, and in particular, to respond to a mischief that has arisen, which is people who are powerful and wealthy and able to afford lawyers initiating lawsuits or threatening lawsuits against individuals who are critical of them in order to stop them from participating in that public debate.
>
> 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 the values that this bill is aimed at addressing.

7. Given the substantial similarities between the Ontario legislation and the *Act*, the decisions of the Ontario Court of Appeal, while not binding on this Court, are persuasive and may be helpful to this Court.

8. The substantive provisions of the *Act*, which permit the Court to dismiss claims, are found Section 4 of the *Act*, which provides as follows:

> **Application to court**
>
> 4 (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that
>
> (a) the proceeding arises from an expression made by the applicant, and,
>
> (b) the expression relates to a matter of public interest.
>
> (2) If the applicant 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 satisfies the court that
>
> (a) there are grounds to believe that
>
> (i) the proceeding has substantial merit, and
>
> (ii) the applicant has no valid defence in the proceeding, and
>
> (b) 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

9. The Ontario Court of Appeal summarized the operation of an identical provision as follows:

> Stripped to its essentials, s. 137.1 allows a defendant to move any time after a claim is commenced for an order dismissing that claim. The

> defendant must demonstrate that the litigation arises out of the defendant's expression on a matter relating to the public interest. If the defendant meets that onus, the onus shifts to the plaintiff to demonstrate that its lawsuit clears the merits-based hurdle in s. 137.1(4)(a) and the public interest hurdle in s. 137.1(4)(b).[1]

The Defendant's burden under s. 4 of the *Act*

10. Section 1 of the *Act* defines "expression" broadly as "any communication whether made verbally or non-verbally, publicly or privately, and whether it is directed or not directed at a person or entity."

11. In this case, the proceeding arises out of comments Mr. Hansman made about Trustee Neufeld when Mr. Hansman was being interviewed by reporters, which comments were either republished in print form, or rebroadcast in video or audio form by those reporters; accordingly, Mr. Hansman has satisfied the requirements of 4(1)(a) of the *Act* set forth above.

12. The Act does not attempt to define "a matter of public interest". However, the Ontario Court of Appeal observes that, "Statements about a candidate's fitness for office made in the course of an ongoing election campaign undoubtedly qualify as expression relating to a matter of public interest".[2]

13. Similarly, statements about an office holder's fitness to *continue to hold* that office also undoubtedly qualify as expression related to a matter of public interest.

14. Other matters of public interest raised by Mr. Hansman in his comments about Trustee Neufeld include the impact of the statements of an elected school board official on students and teachers; the education of young people on issues such as sexual orientation and gender identity; and, the equality rights and dignity of vulnerable sexual minorities.

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[1] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at para. 7 ("*Pointes Protection*")

[2] *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689 at para.15.

15. The question of whether expression relates to a matter of public interest may be a contentious issue in some cases, including defamation cases. Our courts, for example, have drawn a distinction between matters that are of public interest, and other matters, such as celebrity scandals, that are merely of interest to the public.[3] Mr. Hansman's comments in this case clearly fall into the former category. It is plain and obvious that Mr. Hansman's expression(s) throughout this dispute is about matters of public interest, and is the kind of expression that the Act is meant to protect.

The Plaintiff's burden under s. 4 of the Act.

16. Once the defendant/applicant satisfies its initial burden, the burden then shifts to the plaintiff/respondent to satisfy the Court that there are grounds to believe his or her claim has "substantial merit" and that the defendant has "no valid defence".

Section 4(2)(a)(i) -- Substantial Merit

17. In this case, there are serious doubts as to the merits of the Plaintiff's case, which merits are the subject of the inquiry under s. 4(2)(a) of the Act. These include:

a. The fact that the Trustee Neufeld is suing the Mr. Hansman for words that were spoken or published by other persons, namely, Education Minister Rob Fleming, Morgane Oger, and the citizens who protested against Trustee Neufeld on various occasions, all parties that Trustee Neufeld chose not to sue.

b. The fact that Trustee Neufeld alleges a "smear campaign", a claim that sounds in conspiracy, yet fails to name as defendants any of those persons who allegedly conspired with Mr Hansman as part of the alleged "smear campaign".

c. The fact that the damages particularized by the Trustee Neufeld at paragraph 47 of his Amended Notice of Civil Claim are the result of decisions made and acts done by persons other than the Mr. Hansman, including Trustee Neufeld's fellow school trustees and the Maple Ridge School Board. The connection between those decisions, and Mr. Hansman's comments about Trustee

[3] See *Grant v. Torstar Corp.*, [2009] 3 SCR 640, 2009 SCC 61 at paras. 102-105

Neufeld, is tenuous as best.

d. The fact that Trustee Neufeld not only started this Action in the midst of an election campaign, nearly a year after Mr. Hansman first made comments about him, but announced he was doing so on the same day that he demanded a retraction and apology from Mr. Hansman. This conduct and the timing of it supports an inference that Trustee Neufeld's aim in this litigation was not redeem his reputation, but rather to silence his critics and opponents, and to fire up his base of supporters so as to elect an anti-SOGI slate.

e. There is also reason to believe that Trustee Neufeld commenced the Action in retaliation for the complaint filed at the HRT by the BCTF. In his Notice of Civil Claim, Trustee Neufeld attacks that complaint as "abusive and absurd". In the circumstances, Mr. Hansman asks this Court to draw the inevitable inference that the Trustee Neufeld started this Action in whole or in part in bad faith or for an improper purpose.

Section 4(2)(a)(ii): No Valid Defence

18. Mr. Hansman, on the other hand, has two valid and strong defences to Trustee Neufeld's claims: qualified privilege and fair comment.

19. The occasion of qualified privilege arises because, despite Trustee Neufeld's claim in his October 25, 2017 Facebook "apology", that he was "critical of an educational resource, not individuals", the Facebook Post contained an attack on those who created and promoted SOGI 123, including Mr. Hansman in his personal capacity and as President of the BCTF.

20. A "weapon of propaganda" – Trustee Neufeld's characterization of SOGI 123 – does not deploy itself; and the use of the word "propaganda" imputes dishonesty, calculation, manipulation and bad faith to those who created, supported and promoted SOGI 123. The words "radical cultural nihilists" also carry a defamatory sting. A reasonable person would infer the above words refer to the persons who developed, distributed, supported and use the SOGI materials, a group that included both members

of the BCTF and Mr. Hansman.

21. Such attacks by Trustee Neufeld give rise to an occasion of qualified privilege, which allows the person or persons attacked to reply, not only by defending themselves, but by calling into question the motives, character and bona fides of their accuser. The reply is protected by qualified privilege, even if it involves strong or confrontational language, so long as it is "germane and reasonably appropriate to the occasions", which is to say that the reply does not go beyond that matter that gave rise to the occasion of privilege: see, for example, *Ward v. Clark*, 2001 BCCA 724.

22. Mr. Hansman also pleads fair comment, which protects comments made on matters of public interest. Despite the nomenclature, the comment need not be fair, but only recognizable as a comment, a term that includes "a deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof"[4]: Mr. Hansman's comments concerning Mr. Neufeld clearly fall within that definition, and would not be understood by as statements of fact.

23. If the Plaintiff persuades the Court that there are grounds to believe his claims have substantial merit, and ground to believe the Defendant does not have a valid defence, the Court must still weigh the injury the Plaintiff has suffered as a result of the expression against the public interest in permitting a full and vigorous airing of views on the matter of public interest.

Section 4(2)b

24. The Ontario Court of Appeal called this provision the "heart" of the legislation:

> The section declares that some claims that target expression on matters of public interest are properly terminated on a motion, even though they could succeed on their merits at trial. The "public interest" hurdle reflects the legislature's determination that the success of some claims that target expression on matters of public interest comes at too great a cost to the

[4] *WIC Radio v. Simpson*, 2008 SCC 40 at para. 26, citing *Ross v. New Brunswick Teachers' Assn*, 2001 NBCA 62 at para 56

public interest in promoting and protecting freedom of expression.[5]

25. On the plaintiff's side of the scale – the scale used to balance reputation and discourse on matters of public interest -- the Court noted:

> ....the harm suffered or likely to be suffered by the plaintiff as a consequence of the defendant's expression will be measured primarily by the monetary damages suffered or likely to be suffered by the plaintiff as a consequence of the impugned expression. However, harm to the plaintiff can refer to non-monetary harm as well.

26. In this case, Trustee Neufeld does not plead any special damages, or allege any financial loss flowing from the comments made by Mr. Hansman. His damages appear to be limited to reputational harm and emotional distress. The only harms particularized in the Amended Notice of Civil Claim are related to the deterioration of Trustee Neufeld's relationship with other members of the school board and the restrictions that have been placed on his activities as a Trustee.

27. In light of the polarizing effect of the Facebook Post, and Trustee Neufeld's subsequent association with Ms. Simpson, herself a polarizing figure, it seems unlikely that Mr. Hansman's comments about Trustee Neufeld and his views on SOGI-inclusive schools and SOGI 123 are a significant cause, much less the primary cause, of Trustee Neufeld's various troubles.

28. On the other hand, allowing the Action to proceed would not only silence Mr. Hansman, but would stifle debate on matters that lie at the heart of democracy, including the fitness of elected public officials to hold office; the education of children; and the protection of vulnerable people within the school system.

29. In this case, Trustee Neufeld's concerns about his reputation should give way to free and open debate about these matters that are of critical public interest.

30. The Action should be dismissed, and Mr. Hansman should have his costs, as contemplated the Act

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[5] *Pointes Protection* at para. 86.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit # 1 of Glen Hansman made April 17, 2019;
2. Affidavit #1 of Sara Dettman made April 17, 2019;
3. The Pleadings filed herein;
4. Such other material as the applicant may advise and the Court may allow.

The Applicant estimates that the Application will take two hours.

[*Check the correct box.*]

☐ This matter is within the jurisdiction of a master.

☒ This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: 23/APR/2019

Signature of

☐ applicant ☒ lawyer for applicant

Christopher Dafoe

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs ..... of Part I of this notice of application

[ ] with the following variations and additional terms:

.....

.....

.....

Date: ....

Signature of [ ] Judge [ ] Master

Form 33 (Rule 8-1 (10)

NO. S35152
CHILLIWACK REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BARRY NEUFELD

PLAINTIFF

AND:

GLEN HANSMAN

DEFENDANT

APPLICATION RESPONSE

Application response of the Plaintiff BARRY NEUFELD

THIS IS A RESPONSE TO the notice of application of the Defendant, filed April 23, 2019.

Part 1: ORDERS CONSENTED TO

The Plaintiff consents to granting of the orders set out in the following paragraphs of Part I of the notice of application: NIL

Part 2: ORDERS OPPOSED

The Plaintiff opposes the granting of orders set out in paragraphs 1, 2 and 3 of Part I of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Plaintiff takes no position on the granting of the orders set out in the following paragraphs of Part I of the notice of application: NIL

Part 4: FACTUAL BASIS

1. The defendant admits making the statements alleged in the Notice of Civil Claim.

2. This application was delivered two days before a full day hearing on the defendant's application to strike portions of the claim was to be heard. This enabled the defendant to avoid that hearing, to avoid the examinations for discovery set for June 11 and 12, 2019, to avoid a trial management conference set for July 18, 2019 and possibly to avoid the trial presently set for December 2, 2019. (see procedural history below)

3. The plaintiff alleges that the defendant's conduct was actuated by malice (para. 38) and that defamatory meanings were conveyed "*...both expressly and by innuendo...*" (para. 34). Both false and legal innuendo are pleaded (paras. 49 and 50).

4. The plaintiff further pleads that the defendant collaborated with others in a smear campaign (para. 30). This is important to the factual matrix. Subject to republication, the plaintiff is not suing the defendant for the statements of others.

5. The defendant has refused to produce documents remotely close to the requirements of Rule 7-1. In fact, much of the material he tenders on this application is not listed.

Affidavit #1 of J.Thorsell,
Ex. A Defendant's List of Documents, Feb. 14, 2019
Ex. B Jaffe letter, Feb. 19, 2019
Ex. C Dafoe letter, March 5, 2019

Affidavit #2 of J. Thorsell,
Ex. A samples of defendant's emails to the public

6. As to the "smear campaign", the defendant concedes (para.16 of the ARCC) he "*worked with Members of the BCTF to make their concerns about the Plaintiff's statements and Facebook post known to the public and school board officials*". Yet nothing has been produced relative to such efforts, nor any related communications within the BCTF, with other public sector unions, with the media or with anybody else.

7. In January, 2018, CUPE and School Board District 33 issued similar press releases about the plaintiff. The plaintiff issued his own press statement to mitigate matters.

Affidavit #1 of R. Britten, Ex. E, F and G

8. Whether young children ought to be introduced to the prospect of gender transitioning is controversial.

Affidavit #1 of R. Britten,
Ex. A Johns Hopkins Psychiatrist: Transgender is 'Mental Disorder;' Sex Change 'Biologically Impossible'
Ex. J Hansard, L.Throness, MLA

9. The vilification and persecution of the plaintiff has raised concerns about freedom of speech and has attracted national media attention.

Affidavit #1 of R. Britten,
Ex. H: "B.C. school official protests "transgender education" -- and pays the price"

10. The claim herein does not directly or indirectly challenge, circumvent, qualify, undermine, prejudice or in any way affect either of the two BC Human Rights Tribunal prosecutions initiated by the BCTF and CUPE.The outcome those proceedings is immaterial to this defamation claim.

11. However, the HRT proceedings is important to the factual matrix. Commencement of those proceedings enabled a reactivation of the smear campaign as pleaded (para. 23).

12. Once the unions commenced their HRT prosecutions, the defendant's ongoing vilification of the plaintiff often mentioned those proceedings. Regardless of merit, the HRT prosecution is highly stigmatizing. It adds to the sting of the libel, especially regarding somebody like a school board trustee. In addition, to the extent innuendo is necessary to derive defamatory meaning, it is a material extrinsic fact.

Affidavit#1 of J. Thorsell,
Ex. D media publications - HRT prosecution

13. As to the defendant's claims the plaintiff was spreading hatred, the plaintiff has

pleaded two sections of the Criminal Code of Canada which describe such misconduct (para. 35). As the defendant admits, his statements included:

Para. 20: he "promoted hatred"
Para. 24: "...his comments "...exposed them [trans people] to hatred."
"...he is creating a school environment... that is discriminatory and hateful,"

Para. 25: he "....tip toed quite far into hate speech"
Para. 26: his "hateful" public comments about trans people have created an unsafe work environment

Para. 29: he was "...continuing to spread hate about LGBTQ people "

14. The risk of parents losing custody of their children for failing to accept state ordained gender ideology attracted publicity under the former government in Ontario.

Affidavit #1 of R. Britten,
Ex. B "Ontario Makes Disapproval of Kid's Gender Choice Potential Child Abuse"

15. The defendant's accusations of hatred and bigotry directed at those he disagrees with are not confined to the plaintiff. For example, as regards another critic of SOGI running for school board, he proclaimed:

"It is extremely problematic to have somebody who is running as a school trustee continuing to spread hate about LGBTQ people — especially trans people — and also be out there, making vile comments about refugees and immigrants, as a group."

Affidavit #1 of R. Britten,
Ex. I "BCTF president speaks out against anti-refugee, anti-LGBTQ school trustee candidates" CityNews 1130, Sept. 16/18

Procedural History

Plaintiff's Demand for Apology	Sept.19/18
Particulars of defendant's "hate speech" allegations	Sept. 24/18
Defendant's refusal to apologize	Sept. 27/18
NCC filed	Oct. 12/18
RNCC filed	Nov. 5/18
Reply filed	Nov. 8/18
Amended NCC	Jan. 2/19
Notice of Trial	Jan. 2/19
Amended RNCC	Jan. 23/19
Defendant's "List of Documents"	Feb. 14/19
Plaintiff's demand for further documents	Feb. 19/19

Defendant's refusal to provide further documents	March 5/19
Defendant's application to strike pleadings	March 7/19
Confirmation of April 26/19 hearing	March 14/19
Plaintiff's Response to above pleadings application	March 26/19
Plaintiff's cross application for further documents	April 1/19
Defendant's PPP Act application	April 23/19
Defendant's Response to Plaintiff's documents application	April 24/19

Part 5: LEGAL BASIS

1. This case is not about whether SOGI is a good resource, whether young children ought to be introduced to the prospect of gender transitioning or whether it is the job of teachers, as opposed to parents, to address such matters with children.

2. This litigation is about whether people may be critical of the prevailing gender ideology without being portrayed as spreading hatred and other such vile defects.

3. There can be no serious question that labelling people as intolerant, bigoted, discriminatory, homophobic and/or hateful is defamatory. The test is often stated as:

> *"Expression which tends to lower a person's reputation in the estimation of right-thinking members of society generally, or to expose a person to hatred, contempt or ridicule, is defamatory."*

Lawson v. Baines, 2011 BCSC 326, at para. 28 (quoting the SCC in Cherneskey)

4. Fair comment and qualified privilege defences fail if the subject statement(s) was actuated by malice, a concept defined broadly in defamation law to include:

> *".... an improper purpose or indirect motive which includes, amongst other things, engaging in a course of action for one's own benefit or advantage, or for the purpose of harassing or intimidating the plaintiff."*

CFAR v. Can. Jewish Congress et al. [1999] B.C.J. No. 2160, per Romilly J. at para. 36

The Protection of Public Protection Act (the Act)

5. Anti- SLAPP legislation seeks to address such concerns as plaintiffs using litigation or threats of litigation and the exploitation of a financial imbalance to punish and

silence critics and/or stifle debate on matters of public interest, often in circumstances where a plaintiff's damages are minimal or nominal.

Platnick v. Bent, 2018 ONCA 687 (see para. 99)

6. It would be patently absurd for the president of the powerful BCTF (45,000 members) to contend his freedom of expression is threatened by a solitary school board trustee in Chilliwack.

7. However, despite no indicia of SLAPP herein, there is nothing which precludes using the Act to inflict the very kind of mischief it was meant to prevent.

8. Absent the procedural relief sought by the plaintiff below, the mere bringing of the application has not just run up the plaintiff's costs, it has destroyed any chance for "*...the just, speedy and inexpensive determination....on the merits.*"

This is Not a Summary Trial

9. As evident by the volume and nature of the defendant's material on this application, he is effectively seeking a summary trial. However, as the Ontario Court of Appeal stated about the Ontario legislation:

[73] Turning to the specific language of ss. 137.1(4)(a)(i) and (ii), the interpretation must begin by recognizing the purpose of s. 137.1. It provides a judicial screening or triage device designed to eliminate certain claims at an early stage of the litigation process. Sections 137.1(4)(a) and (b) identify the criteria to be used in that screening process. Section 137.1 ***does not provide an alternate means by which the merits of a claim can be tried, and it is not a form of summary judgment intended to allow defendants to obtain a quick and favourable resolution of the merits*** *of allegations involving expressions on matters of public interest. Instead, the provision aims to remove from the litigation stream at an early stage those cases, which under the criteria set out in the section, should not proceed to trial for a determination on the merits.*

[74] Judicial screening of claims at a pretrial stage occurs in both criminal and civil litigation. The purpose of the screening process varies, as do the screening criteria. ***Judges engaged in pretrial screening generally do not make, however, findings of fact in relation to the issues on which the litigation turns, credibility determinations, or any ultimate assessment of the merits of a claim or a defence.***

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[77] The motion records compiled by the parties on s. 137.1 motions will be more abbreviated than would be expected at a later point in the proceedings. When assessing the merits for the purposes of s. 137.1(4)(a), ***the motion judge cannot approach the record as if it were a trial record or even a r. 20 summary judgment record****: Rules of Civil Procedure, R.R.O. 1990, Reg. 194. Those records undoubtedly allow for a more fulsome and thorough scrutiny of the merits of the claim and the validity of any defence. The merits inquiry under s. 137.1(4)(a) will reflect the limits imposed by the nature of the record.*

[78] ***Motion judges must be careful that s. 137.1 motions do not slide into de facto summary judgment motions.*** *If the motion record raises serious questions about the credibility of affiants and the inferences to be drawn from competing primary facts,* ***the motion judge must avoid taking a "deep dive" into the ultimate merits of the claim*** *under the guise of the much more limited merits analysis required by s. 137.1(4)(a). If it becomes apparent to the motion judge that a proper merits analysis would go beyond what could properly be undertaken within the confines of a s. 137.1 motion, I think the motion judge should advise the parties that a motion for summary judgment would provide a more suitable vehicle for an expeditious and early resolution of the claim.[7]*

1704604 Ont. Ltd. v. Pointes Protection Ass., 2018 ONCA 685 , per Doherty J.A.

10. In addition, even if this was a summary trial, much of the defendant's "evidence" is clearly hearsay and inadmissible for the purpose advanced by the defendant herein.

The merit threshold

11. As the Ontario Court of Appeal stated:

[79] The specific inquiries required of the motion judge under s. 137.1(4)(a) must be responsive to the language of the section. The motion judge must first satisfy himself or herself that there are reasonable grounds to believe that the claim has "substantial merit". Again, ***I emphasize that it is not for the motion judge to decide whether he or she thinks that the claim has "substantial merit"****. It is for the motion judge to determine whether it could reasonably be said, on an examination of the motion record, that the claim has substantial merit.*

[80] .... ***A claim has "substantial merit" for the purposes of s. 137.1 if, upon examination, the claim is shown to be legally tenable and supported by evidence, which could lead a reasonable trier to conclude that the claim has a real chance of success.***

1704604 Ont. Ltd. v. Pointes Protection Ass., 2018 ONCA 685 , per Doherty J.A.

Defamation Law Remains Intact

12. This application must be addressed in the context of the well established principles of defamation law. The Act has not extinguished these features. On the general relationship between legislation and the common law, this court has noted:

*"As a matter of construction, **legislation is presumed to leave the common law intact** absent express language to contrary H.C.F. v. D.T.F., 2017 BCSC 1226 at para. 159. As a general rule, the Legislature is presumed not to depart from prevailing law "without expressing its intention to do so with irresistible clearness".....*

Lougheed Estate v. Wilson, 2017 BCSC 1366 per Dardi J. at para. 600

13. With respect to Ontario's version of the Act, the Ontario Court of Appeal confirmed:

> *[46] Significantly, **the Act does not, except in a minor way, alter the substantive law** as it relates to claims based on expressions on matters of public interest.[3] There are no new defences created for those who speak out on matters of public interest. **The law of defamation remains largely unchanged.***

14. Fundamental principles of defamation law, as frequently affirmed by BC courts, include:

*[70] To obtain judgment, the plaintiff must prove three things: i) that the impugned words were defamatory; ii) that they referred to the plaintiff; and iii) that they were published, meaning that they were communicated to at least one other person. Where the plaintiff establishes these elements, falsity and **damage are presumed** **and the onus shifts to the defendant to advance a defence** in order to escape liability. Defamation is a tort of strict liability, so it is **unnecessary to prove that the defendant was careless or intended to cause harm**: Grant at paras. 28–29.*

<><>

[122] The elements required to establish defamation are set out in the Supreme Court of Canada decision in Grant v. Torstar, 2009 SCC 61 at para. 28 [Grant]:

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. If these elements are established on a balance of probabilities, **falsity and damage are presumed**, though this rule has been subject to strong criticism… The **plaintiff is not required to show** that the defendant intended to do harm, or even that the defendant was careless. **The tort is thus one of strict liability.

Weaver v. Corcoran et al., 2017 BCCA 160, per Dickson JA, at paras. 70, 122

*[262] Where the plaintiff establishes a prima facie case of defamation, **falsity and***

damage are presumed *and the* ***onus shifts to the defendant to advance a defence*** *in order to escape liability.* ***Defamation is a tort of strict liability,*** *so it is unnecessary to prove that the defendant was careless or intended to cause harm: Grant at paras. 28-29.*

Somani v. Jilani, 2018 BCSC 1331, per Sharma, J. at para. 262

[126] Where the plaintiff establishes a prima facie case of defamation, ***falsity and damage are presumed and the onus shifts to the defendant to advance a defence*** *in order to escape liability. Defamation is a tort of strict liability, so it is unnecessary to prove that the defendant was careless or intended to cause harm: Grant at paras. 28-29.*

Pan v. Gao, 2018 BCSC 2137, per Sharma J. at para. 126

[287] ***General damages are presumed from the publication of a defamatory statement and need not be established by proof of actual loss*** *and are assessed at large in light of the circumstances of the case: Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at para. 164 [Hill].*
<><>
[289] In a defamation case, "the damages which are available to [a plaintiff] are damages at large not requiring [a plaintiff] to prove actual loss or injury": John v. Kim, 2007 BCSC 1224 at para. 94.

Holden v. Hanlon, 2019 BCSC 622, per Dardi J. at paras. 287,289

[explaining the presumption of damages in certain slander cases]
"....There are four recognized categories of slander where ***damages are presumed to have been suffered from the very nature of the words,*** *and thus are instances of slander per se: see R. E. Brown, The Law of Defamation in Canada (2nd ed. (loose-leaf)), at pp. 8-23 and 8-24. The two categories on which Mr. Marley relies are: (1) oral imputations calculated to disparage the reputation of the plaintiff in the way of his or her work, business, office, calling, trade or profession; and (2) accusations imputing the commission of a criminal offence."*

Gordić v. Vidović 2014 BCSC 1897, per Burnyeat J. at para. 36

15. Accordingly, this application proceeds on the basis that: i) there is no onus on the plaintiff to disprove defences raised by the defendant, and ii) the presumption of damages upon publication of defamatory comments about the plaintiff applies herein.

The Public Interest Hurdle

16. As to section 4(2) (b) of the Act: Damage caused by the defamation herein is both presumed by law and common sense on the present facts. Denying the plaintiff's ability to clear his name clearly outweighs any conceivable compromise to freedom

of speech enjoyed by the president of a powerful public sector union. In addition, as the evidence indicates, this case raises important issues of freedom of speech.

Relief Sought by the Plaintiff

17. The plaintiff seeks to have his application for a further amended list of documents (filed April 1, 2019) addressed concurrently with the present application. Alternatively, he seeks to have the judge hearing this application assume case management and/or establish a time line for all pre-trial steps necessary to preserve the trial date.

18. In addition, the plaintiff seeks to make submissions on costs of this application separately from these main submission on factors not presently advanced.

Part 6: MATERIAL TO BE RELIED UPON

1. Affidavit #1 of Jacqueline Thorsell, made 25/03/2019
2. Affidavit #2 of Jacqueline Thorsell, made 31/03/2019
3. Affidavit #1 of Rosalind Britten made 22/05/2019
4. Defendant's Notice of Application, (to strike pleadings), filed March 7/19
5. Plaintiff's Response to Defendant's pleadings application, filed March 26/19
6 Plaintiff's Notice of Application (for amended list of documents), filed April1/19
7. Defendant's Response to Plaintiff's documents application, filed April 24/19
8. The pleadings herein and such further material as the Respondent may advise and the Court may permit.

The application respondent estimates that the application will take 2-3 days.

Date: May 22, 2019

.....

Solicitor for the Plaintiff
Paul Jaffe, Barrister and Solicitor,
Suite 200-100 Park Royal,
West Vancouver, B.C., V7T 1A2

No. 35152
Chilliwack Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BARRY NEUFELD

PLAINTIFF(S)

AND:

GLEN HANSMAN

DEFENDANT(S)

Application to Dismiss pursuant to the *Protection of Public Participation Act*

REPLY ARGUMENT OF GLEN HANSMAN

ROBYN TRASK — **Counsel for Glen Hansman**
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I. Importance of the Facts

1. When considering the allegations of defamation, the Court should look at the actual media articles in the record in context, chronologically, and consider exactly what was said. This is because in oral submissions the Plaintiff has been imprecise with respect to characterisation of the facts. For example:

a) The Plaintiff alleges that there was an attack on his character which began on October 23, 2017. It is important to note that the responses to Trustee Neufeld's Facebook post were simply that – responses. In the October 23, 2017 post, he prefaces his comments by stating, "At the risk of being labelled a bigoted homophobe…"[1]. His own words indicate that Trustee Neufeld was aware that his Facebook post would trigger a negative reaction.

b) The criticism of Trustee Neufeld did not commence with Mr. Hansman, nor was Mr. Hansman cited particularly frequently in the media articles about this issue.

c) There is no evidence of a smear campaign. It is not at all surprising that a wide cross section of education stakeholders would speak out against Trustee Neufeld's comments.

d) After October 23, 2017, the Plaintiff continued to make ongoing posts on Facebook and other public comments, including at the November 2017 Culture Guard Rally. Mr. Hansman's comments to the media at any point in time should be read in context. For example, Mr. Hansman's comment in the April 2018 CBC article that Trustee Neufeld "shouldn't be 'anywhere near students' and that's why the BCTF has filed a human rights complaint against him"[2] should be viewed within the chronology of events, after repeated comments and posts by Trustee Neufeld; comments by others including parents concerned for their children;[3] and in response to questions from the media

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[1] Neufeld October 23, 2017 Facebook Post, Dettman Affidavit, Exhibit "A".
[2] CBC Article "Controversial Chilliwack school trustee facing human rights complaint from BCTF", Thorsell Affidavit #1, Exhibit "D" at 24.
[3] See for example:
- comment by parent Mallory Tomlinson at a November 2017 Chilliwack School Board meeting that "her children have been directly affected by Neufeld's statements", Dettman Affidavit, Exhibit "SSS" at 328;
- letter from Chilliwack Trustee Paul McManus, December 2017, which included the following, "Trustee Neufeld has made numerous comments that have offended many or our students, staff and parents, with some of his comments being referred to as hate speech and fear mongering. As a result some students and staff are now feeling unsafe in their school environment." Dettman Affidavit, Exhibit "WWW", at 346;

about the filing of the human rights complaint. This is also set out in Mr. Hansman's Affidavit.[4]

e) It is important that the court look at the actual media articles and not just excerpts. In oral submissions the Plaintiff alleged that comments in a City News 1130 article from September 15, 2018 *could* be about Trustee Neufeld *or others*; or, because the comments address anti-SOGI people, the public will think the comments are about Trustee Neufeld. In fact. there is a link in the City News article to the tweet by Mr. Hansman which makes it apparent the tweet is in response to Laura Lynn Thompson, not Trustee Neufeld.[5] The lack of particularization and specificity in the Amended NOCC is the subject of Mr. Hansman's motion to strike several portions of the Amended NOCC filed March 7, 2019.

f) Mr. Hansman never said Trustee Neufeld "hates gay people".

g) The allegation that Mr. Hansman was acting without consulting with others in the union is false and also irrelevant to this Application. Paragraph 42 of Hansman's Affidavit # 1 states:

> Both prior and subsequent to the filing of the Complaint, teachers in Chilliwack have continued to raise concerns with the CTA about the impact of Trustee Neufeld's comments on the school environment. Those concerns have been passed on to me by the CTA President and others from Chilliwack.

II. Hate Speech

2. In oral submissions the Plaintiff made comments about hate speech that require a reply.

3. First, the Plaintiff argued that when Mr. Hansman was quoted as referencing "hateful comments" by Trustee Neufeld, there is an implication of criminal conduct. There is no basis for that allegation. The quotes by Mr. Hansman were made in the context of the BCTF human rights complaint filed with the Human Rights Tribunal and relate to the *Human Rights Code*.[6] Some of the media quotes are quotes taken from the complaint itself.

- January 18, 2018 Chilliwack School Board meeting in which Trustee Neufeld was directed to stay away from schools in the district on the basis that Trustee Neufeld created concerns for the safety of LGBTQ students. Amended Notice of Civil Claim, para. 47 p. 19;
- January 2018 statement by the Minister of Education that, "Mr. Neufeld has jeopardized student safety, divided his school community, and acted against board and ministry policies", Dettman Affidavit, Exhibit "GGGG" at 388.

[4] Hansman Affidavit, paras. 10 to 48.

[5] City News 1130 Article, "BCTF president speaks out against anti-refugee, anti-LGBTQ school trustee candidate", Thorsell Affidavit #1, Exhibit "D" at 32, link in article; See also p. 15 of Amended Response to Civil Claim.

[6] Complaint, Hansman Affidavit, Exhibit "H".

4. The complaint sets out the union's allegation that Trustee Neufeld has violated ss. 7 and 13 of the *Human Rights Code*. Section 13 prohibits discrimination regarding employment and s. 7 prohibits discriminatory publications. Section 7(1) provides:

> 7 (1) A person must not publish, issue or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that
>
> (a) indicates discrimination or an intention to discriminate against a person or a group or class of persons, or
>
> (b) is likely to expose a person or a group or class of persons to hatred or contempt
>
> because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or that group or class of persons.

5. Second, the Tribunal is the appropriate place for a determination of whether Trustee Neufeld's statements violated ss. 7 or 13 of the *Human Rights Code*. A complaint has been filed with the Tribunal. There is case law from the Tribunal and courts, including the Supreme Court of Canada, that the Tribunal will follow and apply.[7] If the parties disagree with the Tribunal's analysis, judicial review is open to the parties.

6. The comments by counsel for the Plaintiff regarding the need for a s. 96 court to review these issues demonstrate that the defamation claim is, at least in part, an improper and collateral attack on the Human Rights Tribunal proceeding.

7. Third, the Plaintiff's attack that began on October 23, 2017 was not merely on "school resources". It was an attack on gay, lesbian, bi-sexual and transgender people. This is an issue for the Tribunal to consider but because it has been raised by the Plaintiff in his submissions, we include it in this Reply. The Plaintiff's posts on social media and his other public statements repeatedly attacked individuals, including those in the LGBTQ community, those who created SOGI-inclusive resources and those who supported SOGI-inclusive schools. This can be discerned from Trustee Neufeld's own words in his posts and speeches.[8] A summary of the effect of some of these comments is set out in the human rights complaint.[9]

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[7] See for example: *Oger v. Whatcott*, [2019] B.C.H.R.T.D. No. 58.

[8] See for example:

- Dettman Affidavit, Exhibit "A" (October 23, 2017) wherein Trustee Neufeld comments that "allowing little children to change gender is nothing short of child abuse"; that being transgender is part of a "biologically absurd theory"; that there is something wrong with heterosexual marriage being "no longer the norm" or "growing up in homes with same sex parents"; and, that those supporting SOGI-inclusive schools were "radical cultural nihilists".

III. Plaintiff's Anti-SLAPP Characterisation

8. The Plaintiff argues that applications under the *Protection of Public Participation Act* should be limited to SLAPP suits. Leaving aside whether this claim falls within the definition of a SLAPP suit (and the parties' access to resources), there is no basis for this limitation in the legislation or in policy. On its face, and as reflected in the Attorney General's comments in the Legislature,[10] the *Protection of Public Participation Act* seeks to provide protection for expression on matters of public interest. This is a balancing that highlights the importance of freedom of expression on matters of public interest.

9. In considering s. 137.1(4) of the Ontario *Courts of Justice Act*, which is nearly identical to s. 4(2) of the *Protection of Public Participation Act*, the Ontario Court of Appeal in *Pointes* found that there is nothing in the language of the section that limits the provision to claims that fit squarely in the traditional notion of a SLAPP:

> It may well be that this litigation does not have the clear markings of classic SLAPP. However, nothing in the language of s. 137.1 limits the provision to claims, normally defamation actions, that fit squarely within the traditional notion of a SLAPP. 170 Ontario's claim against Pointes clearly targets expression as defined in s. 137.1(2).[11]

10. We submit that a similar analysis should be applied with respect to the *Protection of Public Participation Act*.

- Dettman Affidavit, Exhibit "B" (December 18, 2017) wherein Trustee Neufeld describes SOGI-inclusion as the "self serving agenda of the LGBTQ+ groups who want to be given priority as the most downtrodden of victims"; insinuates that transgender people do not exist as there are only two genders "male and female: In the image of God"; and compares SOGI-inclusive schools to government oppression of indigenous people through the residential school system;
- Dettman Affidavit, Exhibit "F" (March 19, 2018) wherein Trustee Neufeld states LGBTQ "activists are using mafia and Bolshevik techniques to convince the most powerful sectors of our society to acquiesce to their demands"; Dettman Affidavit, Exhibit N (November 17, 2018) wherein Trustee Neufeld describes transgender children as "actually on the Autism spectrum";
- Dettman Affidavit, Exhibit "Q" (December 9, 2018) wherein Trustee Neufeld states, "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".

[9] Complaint, Hansman Affidavit, Exhibit "H".

[10] Hansard, AG's comments introducing Bill for Second Reading, Wong Affidavit, Exhibit "A": "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 the values that this bill is aimed at addressing".

[11] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at para 103.

IV. Innuendo

11. Although it is not completely clear, in paragraphs 49 and 50 of the Legal Basis in the Amended NOCC, the Plaintiff pleads both “legal” or “true” innuendo and “popular” or “false” innuendo.

12. There are three ways defamatory meaning can be established:

a) If the literal meaning of the words complained of are defamatory;

b) If the words complained of are not defamatory in their natural and ordinary meaning, but their meaning based upon extrinsic circumstances unique to certain readers (the "legal" or "true" innuendo meaning) is defamatory; or

c) If the inferential meaning or impression left by the words complained of is defamatory (the "false" or "popular" innuendo meaning).[12]

13. In oral submissions, the Plaintiff argued that when innuendo is plead, the court has to have regard to all of the communications that are “out there”. This is not the law.

14. Popular innuendo refers to inferential meanings that words and statements might have. This does not involve consideration of statements made by everyone else.

15. Legal innuendo is when the defamatory meaning is only apparent to readers or listeners who are aware of some extrinsic facts. The classic example is “Mr. Smith was seen exiting 123 Main St. late last night”, which is innocuous enough unless you know that 123 Main St. is a well-known illegal gambling establishment.

16. The Plaintiff made reference to “extrinsic facts” but has not plead those facts. He appears to be relying on statements by others as extrinsic facts. This does not satisfy the requirement set out in Rule 3-7(21):

> (a) if the plaintiff alleges that the words or matter complained of were used in a derogatory sense other than their ordinary meaning, the plaintiff must give particulars of the facts and matters on which the plaintiff relies in support of that sense.

17. In any event, there is no reasonable innuendo meaning that assists the Plaintiff with meeting his burden under s. 4(2)(a) and (b) addressed below.

[12] *Lawson v. Baines*, 2012 BCCA 117 at para 13.

V. Section 4(2)(a) – There is No Need for a Trial

18. In oral submissions, the Plaintiff argued that this case needs to proceed to a trial because at this stage in the proceeding, the Court cannot assess if there is a valid claim or valid defences without all of the evidence.

19. The test articulated by the Ontario Court of Appeal in *Pointes* is that a motion can be brought at any stage and that the motion judge is to make an assessment of whether the claim could be reasonably seen as successful by a trial judge, and not make a deep dive assessment of the merits of the claim (an evidentiary or credibility assessment):

> Plaintiffs who commence a claim alleging to have been wronged by a defendant's expression on a matter of public interest must be prepared from the commencement of the lawsuit to address the merits of the claim and demonstrate that the public interest in vindicating that claim outweighs the public interest in protecting the defendant's freedom of expression.[13]

20. The Ontario Court of Appeal explained this further in *Pointes:*

> Once again, the question is not whether the motion judge views the evidence as credible, but rather whether, on the entirety of the material, there are reasonable grounds to believe that a reasonable trier could accept the evidence.[14]

21. It is worth reiterating that the Applicant/Defendant in this type of Application need not even file a defence.

22. With respect to the onus on the Plaintiff to establish the applicant has no valid defence in the proceeding, we submit the appropriate test is: are there reasonable grounds, based on the motion record, to conclude that Mr. Hansman's defences of fair comment or qualified privilege would not succeed? This is consistent with the Ontario Court of Appeal's approach in *Pointes*:

> The onus rests on the plaintiff to convince the motion judge that, looking at the motion record through the reasonableness lens, a trier could conclude that none of the defences advanced would succeed. If that assessment is among those reasonably available on the record, the plaintiff has met its onus.[15]

23. The Plaintiff has also alleged there is a need for a trial because there is something new or novel about the issue of sexual orientation, gender identity, school resources and defamation that needs to be determined at trial. This is not a new issue. A similar issue was addressed by the Supreme Court of Canada in *WIC Radio* wherein Kari Simpson was advocating for parents to remove their children from gay teachers' classes. Rafe Mair responded to Ms.

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[13] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at para 45.
[14] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at para 82.
[15] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at para 84.

Simpson's comments on this topic during his radio program and compared Ms. Simpson's "[haranguing of] the crowd" to speeches by Hitler and Governor Wallace.[16]

24. The focus in *WIC Radio* was whether Mr. Mair's comments implied Ms. Simpson "would condone violence towards gay people".[17] The Supreme Court of Canada noted:

> The public debate about the inclusion in schools of educational material on homosexuality clearly engages the public interest. 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 favorable than [s]he anticipated"…[18]

25. The Supreme Court of Canada applied the defence of fair comment and concluded that the trial judge was correct to allow the defence.[19] There is nothing materially different about the facts, legal issues and the outcome in WIC Radio and the case at bar. Mr. Hansman has a valid defence in fair comment, and that alone is enough to defeat Trustee Neufeld's claims at this early juncture.

26. There is no need for a trial here to assess the merits of the claim or defences. From the Plaintiff's oral submissions, it appears that he seeks to have the issue before the Human Rights Tribunal regarding whether Trustee Neufeld's statements were discriminatory, and the merits of SOGI-inclusive resources, determined through a defamation claim. However, these are not the claims at issue in a defamation case and do not lend credence to the need for a trial.

27. With respect to qualified privilege, in oral submissions the Plaintiff has argued that qualified privilege requires a new occasion of qualified privilege for each statement. He cites no authority for this proposition. In the current internet era, Trustee Neufeld's posts and other statements live on forever on the internet – either through his original posts or through quotes in articles. The right of reply should be viewed in this context.

28. There is no evidence or implication of malice by Mr. Hansman. There is no reason to believe Mr. Hansman made anything other than a sincere and good faith response to what were and are troubling statements by a school trustee.

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[16] *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para 3.
[17] *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para 56.
[18] *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para 57 quoting *Macdonell v. Robinson* (1885), 12 O.A.R. 270, at p. 272
[19] *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para 64.

29. The Plaintiff cannot and has not met the test under s. 4(2)(a) of the *Protection of Public Participation Act*.

VI. Section 4(2)(b) – Public Interest Balancing

30. There is a strong public interest in protecting Mr. Hansman's expression. Mr. Hansman was responding to troubling statements made by a school trustee. Trustee Neufeld's statements drew wide condemnation from education stakeholders. This is not because of a smear campaign against Trustee Neufeld. This is because his repeated and persistent statements attacking the LGBTQ community and SOGI-inclusive schools were and are alarming.

31. LGBTQ individuals, and particularly transgender people, are vulnerable members of society. Individuals who are not "out" regarding their sexual orientation or gender identity in their workplaces or with their families etc., cannot speak out in their own defence without outing themselves. Mr. Hansman was the President of the BCTF at the time, and is also a member of the LGBTQ community and a member of the community that created and supports SOGI-inclusive resources and SOGI-inclusive schools. The public interest weighs heavily in favour of Mr. Hansman speaking out in response to statements by a school trustee that a reasonable person would view as having a negative effect on LGBTQ members of the school community and on the school environment.

32. As the Ontario Court of Appeal has noted, there is a high public interest in protecting expression related to a person's suitability for public office. In *Able Translations* a translation company (Able Translations) brought a defamation claim against another translation company (Express International Translations). The claim was based on online posts made about Able Translations and their former vice-president who was running for general office. In dismissing the claim, the Ontario Court of Appeal noted "a person's suitability for a high elected office was a topic of great importance to the public".[20]

33. Similarly, in *Armstrong* the Ontario Court of Appeal considered a defamation claim that arose out of remarks made during a municipal campaign. The Court of Appeal held:

> In the course of an election campaign, there is a high premium placed on the ability of candidates and members of the public to openly and freely express points of view about the opposing candidate, often in strong terms and sometimes with language that becomes personal. Mr. Spencer's tweets did that. As I read this record, Mr. Armstrong demonstrated virtually no harm, actual or potential, flowing to him from Mr.

[20] *Able Translations Ltd. v. Express International Translations Inc.*, 2018 ONCA 690 at para 42.

> Spencer's tweets. Absent any harm or risk of harm, the public interest in allowing Mr. Armstrong to pursue his defamation claim against Mr. Spencer cannot outweigh Mr. Spencer's right to express his opinion on Mr. Armstrong's suitability as a candidate for municipal council, a matter of significant public interest. The claim against Mr. Spencer should have been dismissed under s. 137.1(4)(b).[21]

34. Here, Trustee Neufeld's suitability for the position of school Trustee is a topic of importance to the public. Mr. Hansman's comments were made in that context.

35. As noted above, Trustee Neufeld prefaced his October 23, 2017 comments by stating, "At the risk of being labelled a bigoted homophobe…"[22]. At the very least, Trustee Neufeld was aware that some people would be offended by his comments. Yet he continued, and continues, with his posts and other public statements on this topic while at the same time he wants to stifle Mr. Hansman's legitimate fair comment response. This is the type of Action the *Protection of Public Participation Act* is intended to address.

36. The Plaintiff cannot and has not met the onus of establishing the harm likely to have been suffered by him as a result of Mr. Hansman's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

[21] *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689 at para 84.
[22] Neufeld October 23, 2017 Facebook Post, Dettman Affidavit, Exhibit "A".

File Number: 39796

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

BETWEEN:

GLEN HANSMAN

Appellant
(Respondent)

- and -

BARRY NEUFELD

Respondent
(Appellant)

NOTICE OF APPEAL

(Pursuant to Rule 33(1) of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that, pursuant to leave granted by the Supreme Court of Canada on January 13, 2022, the Appellant Glen Hansman hereby appeals to the Court from the judgment of the Court of Appeal for British Columbia (Vancouver), Number CA46586, 2021 BCCA 222, dated June 9, 2021.

DATED at Vancouver, British Columbia, this 14th day of February, 2022.

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