SCC File No. 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)

-and-

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FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF BRITISH COLUMBIA

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal marks the first time the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 (the "***PPPA***") has come before this Court. The *PPPA* creates a process for dismissing otherwise 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. When introducing the bill[1] for Second Reading in the B.C. Legislature in February 2019, the Honourable David Eby, Attorney General of British Columbia (the "**AGBC**"), stated the *PPPA* was "intended to protect an essential value of our democracy, which is public participation in the debates of the issues of the day."[2] The AGBC intervenes in this appeal to make submissions on the public interest weighing exercise prescribed by s. 4(2)(b) of the *PPPA*.

B. Statement of Facts

2. The AGBC takes no position on the underlying facts in this appeal.

PART II – QUESTIONS IN ISSUE

3. The AGBC directs his submissions in this appeal at two issues:

   a. the public interest weighing exercise prescribed by s. 4(2)(b) of the *PPPA* should consider the public interest in protecting political speech and allowing open discussions about elected officials; and

   b. relying on the common law presumption of harm in defamation risks displacing the statutory burden of proof under s. 4(2)(b) of the *PPPA* and upsetting the statutory balance struck by the Legislature.

PART III – STATEMENT OF ARGUMENT

A. Overview of the *PPPA*

4. The *PPPA* came into force on March 25, 2019. It was a legislative response to what courts

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[1] Bill 2, *Protection of Public Participation Act*, 41st Parl., 4th Sess., British Columbia, 2019.
[2] British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)* [***BC Hansard***], 41st Parl., 4th Sess., No. 198 (14 February 2019) at 7018 (Hon. David Eby).

and scholars termed "strategic litigation against public participation", or "SLAPP" suits.[3] SLAPPs are lawsuits initiated against individuals or organizations that speak out or take a position on issues of public interest—with the intention to silence or otherwise deter that party from participating in public affairs. To mitigate the harmful effects of SLAPPs, the Legislatures of Ontario[4] and British Columbia[5] and the National Assembly of Quebec[6] enacted laws commonly referred to as anti-SLAPP legislation.

5. The purpose of the *PPPA* is to protect public participation in matters of public interest. As the AGBC stated when introducing the legislation in the Legislative Assembly:

> 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.[7]

6. The *PPPA* is modelled on the *Uniform Protection of Public Participation Act (2017)* adopted by the Uniform Law Conference of Canada, which in turn is based on the *Ontario PPPA*.[8]

7. Section 4 of the *PPPA* creates a pre-trial procedure that allows a defendant to apply to the court for an order dismissing a claim arising out of an expression of public interest. The framework this Court established in *1704604 Ontario Ltd. v. Pointes Protection Association*[9] and *Bent v. Platnick*,[10] for considering applications under s. 137.1 of the *Ontario PPPA*, applies with equal

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[3] *BC Hansard*, 41st Parl., 4th Sess., No. 197 (13 February 2019) at 6974-6975 (Hon. David Eby); *BC Hansard*, 41st Parl., 4th Sess., No. 198 (14 February 2019) at 7018-7023 (Hon. David Eby); *BC Hansard*, 41st Parl., 4th Sess., No. 199 (14 February 2019) at 7025-7038 (Hon. David Eby); *BC Hansard*, 41st Parl., 4th Sess., No. 200 (19 February 2019) at 7055-7060 (Hon. David Eby); *BC Hansard*, 41st Parl., 4th Sess., No. 216 (6 March 2019) at 7569-7578 (Hon. David Eby); *BC Hansard*, 41st Parl., 4th Sess., No. 217 (7 March 2019) at 7607-7610 (Hon. David Eby).

[4] *Protection of Public Participation Act*, *2015*, S.O. 2015, c. 23, amending the *Courts of Justice Act*, R.S.O. 1990, c. C.43, by introducing ss. 137.1 to 137.5 [***Ontario PPPA***].

[5] *PPPA*.

[6] *Code of Civil Procedure*, chapter C-25.01, arts 51-54 CCP.

[7] *BC Hansard*, 41st Parl., 4th Sess., No. 198 (14 February 2019) at 7018 (Hon. David Eby).

[8] *BC Hansard*, 41st Parl., 4th Sess., No. 197 (13 February 2019) at 6974 (Hon. David Eby).

[9] 2020 SCC 22 [***Pointes***].

[10] 2020 SCC 23 [***Bent***].

force to s. 4 of the *PPPA*.[11]

8. The final stage of the analysis prescribed by s. 4(2)(b) of the *PPPA* requires the court to weigh the public interest in permitting meritorious lawsuits to proceed against the public interest in protecting the impugned expression. In *Pointes*, Justice Côté described this weighing of the public interest as the "crux" of the analysis.[12]

B. The weighing test under s. 4(2)(b) of the *PPPA* should consider the public interest in protecting political speech

9. In weighing the public interest in protecting the underlying expression, the court may look to s. 2(b) *Charter* jurisprudence and "the core values underlying freedom of expression, such as the search for the truth, participation in political decision making, and diversity in forms of self-fulfillment and human flourishing".[13]

10. In this case, the impugned expression concerned the respondent's fitness to hold their elected public office as a school board trustee.[14] Some of the impugned statements were made while the respondent sought re-election.[15]

11. This Court has previously recognized that political speech of this kind "is the single most important and protected type of expression. It lies at the core of the guarantee of free expression."[16] Indeed, pre-*Charter* jurisprudence from this Court suggested the Canadian Constitution contained an implied right of free expression on political matters.[17] This Court's jurisprudence cautions against curtailing speech in the public sphere merely because the message conveyed may be

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[11] *Hobbs v. Warner*, 2021 BCCA 290 at paras. 8-9, leave to appeal ref'd April 28, 2022 (SCC Docket No. 39922).
[12] *Pointes* at paras. 61-62 and 82.
[13] *Pointes* at para. 77, citing *R. v. Sharpe*, 2001 SCC 2 at paras. 181-182, and *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 24.
[14] See, for example, *Neufeld v. Hansman*, 2019 BCSC 2028 [**Chambers Judgment**] at paras. 24, 27, 34 and 41; Appellant's Record at 7-11.
[15] See, for example, Chambers Judgment at paras. 36 and 42; Appellant's Record at 10 and 12.
[16] *Harper v. Canada*, 2004 SCC 33 [***Harper***] at para. 11 (*per* McLachlin C.J. and Major and Binnie JJ., dissenting in part, but not on this point); see also, *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11 at para. 115.
[17] See *Grant v. Torstar Corp.*, 2009 SCC 61 [***Torstar***] at para. 42, citing *Reference re Alberta Legislation*, [1938] S.C.R. 100, per Duff C.J.; *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299; and *Switzman v. Elbling*, [1957] S.C.R. 285.

"unappetizing" or the messenger "distasteful".[18]

12. Freedom of expression protects not only the person who speaks the message, but also the recipient. Members of the public have a right to information on public governance, absent which they cannot cast an informed vote or evaluate the performance of elected officials.[19]

13. The public interest weighing exercise prescribed by s. 4(2)(b) of the *PPPA* should consider the heightened public interest in protecting political speech and allowing open discussions about elected officials. The weighing test should consider the public interest served by allowing the governed unfettered commentary about those who govern them or seek to do so.

14. The short timeframe of elections makes them especially vulnerable to litigation designed to silence critics. A litigant need only maintain their claim until votes are cast to effectively stifle debate. This is exactly the mischief against which the *PPPA* is designed to protect.

15. A number of decisions applying the *Ontario PPPA* have addressed political speech in the course of elections. They have consistently noted the significant public interest in allowing that speech, even at the expense of individual reputational harm.

16. For example, in *Able Translations Ltd. v. Express International Translations Inc.*,[20] the impugned statements concerned a person's suitability for public office as a member of Parliament. The Court identified three factors that made out a "compelling case in favour of protecting [...] freedom of expression". First, a person's suitability for public office is "a topic of great importance to the public". Second, the point of the expression was to draw the attention of the voting public to a fact that, in the defendant's opinion, provided reason not to vote for the plaintiff. Third, the threat of litigation had silenced the defendant, effectively denying their right to fully participate in the political process.[21]

17. Similarly, in *Armstrong v. Corus Entertainment Inc.*,[22] the Court recognized the significant public interest in comments that one candidate for municipal office made about another's suitability

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[18] *Harper* at para. 14 (*per* McLachlin C.J. and Major and Binnie JJ., dissenting in part, but not on this point).
[19] *Harper* at para. 17 (*per* McLachlin C.J. and Major and Binnie JJ., dissenting in part, but not on this point); see also, *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 104.
[20] 2018 ONCA 690 [***Able***].
[21] *Able* at paras. 41-44.
[22] 2018 ONCA 689 [***Armstrong***].

for office:

> Against what I would characterize as modest evidence of harm or potential harm to Mr. Armstrong stands the very strong public interest in promoting freedom of expression by candidates during the electoral process. The public expects and benefits from vigorous debate among candidates. The rhetoric can become personal and overly zealous. No doubt, candidates have in the past, and will in the future, step over the line between strongly stated opinions and defamatory comments. However, the message to be taken from the enactment of s. 137.1 is that not every foot over the defamatory foul line warrants dragging the offender through the litigation process. By enacting s. 137.1, the Legislature acknowledged that, in some circumstances, permitting the wronged party to seek vindication through litigation comes at too high a cost to freedom of expression.[23]

18. *Able* and *Armstrong* are, thus, instances where the courts' assessment of the public interest in protecting public discourse about a person's fitness for public office was informed by the values underlying freedom of expression, including participation in the electoral process and promotion of an informed vote.

19. Courts have also recognized the political dimension of speech in support of LGBTQ2S+ equality, at the center of this claim. In *Volpe v. Wong-Tam,*[24] the Court found there was "overwhelming public interest" in statements by elected councillors and trustees aimed to promote diversity and tolerance. Those statements sought to ensure that an inclusive environment for LGBTQ2S+ students, parents, and teachers would not be endangered by comments which the trustees believed espoused anti-LGBTQ2S+ views.[25] The Court found this issue was of critical importance to the electorate, as was the spending of public taxpayer dollars in a newspaper that the councillors believed was causing harm to the LGBTQ2S+ community. The Court continued:

> The political speech at issue in this case lies at the core of s. 2(b) protection: *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 115. The constitutional right to freedom of expression includes the "public … interest in being informed about matters of importance": *R v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 28.[26]

20. In the present case, the Court of Appeal noted this Court's guidance in *Pointes* that, when weighing the public interest in the impugned expression, both the *quality* of the expression and the

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[23] *Armstrong* at para. 90.
[24] 2022 ONSC 3106 [***Volpe***].
[25] *Volpe* at paras. 392-403.
[26] *Volpe* at para. 395.

motivation behind it are relevant.[27] Respectfully, however, the Court of Appeal failed to meaningfully engage with either consideration when assessing the public interest in protecting the expression at issue here.

21. The nature of the impugned expression in this case ought to be considered in light of s. 2(b) *Charter* jurisprudence and the core values underlying freedom of expression. The importance of political speech and the strong interest in the public receiving information about an elected official's suitability for public office should inform the level of protection afforded to the expression.

22. Applying these principles, this Court should account for the public interest served by the elected President of the British Columbia Teachers' Federation – a professional union that represents all public school teachers in British Columbia – taking a public position on matters that affect students, parents, and teachers. This Court also ought to consider that the political expression was in defence of a vulnerable group, and the importance of someone in the appellant's position speaking up against what they believe are homophobic, transphobic, and anti-LGBTQ2S+ comments of an elected school board trustee.

23. Failing to consider the public interest in political speech of this kind undermines the *PPPA*'s ability to protect public discourse in one of its most valuable forms. Courts should be cautious not to allow strong statements like "bigoted", "transphobic", "misogynistic", or "hateful"[28] to obscure the importance of the expression. The fact that a person uses strong language in a heated public debate over a political issue cannot be permitted to overwhelm the analysis and goals of the *PPPA*. If the powerful vision of the *PPPA* is to be given meaningful effect, appropriate weight must be given to the importance of encouraging and promoting public participation in debates on political matters.

C. Reliance on the common law presumption of harm in defamation risks displacing the statutory burden under s. 4(2)(b) of the *PPPA*

24. An approach that places too much weight on the common law presumption of harm in defamation cases risks displacing the burden of proof under s. 4(2)(b) of the *PPPA,* contrary to the

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[27] *Neufeld v. Hansman*, 2021 BCCA 222 [**Court of Appeal Judgment**] at para. 61, citing *Pointes* at para. 74 (emphasis in original); Appellant's Record at 71.
[28] Court of Appeal Judgment at para. 62; Appellant's Record at 71-72.

clear intent of the statute. The *PPPA* strikes a delicate balance between the harm caused to the respondent and the public interest in protecting the applicant's free expression. Relying on a presumption of harm obfuscates the weighing analysis the court is required to undertake under s. 4(2)(b). It risks having the court weigh an unqualified, amorphous "harm", without any evidence from the respondent, against an otherwise qualifiable interest, established by the applicant. Such an approach is inconsistent with both the wording of the statute, the intent of the Legislature, and this Court's approach in *Pointes* and *Bent.*

25. Under s. 4(2)(b) of the *PPPA,* it is the respondent's burden to satisfy the court that the harm caused by the impugned expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression. In *Pointes,* this Court recognized that harm is "principally important" in order for a respondent to meet its burden under the equivalent provision in the *Ontario PPPA*.[29] As a prerequisite to the weighing exercise, the respondent must show the existence of both harm and causation – that the harm was suffered as a result of the applicant's expression.[30] However, the *magnitude* of the harm is also relevant to the analysis and must be considered in the weighing exercise under s. 4(2)(b). The court must determine whether the harm is "sufficiently serious" such that the public interest in permitting the action to proceed outweighs the public interest in protecting the expression.[31]

26. In *Bent,* this Court described how the presumption of damages in defamation actions impacts the weighing exercise required under anti-SLAPP legislation:

> General damages are presumed in defamations actions, and this alone is sufficient to constitute harm: *Pointes Protection*, at para. 71; *Torstar*, at para. 28. However, the magnitude of the harm will be important in assessing whether the harm is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression: *Pointes Protection*, at para. 70. General damages in the nominal sense will ordinarily not be sufficient for this purpose.[32]

27. In other words, the presumption of damages may assist a respondent in establishing the *existence* of harm, but it will rarely be sufficient to establish the *sufficiency* of that harm for the

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[29] *Pointes* at para. 68.
[30] *Pointes* at para. 68.
[31] *Pointes* at paras. 70-71 (emphasis added).
[32] *Bent* at para. 144.

purposes of weighing the public interest in permitting the respondent's claim to proceed.[33] Absent exceptional circumstances, the respondent will generally be required to lead evidence to establish the sufficiency of the harm in order to persuade the court that the balance weighs in their favour. This interpretation is consistent with statements made by the AGBC in the B.C. Legislature. The AGBC explained that, under s. 4(2)(b) of the *PPPA*, the "harm likely to have been or to be suffered by the respondent" is a factor for which the respondent must provide some evidentiary basis on which the court can make an assessment as to the harm.[34]

28. In *Lachaux v. Independent Print Ltd.,*[35] the UK Supreme Court recently addressed the role of the presumption of damages in interpreting s. 1 of the *Defamation Act 2013*,[36] which provides that "a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant."[37] In considering whether the presumption of damages could satisfy the "serious harm" criterion, the Court found "that there is a common law presumption of damage to reputation, but no presumption that it is 'serious'".[38] The Court held that the "threshold of seriousness" standard required "its application to be determined by reference to the actual facts about its impact and not just to the meaning of the words."[39] In other words, to determine whether the harm presumed to be caused by defamation is sufficiently "serious" requires

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[33] As McLachin CJ notes in *Torstar* at para. 28, the presumption of damages in defamation cases has been the subject of strong criticism.

[34] *BC Hansard*, 41st Parl., 4th Sess., No. 216 (6 March 2019) at 7574 (Hon. David Eby).

[35] [2019] UKSC 27 [***Lachaux***].

[36] *Defamation Act 2013*, c. 26 (UK). The *Defamation Act 2013* is not anti-SLAPP legislation, but rather a statutory scheme intended to limit actions for defamation. Nevertheless, the reasoning in cases interpreting the *Defamation Act 2013* is persuasive and has been adopted by the Ontario Court of Appeal in cases interpreting the equivalent section of the *Ontario PPPA*. See: *Montour v. Beacon Publishing Inc*., 2019 ONCA 246, leave to appeal ref'd October 19, 2019 (SCC Docket No. 38657); and *Levant v. DeMelle,* 2022 ONCA 79, leave to appeal sought March 28, 2022 (SCC Docket No. 40109) [***Levant***]. The *Defamation Act 2013* also created a statutory defence to an action for defamation arising from a statement on a matter of public interest: see s. 4(1).

[37] *Defamation Act 2013*, s. 1 (emphasis added).

[38] *Lachaux* at para. 13 (emphasis added).

[39] *Lachaux* at para. 12.

evidence beyond the presumption itself.

29. The Ontario Court of Appeal recently considered similar principles in *Levant.*[40] In *Levant,* the Court found that the presumption of damages for defamation is not sufficient for the purposes of the weighing analysis under the equivalent provision in the *Ontario PPPA*.[41] Rather, the Court found that "the presumption of damages in a defamation action involving an individual only goes so far."[42] While the Court accepted the presumption "may be sufficient to establish the existence of damages", it found the presumption "is not sufficient to establish the level of those damages".[43]

30. The Court went on to consider factors relevant to establishing the level or seriousness of damages in that case. In doing so, the Court declined to infer serious reputational harm and criticized the respondent's failure to lead cogent evidence of any specific harm or the magnitude of that harm.[44] Finally, the Court recognized the fact that the respondent injected themselves into public debate on a contentious topic as a relevant factor when assessing the severity of damages in a defamation case.[45] In the present case, the Court of Appeal criticized the chambers judge for his consideration of similar factors.[46]

31. The Court in *Levant* drew a distinction between reliance on the presumption of damages to establish the existence of harm, and the weighing of that harm required by the statutory scheme. The weighing exercise requires that the court consider the seriousness of the harm, which the presumption alone cannot establish. Under the *PPPA,* the court must consider whether serious harm

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[40] The Ontario Court of Appeal in *Levant* relied, in part, on the England and Wales Court of Appeal decision in *Lachaux v. Independent Print Ltd.* [2017] EWCA Civ. 1334, which was reversed in part by the UK Supreme Court in *Lachaux.*

[41] *Levant* at para. 67.
[42] *Levant* at para. 68.
[43] *Levant* at para. 68.
[44] *Levant* at paras. 69-71.
[45] *Levant* at para. 70; see also, *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 75 (*per* LeBel J., concurring in part).
[46] See Court of Appeal Judgment at para. 52 ("the judge repeatedly noted that Mr. Neufeld had not adduced evidence of harm other than bare assertions in his affidavit") and at para. 59 ("the judge heavily discounted Mr. Neufeld's potential damages because others had made similar comments"); Appellant's Record at 68 and 70.

is supported by evidence.

32. The analysis adopted by the Court in *Levant* is consistent with the legislative purpose of the *PPPA,* the allocation of burdens under the statute, and the law of defamation. By contrast, an approach that places too much reliance on the presumption of damages threatens to distort the statutory burden of proof by permitting respondents to simply rely on the presumption of damages in a defamation claim to satisfy the harm criterion under the statute. Applicants seeking to dismiss defamation claims under the *PPPA* would be left to rebut the seriousness of the damage without a respondent having to first demonstrate the level or seriousness of the alleged harm. Further, the court would be conducting the weighing exercise required by the statute in a factual vacuum. Exclusive reliance on the presumption of damages, without more, risks having the court read a feather as a stone in the weighing test, thereby tipping the scales in favour of respondents in every *PPPA* proceeding involving claims of defamation.

33. As the chambers judge recognized, in most applications under the *PPPA* the respondent will be claiming some form of defamation.[47] Accordingly, an approach that places emphasis on the presumption of damages in defamation cases will have broad ramifications. It risks displacing the statutory burden under s. 4(2)(b) and upsetting the balance struck by the Legislature in *every* defamation case involving libel challenged under the *PPPA.*

34. For these reasons, this Court ought to prefer an approach that places limited weight on the presumption of damages in defamation cases and requires the respondent to demonstrate the seriousness of the alleged harm. Such an approach would better reflect the law of defamation, the legislative intent of the *PPPA,* and the statutory burdens articulated under s. 4(2)(b).

PART IV – COSTS

35. The AGBC does not seek costs and asks that no costs be awarded against him.

PART V – ORDER SOUGHT

36. The AGBC takes no position with respect to the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of July, 2022.

Chantelle Rajotte	Emily Lapper	Steven Davis

[47] Chambers Judgment at para. 58; Appellant's Record at 16.

TABLE OF AUTHORITIES

Enactments & Hansard	**Para(s).**
British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 4th Sess., No. 198 (14 February 2019) at 7018-7023	1, 4, 5
British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 4th Sess., No. 199 (14 February 2019) at 7025-7038	4
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Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (U.K.), c. 11, s. 2(b) *Charte canadienne des droits et libertés*, partie 1, de la *Loi constitutionnelle de 1982*, soit l'annexe B de la *Loi de 1982 sur le Canada (R.-U)*, c. 11, s. 2(b)	9, 19, 21
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