Court File No.: 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)

- and -

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

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PART I – OVERVIEW

1. The *Protection of Public Participation Act* ("*PPPA*")[1], which came into effect in British Columbia on March 25, 2019, introduced a pre-trial screening mechanism in proceedings where the expression at issue "relates to a matter of public interest".

2. In previous decisions regarding substantively identical legislation in Ontario, this Honourable Court confirmed that there are four steps to the analysis in determining whether to dismiss such a proceeding.[2]

3. The fourth and final step in this analysis at s. 4(2)(b) of the *PPPA* requires the court to determine whether the public interest in permitting the plaintiff's (in this case, Neufeld) proceeding to continue outweighs the public interest in protecting the defendant's (Hansman) expression.

4. The BC General Employees' Union ("BCGEU") submits that the fact that the expression at issue was union expression, made by an elected union president and directed towards an employer of union members, should be seriously considered under that weighing analysis.

5. It is the BCGEU's position that, in applying the fourth step of the legal test to matters involving union speech, courts must consider the legal and historical importance of union expression in all aspects of Canadian political debate and the societal interest in avoiding a chill on such expression.

PART II – POSITION ON QUESTIONS RAISED

6. The BCGEU submits that the British Columbia Court of Appeal erred in its approach to the legal test under Section 4(2)(b) of the *PPPA* by, in part:

   a. failing to recognize and weigh the nature of the expression at issue as union expression; and

   b. by extension, failing to consider the potential chilling effect on union expression.

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[1] *Protection of Public Participation Act*, S.B.C. 2019, c. 3 ["*PPPA*"].
[2] *1704604 Ontario Ltd*. v. *Pointes Protection Association*, 2020 SCC 22 ["*Pointes*"] at para. 18.

7. The BCGEU takes no position on the facts of the case or the ultimate disposition of the appeal.

PART III – ARGUMENT

A. Background

8. British Columbia's *PPPA*, as has been noted by this Court with respect to substantively identical legislation in Ontario, is intended to screen out proceedings that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such proceedings.[3]

9. In *Pointes,* this Court confirmed that there are four steps to the analysis in determining whether to dismiss an action under the substantively identical Ontario legislation:

a. There is an initial burden on the defendant to satisfy the judge that the proceeding arises from an expression relating to the public interest.

b. Then the burden shifts to the plaintiff to satisfy the judge of the following:

i. that there are grounds to believe that the proceeding has substantial merit;

ii. that the defendant has no valid defence; and

iii. that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the defendant's expression.[4]

10. It is the last of these four steps that is the core of this analysis, and the only aspect of the current case on which the BCGEU makes submissions. Under the *PPPA*, this analysis occurs under s. 4(2)(b).

11. In the instant case, the British Columbia Court of Appeal held that, pursuant to s. 4(2)(b) of the *PPPA*, the public interest in continuing the defamation proceeding brought by the Respondent outweighed the public interest in protecting the Appellant's expression.

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[3] *1704604 Ontario Ltd.* v. *Pointes Protection Association*, 2020 SCC 22 ["*Pointes*"] at para. 62.
[4] *Pointes*, *supra* at para. 18.

12. However, in the course of this weighing exercise, the Court of Appeal did **not** consider the importance of the expression as union speech and the potential chilling effect on future union expression.

13. These are the interrelated issues on which the BCGEU seeks to assist this Court in its consideration.

B. This is a case that is, in part, about union expression

14. A number of factors may be relevant for the motion judge to consider when undertaking the *Pointes* weighing exercise. Two of these are the importance and quality of the expression and the potential chilling effect on future expression either by a party or by others.[5]

15. In *Pointes*, this Court noted that the impugned expression was significant, in part, due to the public interest in both the subject matter of the expression and protecting the form of the expression.[6]

16. With respect to the instant case, the BCGEU submits that the public has a significant interest in protecting the subject matter of expression, which addressed issues facing some of the most marginalized groups in our society.

17. In addition, the BCGEU submits that the expression at issue in this case constitutes union speech. At the relevant time, the Applicant was President of the British Columbia Teachers' Federation ("BCTF"), a union representing approximately 45,000 teachers and associated professionals in British Columbia. Thus, the impugned comments were from a union leader directly related to union members, and as such are union speech.

18. Expressions by union leaders on matters related to labour relations and other matters of importance to union members have long been recognized by this Court as being of fundamental importance to union members. This expression serves a role in enhancing broader social interests.[7]

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[5] *Pointes, supra* at paras. 74, 80.
[6] *Pointes, supra* at para. 120.
[7] *Alberta (Information and Privacy Commissioner)* v. *United Food and Commercial Workers, Local 401*, 2013 SCC 62 ["*Alberta Privacy Commissioner*"] at paras. 29-33.

19. The Respondent is an elected school board trustee in the Chilliwack School District in British Columbia. Pursuant to the British Columbia *School Act*, a board of education has legal responsibility for oversight of management, teaching, and support staff.[8] In substance, the Respondent was the employer of the members of the BCTF.

20. Many of the expressions at issue in the current case relate to the Applicant's views concerning the effect of the Respondent's statements on the health, safety, and working environment of BCTF members. For example, the Applicant stated, "regardless of [the Respondent's] bigoted views… he has responsibilities… for ensuring a safe and inclusive school." Similarly, he expressed his concerns about hate speech.[9] These types of expressions are at the heart of union expression, and at the heart of an elected union leader's duties to their members. While not a classic "labour dispute" in the usual sense of a strike, lockout or grievance arbitration, the factual issues at hand still fit this description.

21. It is the BCGEU's position that an interpretation of s. 4(2)(b) of the *PPPA* that includes analysis of whether the expression at issue is union expression and ensures that no chill is placed on such important expression best reflects the purpose of the legislation as outlined above and ensures that the nature and quality of the expression at issue is properly considered.

C. This Honourable Court's jurisprudence surrounding union expression

22. The assessment of the quality of expression in the course of the *PPPA* weighing exercise should be informed by jurisprudence surrounding s. 2(*b*) *Canadian Charter of Rights and Freedoms*, including the core values underlying freedom of expression, such as the search for truth, participation in political decision making, and diversity in forms of self-fulfilment and human flourishing. The closer the expression is to any of these core values, the greater the public interest in protecting it.[10]

23. This Court has addressed these *Charter* principles in the labour context. In *Pepsi-Cola*, this Court grappled with aggressive picketing in the context of a heated job action and maintained that:

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[8] *School Act* [RSBC 1996], c. 412, s. 15.
[9] Reasons for Judgment of the Supreme Court of British Columbia, Appellant's Record ("AR") Vol. 1 at 1 ("BCSC Reasons") at para 24.
[10] *Pointes, supra* at para. 77.

> Picketing, however defined, always involves expressive action. As such, it engages one of the highest constitutional values: freedom of expression. This Court's jurisprudence establishes that both primary and secondary picketing are forms of expression, even when associated with tortious acts: *Dolphin Delivery*, *supra*. The Court, moreover, has repeatedly reaffirmed the importance of freedom of expression. It is the foundation of a democratic society (see *R.* v. *Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; R. v. *Keegstra*, [1990] 3 S.C.R. 697; *R.* v. *Butler*, [1992] 1 S.C.R. 452). The core values which free expression promotes include self-fulfillment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment.[11]

24. This approach aligns with the Court's earlier decision in *KMart Canada*, wherein it expressly and unequivocally stated that **"[the] importance of freedom of expression during labour disputes cannot be overemphasized**." [emphasis added][12]

25. The Court in *Pepsi-Cola* expanded upon this pronouncement:

> Free expression is particularly critical in the labour context. As Cory J. observed for the Court in *U.F.C.W., Local 1518* v. *KMart Canada Ltd*., [1999] 2 S.C.R. 1083, "[f]or employees, freedom of expression becomes not only an important but an essential component of labour relations" (para. 25). The values associated with free expression relate directly to one's work. A person's employment, and the conditions of their workplace, inform one's identity, emotional health, and sense of self-worth: *Reference Re Public Service Employee Relations Act* (*Alta*.), [1987] 1 S.C.R. 313; KMart*, supra*.
>
> […]
>
> Free expression in the labour context benefits not only individual workers and unions, but **also society as a whole**. As part of the free flow of ideas which is an integral part of any democracy, the free flow of expression by unions and their members in a labour dispute brings the debate on labour conditions into the public realm.[13] [emphasis added]

26. The Court in *Pepsi-Cola* further acknowledged that the "[personal] issues at stake in labour disputes often go beyond the obvious issues of work availability and wages."[14] This approach

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[11] *Retail, Wholesale and Department Store Union, Local 558* v. *Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 ["*Pepsi-Cola*"] at para. 32.
[12] *U.F.C.W., Local 1518* v. *KMart Canada Ltd.*, [1999] 2 SCR 1083 ["*Kmart Canada*"] at para. 73; emphasis added.
[13] *Pepsi-Cola, supra* at para. 33, 35.
[14] *Pepsi-Cola, supra* at para. 34.

aligns with the Court's comments in two other significant cases involving the role of unions in society as a whole, *Lavigne*[15] and *Advance Cutting*[16].

27. In both *Lavigne* and *Advance Cutting* the issue on appeal concerned the mandatory union dues remittance on union membership when the member in question does not agree with the union's assumed role in broader societal issues outside of work and wages.

28. In *Lavigne*, the Court endorsed this larger place of unions in civil society, including taking positions in "politics by supporting particular causes", as stemming from a recognition of the expansive character of the interests of unions and their members that go well beyond their direct economic issues and the narrow notion of labour as a commodity. This larger role in society "enhances not only the economic interests of labour but also the interest of working people in preserving some dignity in their working lives."[17]

29. In *Advance Cutting*, this Court expanded upon this larger societal objective that unions be able to "participate in a meaningful way in the debates on the direction of Canadian society", going so far as to hold that "**[the] fact that unions intervene in political social debate is well known and well documented and might be the object of judicial notice."** [emphasis added][18]

30. This Court again emphasized the important role that union expression plays both with respect to the direct economic goals of union members and with respect to broader social interests in *Alberta Privacy Commissioner*, reviewing with approval many of the cases cited above and noting that "in the labour context, freedom of expression can enhance broader societal interests" and "[since] the Second World War, the Canadian government has recognized that unions have a role to play in the Canadian economy and society more broadly".[19]

31. For all of these reasons, the BCGEU submits that a proper interpretation of s. 4(2)(b) of the *PPPA*, that affords considerable weight to the presence of union expression in larger political

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[15] *Lavigne* v. *Ontario Public Service Employees Union*, [1991] 2 SCR 211 ["*Lavigne*"]
[16] *R.* v. *Advance Cutting & Coring Ltd.*, 2001 SCC 70 ["*Advance Cutting*"].
[17] *Lavigne, supra* at para. 156.
[18] *Advance Cutting, supra* at paras. 165, 226; emphasis added.
[19] *Alberta Privacy Commissioner*, *supra* at paras. 33, 34.

debates within society and ensures that no chill is placed on such important expression, is the only interpretation that accords with this Court's jurisprudence.

D. Academic and international recognition of union expression

32. In line with this approach, the leading academic writing has acknowledged the role of union expression, not just with respect to improving the working conditions of union members but also to advancing larger societal goals.[20] As Gerry Sran *et al*. commented:

> Traditionally, unions have played a significant role in public policy and legislative decisions that affect the distribution of income. Working in coalitions across a spectrum of groups, unions have been able to push policy makers to address issues of rising inequality, bringing to the table an admirable track record of lobbying efforts for minimum-wage laws, public pension plans, unemployment insurance, and occupational health and safety legislation. **Unions have also supported the fight for gender equality along with initiatives to reduce poverty, combat racism, advance social inclusion and human rights for equality-seeking groups, and advocate for healthy communities. With a tool chest that includes everything from organizing education events to holding mass rallies, unions have mobilized the broader society to resist the erosion of human rights**.[21] [Emphasis added.]

33. Similarly, international bodies have also long recognized the importance of union expression, as far back as the very roots of modern labour law:

> […] it would not be possible to speak of collective bargaining or co-operation in the true sense of those terms if the organisations participating in such bargaining and co-operation did not enjoy complete autonomy in relation to the State and were not accorded full freedom of expression and action.[22]

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[20] See David J Doorey, "Just Transitions Law: Putting Labour Law to Work on Climate Change" (2017) 30:2 J Envtl L & Prac 201; John S Ahlquist, "Labor Unions, Political Representation, and Economic Inequality" (2017) 20:1 Annual Rev Political Science 409; Dimitris Stevis, "Union and the Environment: Pathways to Global Labor Environmentalism" (2011) 14:2 WorkingUSA 145; with respect to gender equality and supporting a continued democratic society, see also Sran et al, "Why Unions Matter: Unions, Income Inequality, and regressive Labour Laws" in Matthew Behrens, ed, Unions Matter: Advancing Democracy, Economic Equality, and Social Justice, (Toronto: Between the Lines, 2014) 13 at 39 [Sran et al, Why Unions Matter] and Nathalie Des Rosiers, "Unions and Democratic Governance" in Matthew Behrens, ed, Unions Matter: Advancing Democracy, Economic Equality, and Social Justice, (Toronto: Between the Lines, 2014) 93 at 94.

[21] Sran et al, Why Unions Matter, supra note 1.

[22] International Labour Office, Freedom of Association and Industrial Relations, International Labour Conference, 13th Sess., Report VII, Geneva, 1947 at 107. See also, International Labour

E. The importance of union expression and the need to protect it is enmeshed in our system of labour relations

34. The preceding passages firmly establish union speech concerning the larger society as valuable expression deserving of significant weight under the *Pointes* test. The importance of this expression on its own establishes that the *PPPA* ought not be interpreted in a manner that risks a chilling effect on union expression.

35. A further source of the need to avoid such a chilling effect in the application of s. 4(2)(b) of the *PPPA* is found in the administrative tribunal jurisprudence, which repeatedly acknowledges the importance of union expression, most particularly expression from elected union leaders in labour relations between unions and their employer counterparts, such as the Respondent.

36. This acknowledgement of union expression in the reality of labour relations extends far back in the arbitral jurisprudence, as seen in *City of London* case below. This arbitration award aligns with this Court's understanding that union speech may be strident and even aggressive: [23]

> **The board also accepts the position adopted by other arbitrators that union officials have somewhat wider latitude in permissible speech than other employees when they are acting in their capacity as union officers.** The union is by nature a combat organization. Its relationship with management must be in large measure adversarial. Leaders of unions must at times be belligerent toward management and at other times must stir up their troops for combat. Unions depend in large measure on volunteers from among the rank and file members to provide leadership. Their ability to lead cannot be unduly restricted because of their employment relationship with the firm with whom they deal on behalf of the union.[24] [Emphasis added.]

37. The privileged status afforded to free expression by union leadership in responding to employers is repeatedly acknowledged in labour tribunal decisions dating back decades. In *Ford Motor*, for example, the arbitrator rejected an employer's attempt to discipline union leaders for insubordination and expressly noted that union leaders in the workplace stand in a different place on such issues as follows:

Organization, Declaration of Philadelphia: Declaration concerning the aims and purposes of the International Labour Organization, (1944).

[23] *Pepsi-Cola, supra* at para. 90.

[24] *Re Corporation of the City of London and London Civic Employees Union, Local 107*, 1978 CanLII 3475 (ON LA) at p. 152-153

> Clearly, union stewards stand in a different position than the normal employee when dealing with management. As noted in the *International Harvester* award, when acting in his representative capacity a union steward stands in a position of equality with management. [25]

38. In *Burns Meats*[26], a leading labour arbitrator cited with approval the United States Supreme Court's seminal holding in *Linn v. United Plant Guard Workers of America, Local 114*,[27] where that court grappled with allegations made by a union that the employer had lied to their employees and the employer's Pinkerton managers were "robbers". Even in the relative infancy of modern labour relations, the U.S. Supreme Court held that the "general common law standard of defamation, namely that a statement adverse to a person's reputation is actionable *per se* if it can be shown that the statement is false, is too restrictive in the context of a union campaign."[28]

39. The arbitrator in *Burns Meats* went on to note that the principles set out in the earlier American jurisprudence are "not foreign to our law", citing another foundational arbitral decision, *Firestone Steel*[29], and noted that a "steward on the shop floor cannot be expected to demonstrate the finesse and social graces of a career diplomat".[30]

40. The arbitrator also took heed of the reality that all elected union officials, from shop stewards to union presidents, are an integral part of a larger political infrastructure within the unionized setting:

> A chief steward often operates within a political process. Elected by his fellow employees, he may be required one day to speak harsh words to management and another day to speak harsh words about management to employees in an effort to inform or rally them. He may posture in his communications both with management and with the employees. In that he is not unlike other elected officials.[31]

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[25] *Re Ford Motor Co. of Canada v. U.A.W., Local 107* (1976), 1976 CanLII 2111 (ON LA) at p. 336.

[26] *Re Burns Meats Ltd. and Canadian Food & Allied Workers, Local P139,* 1980 CanLII 4012 (ON LA) ["*Burns Meats*"]

[27] 383 U.S. 53 (1966)

[28] *Burns Meats, supra* at p. 383.

[29] *Firestone Steel Products of Canada* (1975), 8 L.A.C. (2) 164 (Brandt) at p. 167 as cited in *Burns Meats* at p. 385.

[30] *Burns Meats*, *supra* at p. 385.

[31] *Burns Meats, supra* at p. 386

41. For these reasons, the BCGEU submits the potential chilling effect of *not* giving serious weight to the importance of union speech under s. 4(2)(b) of the *PPPA* will have significant repercussions for our system of labour relations. These adverse effects will not only be felt at the relatively sophisticated and well-resourced union president level but will permeate throughout the unionized setting to stewards on the shop floor and the day-to-day activities of unions.

42. The *PPPA* ought not be interpreted in a manner that will leave union leaders, long recognized as voices for the voiceless, marginalized, and oppressed, vulnerable to litigation that is manifestly not in the public interest.

F. Conclusion

43. In closing, the BCGEU submits that the weighing exercise under the s. 4(2)(b) of the *PPPA* should consider the importance of union expression and the societal interest in avoiding a chill on such expression. Such an approach would not only align with *Charter* values, existing jurisprudence, academic literature, and international law instruments, but also avoid unanticipated adverse consequences for the proper functioning of labour relations in Canada.

PART IV – SUBMISSIONS ON COSTS

44. The BCGEU takes no position on the disposition of the appeal. The BCGEU seeks no costs and requests that no costs be ordered against it.

PART V - ORDER SOUGHT

45. The BCGEU makes no submissions on the outcome of the appeal.

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

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PART VI – TABLE OF AUTHORITIES

CASELAW	PARAGRAPH REFERENCE
1704604 Ontario Ltd. v. *Pointes Protection Association*, 2020 SCC 22	2, 8, 9, 14, 15, 22, 34
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