

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

B E T W E E N :

GLEN HANSMAN

Appellant

- and -

BARRY NEUFELD

Respondent

- and -

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PART I- Overview and Statement of Facts

1. Free expression is an essential means of advancing equality in democratic societies, enabling those harmed by systemic discrimination to live life on their own terms, share their experiences, create community, organize, and advocate for change. However, access to expressive opportunities, and the corresponding ability to participate in civil society, remain unequal and unsafe for many members of society. The use of litigation as a tool to quell expressions on matters of public interest contributes to and perpetuates these participatory inequalities, which in turn safeguard the *status quo* and the interests and perspectives of the powerful and privileged.
2. The state plays an important role in promoting substantive equality in public participation. Under BC's *Protection of Public Participation Act*,¹ courts must dismiss even meritorious claims where they arise from expressions on matters of public interest, and the public interest in protecting those expressions outweighs the public interest in allowing the claims to proceed to trial.² While the *PPPA* thus has the potential to remedy participatory inequalities, this potential will not be realized without a purposive and highly contextual legal analysis.
3. This appeal concerns the application of the *PPPA* to a defamation claim where the expressions at issue were responsive to attacks on transgender youth and other members of the 2SLGBTQ+ community. The Court of Appeal, in reversing the BC Supreme Court's dismissal of the claim under s. 4 of the *PPPA*, engaged in a decontextualized legal analysis which distorted and ultimately thwarted the *PPPA*'s purpose and promise.³
4. West Coast LEAF submits that the constitutionally protected principle of substantive equality must guide the interpretation of the *PPPA*. It will address a substantive equality-informed approach to the public interest weighing exercise which includes a framework for assessing "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."

¹ *Protection of Public Participation Act*, SBC 2019, c 3 [*PPPA*].

² *PPPA*, *supra* note 1, s 4.

³ *Neufeld v Hansman*, 2021 BCCA 222 [*Hansman (BCCA)*].

PART II – Position with Respect to the Questions in Issue

5. West Coast LEAF addresses a substantive equality-informed approach to the public interest weighing exercise. It takes no position on the outcome of the appeal.

PART III- Statement of Argument

A. Substantive Equality, the *PPPA*, and the Public Interest Weighing Exercise

6. The purpose of the *PPPA* has clear equality dimensions. During second reading, the Attorney General of BC confirmed that the *PPPA* was intended to protect the essential democratic value of public participation and prevent “powerful and wealthy” people from using litigation as a tool to insulate themselves from public criticism and “stop people from talking about the issues of the day.”⁴ He went on to discuss the particular risks posed by defamation law to public debate, describing it as structurally unfair and still rooted in its historical protection of “aristocrats” from commentary by the “common folks” or “rabble” around them.⁵
7. The Attorney General’s concerns about abusive litigation by the “powerful and wealthy” reflect the reality of participatory inequalities in Canada. Members of dominant groups, by virtue of their social, political, and economic power, already enjoy disproportionate access to and influence over public discourse and, in turn, the democratic process. They maintain their dominant position in part through their privileged access to the legal system. Meanwhile, the same social forces that operate to marginalize and oppress certain groups in society also act as compounding barriers to their meaningful public participation.⁶ These barriers include lower social status, systemic discrimination, limited financial and other resources, increased exposure to violence, the presence of hateful, discriminatory, or otherwise harmful speech in the public square, and decreased access to justice and the courts.⁷

⁴ British Columbia, Legislative Assembly, *Hansard*, 41-4, No 198 (14 February 2019) at 7018 (Hon David Eby).

⁵ *Ibid* at 7018-7019.

⁶ *Oger v Whatcott (No 7)*, 2019 BCHRT 58 [*Oger*] at para 68.

⁷ For a general discussion of unequal access to justice, see *Council of Canadians with Disabilities v British Columbia (AG)*, 2020 BCCA 241 at paras 76-77.

8. This Court’s interpretation of the *PPPA*’s equivalent legislation in Ontario further supports the *PPPA*’s equality dimensions.⁸ The Court confirmed in *Pointes* that such legislation seeks to uphold the democratic ideals of a pluralistic society.⁹ Moreover, equality concerns run through the Court’s approach to the public interest weighing analysis, which includes consideration of the social value of the expression at issue,¹⁰ the power differentials which mark the indicia of a SLAPP suit,¹¹ and systemic public participation implications (including, importantly, 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).¹²
9. The *Charter*’s equality guarantee under s. 15 is a critical interpretive aid in realizing the *PPPA*’s purpose as it intersects with the state’s underlying interest in protecting and promoting the shared values of equality, human rights and democracy.¹³ The animating norm of the *Charter*’s equality guarantee is substantive equality.¹⁴ As described by this Court in *Fraser*¹⁵:

At the heart of substantive equality is the recognition that identical or facially neutral treatment may “frequently produce serious inequality” (*Andrews*, at p. 164). This is precisely what happens when “neutral” laws ignore the “true characteristics of [a] group which act as headwinds to the enjoyment of society’s benefits” (*Eaton v. Brant County Board of Education*, 1997 CanLII 366 (SCC), [1997] 1 S.C.R. 241, at para. 67; *Eldridge*, at para. 65)

10. Ensuring substantive equality in a s. 15 claim requires attention to the claimant group’s “full” social, political, economic, and historical context, the “actual impact” of the law on that

⁸ *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 [*Pointes*] and *Bent v Platnick*, 2020 SCC 23 [*Bent*].

⁹ *Pointes*, *supra* note 8 at para 1.

¹⁰ *Ibid* at paras 74-77.

¹¹ *Ibid* at para 78.

¹² *Ibid* at para 80.

¹³ *Loyola High School v Quebec (AG)*, 2015 SCC 12 at para 47. See also *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 41.

¹⁴ *Fraser v Canada (AG)*, 2020 SCC 28 [*Fraser*] at para 47, citing *Withler v. Canada (AG)*, 2011 SCC 12 [*Withler*] at para 2, *R v Kapp*, 2008 SCC 41 at paras 15-16, and *Quebec (AG) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [*Alliance*] at para 25.

¹⁵ *Fraser*, *supra* note 14 at para 47.

group's situation, and the "persistent systemic disadvantages [that] have operated to limit the opportunities available" to that group's members.¹⁶

A Substantive Equality-Informed Approach to the Public Interest Weighing Exercise

11. Substantive equality in public participation means that every member of society, regardless of their social position, can enjoy the "the search for truth," "participation in political decision making," and "self-fulfilment and human flourishing" arising from freedom of expression under s. 2(b) of the *Charter*.¹⁷ To support this ideal, a substantive equality-informed approach to the public interest weighing analysis must be purposive and highly contextual. Courts will need to identify and squarely engage with pre-existing participatory inequalities so as to ensure that the *PPPA* does not operate to perpetuate them.
12. Where the issues in the case implicate the equality interests and public participation of a marginalized group in society, overarching and interrelated considerations include:
 - a. The full social, political, economic, and historical context of the affected group, including the "persistent systemic disadvantages" which have operated to limit their equality and public participation.
 - b. Any power differentials between the plaintiff and the affected group, including whether the plaintiff is a member of a historically dominant group.
 - c. The discursive context of the expression and the claim, including the ways in which the expression may undermine or enhance the equality and public participation of the affected group in light of a particular debate's history, dynamics, and use of language.

¹⁶ *Fraser*, *supra* note 14 at para 42, citing *Withler*, *supra* note 14 at para 43, *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 17, *Quebec (AG) v A*, 2013 SCC 5 at paras 327-332, *Alliance*, *supra* note 14 at para 28 and *Centrale des syndicats du Québec v Quebec (AG)*, 2018 SCC 18 at para 35.

¹⁷ *R v Sharpe*, 2001 SCC 2 at para 182; *Thomson Newspapers Co v Canada (AG)*, [1998] 1 SCR 877, 1998 CanLII 829 (SCC) at para 24.

- d. The equality and public participation implications of allies who speak out on behalf of the affected group, especially where members of the affected group face barriers to speaking out themselves.
 - e. The legal context of the expression and the claim, including the ways in which the claim may undermine the equality and public participation of the affected group because of unequal access to justice, systemic discrimination in the justice system, and/or the structure of defamation law.
13. An important starting point to this analysis is the proper identification of the expression to be weighed. In the judgment under appeal, the Court of Appeal limited the “actual expression” at issue to the defamatory sting of Mr. Hansman’s expressions and then proceeded to consider, in a contextual vacuum, the public interest in calling a person “bigoted, transphobic, anti-immigrant, racist, misogynistic, and hateful.”¹⁸ Such a narrow and myopic lens on the expression at issue only served to obfuscate the case’s equality and public participation implications. Courts must instead define expressions broadly, holistically, and in relation to their full social, discursive, and legal context.
14. This case ultimately highlights the absurd results arising from a formalistic and decontextualized approach to the public interest weighing analysis. With respect, the Court of Appeal missed what was “really going on” in the case before it. Transgender people experience exceptionally high rates of systemic discrimination, poverty, social isolation, suicide, violence, and inadequate access to healthcare.¹⁹ However, and as illustrated by Mr. Neufeld’s comments, their equality, private healthcare decisions, and very existence continue to be questioned and disparaged in the public square (including before the courts), with the ultimate effect of perpetuating their systemic disadvantage.²⁰ Meanwhile, transgender people are underrepresented in civil society and the very “debates” of which they are the subject matter,

¹⁸ *Hansman (BCCA)*, *supra* note 3 at paras 61-70.

¹⁹ *Oger*, *supra* note 6 at paras 60-71.

²⁰ *Ibid.* See also the cases of *AB v CD*, 2020 BCCA 11; *AM v Dr F*, 2021 BCSC 32, and *GMS v Dr Z*, 2021 BCSC 1915, where litigants sought to draw the courts into improper debates about the merits of gender affirming care and the dignity of transgender youth.

including because of their exposure to violence and hateful, discriminatory, or otherwise harmful speech.²¹ Allies of transgender people, such as Mr. Hansman, play a critical role in this social and discursive context by responding to attacks on transgender people and otherwise promoting their equality interests.²²

B. Meaningfully Assessing the Hostility Factor

15. Consideration of “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” (“the hostility factor”) is highly relevant to the substantive equality analysis, as it recognizes that both expressive activity and litigation which seeks to limit expressive activity have the potential to harm vulnerable or protected groups, and in turn push them further out of the public square. The Court in *Pointes*, however, did not set out a framework for assessing or weighing the hostility factor.
16. West Coast LEAF submits that this Court must provide clear and concrete guidance on the hostility factor to make it meaningful in practice. In its review of cases from BC and Ontario which apply the *Pointes* analysis, West Coast LEAF did not locate any decision which expressly considers the hostility factor. This case is emblematic of the problem. Neither the Chambers Judge nor the Court of Appeal considered whether Mr. Neufeld’s claim might provoke hostility against transgender people, even though the issues in the case clearly implicate transgender people’s equality and dignity interests.²³

²¹ *Oger*, *supra* note 6 at paras 66-71.

²² It is important to note that while Mr. Hansman was acting as an ally to transgender people, he was also speaking out as a member of the larger 2SLGBTQ+ community.

²³ In *Volpe v Wong-Tam*, 2022 ONSC 3106, the Ontario Superior Court of Justice addressed a similar factual matrix and also did not consider the hostility factor. The expressions at issue in the underlying defamation claim were responsive to the plaintiffs’ attacks on the 2SLGBTQ+ community and described the plaintiffs as homophobic and transphobic. In contrast to the Court of Appeal’s decision in this case, the Chambers Judge found that the importance of protecting

17. Another context in which the hostility factor could be relevant is where the expressions relate to gender-based violence. In *Galloway v AB*,²⁴ a university professor sued a former student who accused him of sexual assault, as well as 24 other people who allegedly repeated her allegations while supporting her on campus or in social media debates. Most of his claim was allowed to proceed. In *Smith v Nagy*,²⁵ a prominent member of an online gaming community sued his ex-wife over a social media post accusing him of abuse (which later prompted more of his victims to speak out). His claim was also allowed to proceed. Neither decision considered the hostility factor even though defamation claims may discourage survivors from reporting, disclosing, and/or engaging in public discussion about gender-based violence.²⁶

A Proposed Framework for the Hostility Factor

18. Like the rest of the public interest weighing exercise, a substantive equality-informed assessment of the hostility factor must be purposive and contextual. A threshold issue is whether there is a connection between the expression or the claim and an identifiably vulnerable group or a group protected by s. 15 of the *Charter* or human rights legislation. At this stage of the analysis, such a connection should be defined largely and liberally. A party does not need to be a member of the affected group for that group's interests to be considered. For example, the hostility factor is relevant in cases such as this appeal where the underlying claim implicates an ally's equality-enhancing expressions.

19. Groups protected by s. 15 of the *Charter* and human rights legislation will be informed by s. 15 and human rights jurisprudence, read in a broad and inclusive way. Such jurisprudence will often be an important tool in understanding a protected or analogous group's social context and the "built-in headwinds" affecting their equality and public participation.

expressions which seek to ensure the safety and inclusion of 2SLGBTQ+ students outweighed the reputational harm to the plaintiffs.

²⁴ *Galloway v AB*, 2021 BCSC 2344 [*Galloway*].

²⁵ *Smith v Nagy*, 2021 ONSC 4265 [*Smith*].

²⁶ In *Galloway*, the defendant A.B. raised the hostility factor in argument (see para 661), but the Chambers Judge did not address this argument in her analysis.

20. “Identifiably vulnerable” groups include but are not limited to groups with protected status. The overarching marker of vulnerability is substantive inequality in society, as indicated by characteristics including historical disadvantage, social and/or economic marginalization, the presence of prejudice and systemic discrimination against the group, unequal access to expressive opportunities, and unequal access to justice. Groups can be identifiably vulnerable because of characteristics which have not been recognized as immutable in and of themselves, such as poverty or unhoused status. However, such characteristics must still be connected to a group’s intrinsic equality and dignity. An unpopular position on a political or social issue, for example, would not typically render a group vulnerable for the purposes of this analysis.
21. Courts must be careful to avoid ascribing vulnerability to members of historically advantaged groups, such as white people, cisgender men, or members of a dominant faith group, who wrongly equate a perceived decrease in their own privilege with oppression or inequality.
22. Once the threshold connection has been established, the possibility that the expression or the claim might provoke hostility against a vulnerable or protected group should be considered from the perspective of an informed member of the affected group. Such a perspective ensures the acute sensitivity to context required by substantive equality, especially since the experiences of marginalized people will often diverge from those of “an informed member of society” and/or be subject to widespread misunderstandings or biases.
23. The focus of the analysis should be on the effects of the expression or the claim. The effects may be direct or indirect, and an intention to provoke hostility is not required. To properly assess the effects, courts must consider their full social, discursive, and legal context.
24. What constitutes “hostility” extends beyond the narrow interpretation of hatred in the criminal and human rights contexts and includes any harm which diminishes the equality of, or perpetuates antagonism against, a vulnerable or protected group. That this Court sought to capture a more expansive harm is evident from its use of the term hostility, which the Oxford English Dictionary (“OED”) defines to mean “opposition or antagonism in action, thought, or

principle.”²⁷ Similarly, the OED defines “hostile” to mean “unfriendly in feeling, action or character; contrary, adverse, antagonistic.”²⁸

25. A balancing of legislative objectives with s. 2(b) expression rights also supports a more expansive harm. Unlike in the criminal or human rights contexts, where the state seeks to control discrimination by attaching criminal or civil sanctions to expressive activity, the *PPPA* applies to private civil disputes and only limits speech to the extent that the plaintiff or others might be deterred from engaging in public debate if they cannot sue. Absent the plaintiff’s claim, there would be no state intervention in their speech at all.
26. While courts should interpret hostility largely and liberally, there must still be a connection between the harm and the group’s vulnerability or protected status. For example, this factor is not intended to capture reputational harm to a cisgender woman (who is a member of a protected group by virtue of her “sex” status) who, like Mr. Neufeld, is criticized for disparaging or demeaning transgender people.
27. The terms “possibility” and “might provoke” suggest that while the potential harm must be more than speculative, there is no requirement to prove that the expression or the claim either:
 - a. provoked or likely provoked hostility; or
 - b. will or will likely provoke hostility.
28. This approach is both consistent with substantive equality and commensurate with a pre-trial screening mechanism. Placing an onerous evidentiary burden on marginalized people and their allies, especially in a summary assessment context, will often prevent meaningful consideration of their equality interests.
29. With respect to the effects of the expression, situating the expression within the history and dynamics of its specific discursive context is critical. For example, in *Oger*, the BC Human Rights Tribunal observed that a statement that transgender people “are not real” reflects “the most pernicious stereotype about transgender people, and is one which is found at the root of

²⁷ Oxford English Dictionary, 3d ed, *sub verbo*, “hostility” (figurative) [*OED*].

²⁸ OED, *supra* note 26, *sub verbo*, “hostile” (figurative).

most discrimination against them.”²⁹ However, such a statement about another social group, such as cisgender women, would not have the same harmful effect.³⁰ Similarly, the analysis must be sensitive to the presence of coded language or “dog whistles.” “Polite” expressions which mask a denigrating meaning pose particular risks because of their perniciousness and the difficulties in identifying them.

30. With respect to the effects of the claim, hostility may arise from claims which rely upon or perpetuate prejudice, stereotypes, or other harmful beliefs about vulnerable or protected groups. It may also arise from claims which suppress equality-enhancing expressions, including expressions which are responsive to attacks on a vulnerable or protected group. Whether an expression is equality-enhancing should be assessed broadly and contextually, as a narrow focus on the defamatory sting of the expression will often distort its significance. Moreover, courts must recognize that in “a pluralistic and healthy democracy,” attacks on a vulnerable or protected group often merit vigorous and outraged responses.


31. A finding that there is the possibility that the expression or the claim might provoke hostility against a vulnerable or protected group must be given significant weight in the public interest weighing exercise and will often be determinative of its outcome. Such expressions and claims are contrary to the purpose of the *PPPA* and undermine the state’s interest in protecting and promoting the shared values of equality, human rights, and democracy. There is thus limited to no public interest in affording them legal protection.

PARTS IV AND V- SUBMISSION ON COSTS AND ORDER SOUGHT

32. West Coast LEAF does not seek any orders.

33. West Coast LEAF seeks no costs and asks that no costs be awarded against it.

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



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²⁹ *Oger, supra* note 7 at para 156-157.

³⁰ *Ibid.*

PART VI- TABLE OF AUTHORITIES

JURISPRUDENCE	CITED AT PARA(S).
<i>1704604 Ontario Ltd v Pointes Protection Association</i> , 2020 SCC 22	8, 15-16
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