

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)

-and-

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EGALE CANADA HUMAN RIGHTS TRUST AND
CENTRE FOR FREE EXPRESSION**

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

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**FACTUM OF THE INTERVENER,
CANADIAN HUMAN RIGHTS COMMISSION**
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

PART I: OVERVIEW AND STATEMENT OF FACTS

1. Human rights statutes are considered fundamental law.¹ Our law recognizes the equality and dignity of human beings by prohibiting discrimination based on race, national or ethnic origin, religion, age, sex, sexual orientation, gender expression or identity, disability and

¹ *CN v Canada (Canadian Human Rights Commission)*, [\[1987\] 1 SCR 1114](#) at 1136 referring to *Insurance Corporation of British Columbia v Heerspink*, [\[1982\] 2 SCR 145](#) at 158.

other protected grounds.² This Court has also stated that the shared values of equality, human rights and democracy ‘are values that the state has always had an interest in promoting and protecting.’³

2. The *Protection of Public Participation Act*⁴ and other similar provincial legislative frameworks can complement human rights statutes. The purpose of the *PPPA* is to mitigate the deleterious effects of strategic lawsuits against individuals or organizations who speak out or take positions on matters of public interest. Such lawsuits, also referred to as SLAPPs (strategic lawsuits against public participation), are meant to silence or intimidate individuals or organizations and are considered harmful to expression.⁵ The result of this appeal could affect the ability of equality-seeking groups, often marginalized or vulnerable, to defend themselves against speech attacking them. It is important that this Court consider that impact given that equality and human rights are core values and fundamental law in Canada.
3. The Canadian Human Rights Commission (the Commission or CHRC) has a long history of promoting equality rights and combatting discrimination. The Commission intervenes in this appeal because of the potential impact of the Court’s interpretation of the weighing exercise in s 4(2)(b) of the *PPPA* on the interests of protected groups under human rights statutes.
4. Although this appeal deals with sexual orientation and gender identity or expression, its outcome has potential broader application to equality-seeking groups or those acting on their behalf who may wish to seek the protection of the *PPPA* or similar legislation in force elsewhere in Canada. In the s 4(2)(b) *PPPA* weighing exercise, the Commission asks that this Court attach significant weight to a defendant’s expression that furthers the interests of equality-seeking groups.

² [Canadian Human Rights Act](#), RSC 1985, c H-6, s 2 [*CHRA*].

³ *Law Society of British Columbia v Trinity Western University*, [2018 SCC 32](#) at para 41 quoting Abella J in *Loyola High School v Quebec (Attorney General)*, [2015 SCC 12](#) at para 47.

⁴ [Protection of Public Participation Act](#), SBC 2019, c 3 [*PPPA*].

⁵ *1704604 Ontario Ltd. v Pointes Protection Association*, [2020 SCC 22](#) at paras 2-3 [*Pointes Protection*].

PART II: QUESTIONS IN ISSUE

5. The first issue set out in the appellant’s factum addresses the defence of fair comment. The CHRC does not offer submissions concerning this issue.
6. The second issue in the appellant’s factum addresses the weighing of the public interest in continuing the proceeding against the public interest in protecting the defendant’s expression. The CHRC will address this issue.

PART III: STATEMENT OF ARGUMENT

A. The Significant Value of Equality and Human Rights

7. Human rights statutes protect the equality and dignity of human beings by prohibiting discrimination based on statutorily prohibited grounds. Section 2 of the *Canadian Human Rights Act* provides that “all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices” based on the thirteen prohibited grounds of discrimination as set out in the provision.⁶
8. Human rights legislation has been described as “the law of the people”⁷ and “often the final refuge of the disadvantaged and disenfranchised.”⁸ It has also been described as “the last protection of the most vulnerable members of society.”⁹
9. This Court has also cautioned that erecting barriers to access can render this refuge meaningless and has emphasized the “laudatory goals of [human rights statutes] are not well served by reading in limitations to [their] application.”¹⁰ In this regard, given the

⁶ *Canadian Human Rights Act*, RSC 1985, c H-6, s 2.

⁷ *Tranchemontagne v Ontario (Director, Disability Support Program)*, [2006 SCC 14](#) at para 33.

⁸ *Zurich Insurance Co v Ontario (Human Rights Commission)*, [\[1992\] 2 SCR 321](#) at 339.

⁹ *Zurich Insurance Co v Ontario (Human Rights Commission)*, [\[1992\] 2 SCR 321](#) at 339; *Tranchemontagne v Ontario (Director, Disability Support Program)*, [2006 SCC 14](#) at para 49.

¹⁰ *Tranchemontagne v Ontario (Director, Disability Support Program)*, [2006 SCC 14](#) at para 14.

Unless the legislative wording expressly requires otherwise, human rights statutes from across

special nature of human rights laws and the vulnerability of the persons that they are designed to protect, rights-granting provisions are to receive a broad and purposive interpretation while exceptions to them are to be narrowly construed.¹¹ Anti-SLAPP legislation, designed to protect expressions in the public interest against unmeritorious claims, also creates a safe refuge for those advocating for the marginalized and vulnerable.

10. The *PPPA* and similar legislation can offer advocates who further the interests of marginalized and vulnerable groups the possibility of early dismissal of unmeritorious proceedings brought against them. Those who speak out defending marginalized and vulnerable groups should not be silenced when words or activities that denigrate or tend to denigrate such groups enter the public arena. Indeed, this Court suggested that the **nature** of expression will inform the level of protection afforded to the expression.¹²
11. Courts have recognized the importance of equality and human rights in Canadian society not just in human rights cases but also in other areas of the law such as criminal law and labour law.¹³ When equality-seeking groups seek to defend themselves and meaningfully participate in public discourse, such participation should be encouraged and not stifled.

B. Freedom of Expression in Furtherance of Equality and Human Rights

12. Our legal system also recognizes that freedom of expression is of critical importance in our democracy,¹⁴ but expression that causes “vilification” and “detestation” is not sanctioned

Canada are to be given consistent interpretation, due to their general similarities, quasi-constitutional status, and shared objectives in preventing discrimination; see for example, *University of British Columbia v Berg*, [\[1993\] 2 SCR 353](#) at 373 and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, [2018 SCC 39](#) at para 31.

¹¹ *Zurich Insurance Co v Ontario (Human Rights Commission)*, [\[1992\] 2 SCR 321](#) at 339.

¹² *1704604 Ontario Ltd. v Pointes Protection Association*, [2020 SCC 22](#) at para 77.

¹³ *Northern Regional Health Authority v Horrocks*, [2021 SCC 42](#) at para 107 (Karakatsanis J, dissenting reasons); *R v Morris*, [2021 ONCA 680 \(CanLII\)](#), referring to the following relevant cases at para 1: *R v Le*, [2019 SCC 34](#) at paras 89-97; *R v Theriault*, [2021 ONCA 517 \(CanLII\)](#) at para 212, leave to appeal to SCC requested, 39768 (July 19, 2021); *R v Parks*, (1993) 15 OR (3d) 324, [1993 CanLII 3383 \(ON CA\)](#) at 342, leave to appeal refused, [1993] SCCA No 481.

¹⁴ *R v Keegstra*, [\[1990\] 3 SCR 697](#) at 726 [*Keegstra*].

by our law.¹⁵

13. The nature and principles underlying our vigilant protection of free expression were summarized in *Irwin Toy* as follows: i) the search for and attainment of truth is an inherently good activity; (ii) participation in social and political decision-making is to be fostered and encouraged; and, iii) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.¹⁶ In *Pointes Protection*, where the Court addressed the Ontario equivalent of the *PPPA*, Côté J writing for the Court, set out these values as relevant considerations in the weighing exercise under s 4(2)(b), stating that “[t]he closer expression is to any of these core values, the greater the public interest in protecting it.”¹⁷
14. In providing additional guidance to courts and litigants concerning the weighing exercise under s 4(2)(b) of the *PPPA*, this Court can facilitate the participation of equality-seeking groups in the economic, social and political life in Canada by ensuring that there is no disproportionate impact on them or on those advancing their interests. Expressions that further the interests of equality-seeking groups promote diversity in the form of individual self-fulfillment and human flourishing, a “conviction” that “fuels”¹⁸ both freedom of expression and the objectives of human rights statutes.
15. This Court has recognized the need to protect minority groups from the “intolerance” and “psychological pain” caused by communications such as hate propaganda.¹⁹ This Court has also recently stated that some expression, although falling short of hate speech **“nonetheless forces certain persons ‘to argue for their basic humanity or social standing, as a precondition in the deliberative aspects of our democracy.’**²⁰

¹⁵ *R v Keegstra*, [1990] 3 SCR 697 at 777; *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at 895; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 41 [*Whatcott*].

¹⁶ *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976 [*Irwin Toy Ltd.*].

¹⁷ *1704604 Ontario Ltd. v Pointes Protection Association*, 2020 SCC 22 at para 77.

¹⁸ *R v Keegstra*, [1990] 3 SCR 697 at 727-728.

¹⁹ *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at 916.

²⁰ *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 at para 63 [emphasis added].

Expressions that are responsive to hate propaganda and/or to communications that fall short of the legal threshold of hate speech are worthy of protection in furtherance of equality and human rights.

16. Those who enter the forum of freewheeling debate concerning issues that strike at equality and human rights should expect to “get it back as good as [they] give it, and g[e]t wet in the process.”²¹ Riposte to speech that denigrates protected groups may result in sharp or intemperate rebuke. But, as this Court further stated, our democracy does not afford a right to not be offended.²²
17. It is not surprising that strong words will follow ranging from the temperate to the intemperate when marginalized and vulnerable groups and those advocating for them are put in the position of having to argue for their “basic humanity.” Acts of unconscious bias, overt racism and inaction by those in positions of power and privilege in the face of injustice will engender strong feelings and strong words. Human rights tribunals recognize that those who are discriminated against will be angered by over scrutinization, assumptions based on stereotypes, profiling and disrespect.²³

C. Weighing the Two Public Interests: The Importance of Expressions that Advance the Interests of Equality-Seeking Groups

18. The weighing exercise set out in s 4(2)(b), in which a court must make a dismissal order unless the respondent satisfies the court that “the harm likely to have been or to be suffered by the respondent as a result of the applicant’s expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that

²¹ *Mondal v Evans-Bitten*, [2022 ONSC 809 \(CanLII\)](#) at para 41.

²² *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [2021 SCC 43](#) at para 82.

²³ *Radek v Henderson Development (Canada) and Securiguard Services (No 3)*, [2005 BCHRT 302 \(CanLII\)](#) at para 484; *Johnson v Halifax Regional Police Service*, [2003 CanLII 89397 \(NS HRC\)](#) at para 41; *Graham v Enterprise Rent A Car Canada Company representing Enterprise, Alamo, and National Car Rental*, [2020 HRTO 424 \(CanLII\)](#) at para 60; *Naraine v Ford Motor Co. of Canada (No.4)*, [1996 CanLII 20059 \(ON HRT\)](#) at paras 91-96, 27 CHRR 230, aff’g [1999 CanLII 18727 \(ON SCDC\)](#), rev’g on other grounds [2001CanLII 21234 \(ON CA\)](#) leave to appeal and cross-appeal to SCC refused [2002] SCCA No 69.

expression,” is of particular significance when the expression is in defence of equality-seeking groups protected under human rights legislation.

19. The Commission submits that there is a link between the value of human rights Canadians seek to uphold and the weighing exercise in the *PPPA*. When weighing two public interests under s 4(2)(b) of the *PPPA*, if the expression is one that advances human rights, then it should be given significant weight in the analysis because equality and human rights are non-peripheral core values and have been recognized as such by this Court. Conversely, the impact of the harm caused to the plaintiff, whether it be reputationally or otherwise, will be of lesser weight if the “claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the *Charter* or human rights legislation.”²⁴
20. If an applicant’s expression in a *PPPA* motion is in furtherance of the interests of an equality-seeking group, then significant weight should be placed on the public interest value in protecting that expression. This approach is in accordance with this Court’s recognition of the fundamental importance of equality and human rights and in the spirit of its guidance in *Pointes Protection*.²⁵
21. Equality and human rights are at the core of the free expression guarantee while hate propaganda and its ilk are tenuously connected with the values underlying the guarantee of freedom of speech. Indeed, as this Court has re-affirmed in *Pointes Protection*, “not all expression is created equal.”²⁶ Values that underlie a free and democratic society, eg, equality and human rights, are deserving of special consideration in the weighing exercise under s 4(2)(b) of the *PPPA*.
22. Thus, both those who **initiate** discourse in furtherance of equality-seeking groups’ interests and those who **respond** to harmful discourse affecting equality-seeking groups should be able to speak out without fear of strategic lawsuits aimed at silencing them. To ensure this, the Commission asks this Court to afford strong protection to the expression when the

²⁴ *1704604 Ontario Ltd. v Pointes Protection Association*, [2020 SCC 22](#) at para 80.

²⁵ *1704604 Ontario Ltd. v Pointes Protection Association*, [2020 SCC 22](#) at para 80.

²⁶ *1704604 Ontario Ltd. v Pointes Protection Association*, [2020 SCC 22](#) at para 76.

motivation and **quality** of the expression are related to fundamental values such as equality and human rights.

23. The *PPPA*, like the *Charter*²⁷ and human rights legislation, supports the protection of individuals and vulnerable groups, who are “innocently caught in the verbal cross-fire that goes beyond legitimate debate”²⁸ from both speech that stops short of hate speech and speech that exceeds tolerable limits in our Canadian democracy.
24. Expressions that are responsive to statements or situations that denigrate or tend to denigrate an identifiable group fall at the “high end” of “the protection-deserving spectrum,” to use this Court’s instructive comments in *Bent*.²⁹ Such expressions strike at the heart of the core values underlying freedom of expression since they relate to diversity in the form of self-fulfillment and human flourishing. Such expressions also challenge mainstream and majority views and thereby function as a search for the truth. Finally, such expressions promote the interests of marginalized and vulnerable groups thereby increasing their ability to participate in the economic, social and political life in Canada. Thus, expressions in defence of these groups are consistent with the values underlying the guarantee of freedom of expression.
25. By affording increased protection to expressions that protect equality and human rights, a court’s discretion remains unaltered but tethered to the core-value analysis adopted by this Court in *Keegstra*,³⁰ *Sharpe*,³¹ *Whatcott*,³² and *Pointes Protection*.³³ Once tied to human rights and equality, the level of protection afforded to the expression should increase. Conversely, statements that are vindictive or antithetical to equality and human rights would be at the low end of the protection-deserving spectrum. Thus, ascertaining whether

²⁷ [Canadian Charter of Rights and Freedoms](#) as found in the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11(UK) [*Charter*].

²⁸ *R v Keegstra*, [\[1990\] 3 SCR 697](#) at 725, citing from the Special Committee on Hate Propaganda in Canada. *Report of the Special Committee on Hate Propaganda in Canada*. Ottawa: Queen's Printer, 1966.

²⁹ *Bent v Platnick*, [2020 SCC 23](#) at para 169.

³⁰ *R v Keegstra*, [\[1990\] 3 SCR 697](#) see for example at 761-762, 765, and 772.

³¹ *R v Sharpe*, [2001 SCC 2](#) at paras 181-186 [*Sharpe*].

³² *Saskatchewan (Human Rights Commission) v Whatcott*, [2013 SCC 11](#) at para 112.

³³ *1704604 Ontario Ltd. v Pointes Protection Association*, [2020 SCC 22](#) at para 77.

the expressions are tied to core values and the objectives of freedom of expression are key considerations in the weighing exercise undertaken by a motion judge.³⁴

26. If this Court were to clarify that expressions that enhance protection of equality-seeking groups will be given more weight, it will provide additional guidance for courts and potential litigants and may reduce lawsuits designed to stifle defenders of equality and human rights. Moreover, not affording increased value to expressions espousing equality and human rights values could lead to those who would normally speak in defence of the marginalized and vulnerable to think twice about voicing their views.
27. If this Court recognizes the negative impact of an expression or claim that might provoke hostility against an identifiably vulnerable group or a group protected under s 15 of the *Charter* or human rights legislation, then it recognizes the high value in expressions that protect such groups. Thus, significant weight should attach to expressions that support vulnerable and equality-seeking groups.

D. Conclusion

28. In summary, if an applicant's expression in a *PPPA* motion is in furtherance of the interests of an equality-seeking group, then significant weight should be placed on the public interest value in protecting that expression. This interpretation is in accordance with the purpose of anti-SLAPP legislation as discussed in *Pointes Protection*³⁵ and as explained by the Attorneys General of Ontario and British Columbia referenced by this Court in *Pointes Protection* and by the chambers judge in his decision.³⁶
29. Often courts and tribunals need to reconcile the competing rights of freedom of expression and equality. Where instances of freedom of expression and the right to equality converge, such a convergence should be fostered and protected. Thus, the human rights analysis or lens in interpreting non-human rights legislation like the *PPPA* is necessary in the weighing of the two public interest considerations in s 4(2)(b). Legislation such as the *PPPA* can

³⁴ *1704604 Ontario Ltd. v Pointes Protection Association*, [2020 SCC 22](#) at para 76.

³⁵ *1704604 Ontario Ltd. v Pointes Protection Association*, [2020 SCC 22](#) at para 30.

³⁶ *1704604 Ontario Ltd. v Pointes Protection Association*, [2020 SCC 22](#) at paras 7-14; *Neufeld v Hansman*, [2019 BCSC 2028 \(CanLII\)](#) at para 54.

serve to promote the public interest and deter discrimination by increased protection of expressions made on behalf of equality-seeking groups.

PART IV: SUBMISSIONS ON COSTS

30. The CHRC is not seeking costs in this matter and requests that no costs be ordered against it.

PART V: ORDER SOUGHT

31. The CHRC makes no submissions on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of July 2022,



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Canadian Human Rights Commission

PART VI: TABLE OF AUTHORITIES

Cited at Para. No.

LEGISLATION

Canadian Human Rights Act, RSC 1985, c H-6 / *Loi canadienne sur les droits de la personne*, LRC (1985), ch H-6

[section 2 / article 2](#)1, 7

Canadian Charter of Rights and Freedoms as found in the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11(UK) / *Charte canadienne des droits et libertés*, tel que trouvé dans la *Loi constitutionnelle de 1982*, étant l'annexe B de la *Loi de 1982 sur le Canada*, 1982, ch 11 (R-U)23

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<i>R v Theriault</i> , 2021 ONCA 517 (CanLII)	9
<i>Radek v Henderson Development (Canada) and Securiguard Services (No 3)</i> , 2005 BCHRT 302 (CanLII)	17
<i>Saskatchewan (Human Rights Commission) v Whatcott</i> , 2013 SCC 11	12, 25
<i>Tranchemontagne v Ontario (Director, Disability Support Program)</i> , 2006 SCC 14	8
<i>University of British Columbia v Berg</i> , [1993] 2 SCR 353	9
<i>Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)</i> , 2021 SCC 43	15, 16
<i>Zurich Insurance Co v Ontario (Human Rights Commission)</i> , [1992] 2 SCR 321	8, 9