

File Number: \_\_\_\_\_

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

BETWEEN:

GLEN HANSMAN

Applicant  
(Respondent)

- and -

BARRY NEUFELD

Respondent  
(Appellant)

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**APPLICANT'S MEMORANDUM OF ARGUMENT**  
(Pursuant to Rule 25(1)(c) of the *Rules of the Supreme Court of Canada*)

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. British Columbia’s *Protection of Public Participation Act* is designed to protect freedom of expression and public participation in debates on matters of public interest.<sup>1</sup> It is in all material respects identical to Ontario legislation<sup>2</sup> that was the subject of decisions by this Court in *1704604 Ontario Ltd. v. Pointes Protection Association* and *Bent v. Platnick*.<sup>3</sup>

2. This case raises an issue of vital importance to the proper functioning of the British Columbia and Ontario schemes that was not addressed in either *Pointes* or *Bent*: the role, if any, of a plaintiff’s expressive rights in the public interest weighing exercise prescribed by s. 4(2)(b) of the *PPPA*. Under that provision, a court must weigh the public interest in continuing the proceeding against the public interest in protecting the defendant’s expression. As part of that exercise, should a court consider whether dismissing a defamation action would have a chilling effect on the expressive activity of the plaintiff or others because they may be dissuaded from participating in public discourse if they are unable to continue a defamation action?

3. This issue did not arise in *Pointes* or *Bent* because in neither of those cases was the plaintiff also engaged in expressive activity. Yet as the facts of the present case demonstrate, the resolution of this issue has significant implications for whether the promise of the *PPPA* can be realized, particularly where the defendant has spoken out in defence of a vulnerable group in Canadian society.

4. The applicant, Glen Hansman (“Hansman”), is a gay man and teacher. At the time of the events giving rise to this litigation, Hansman was the President of the British Columbia Teachers’ Federation (“BCTF”), the union representing approximately 45,000 teachers and associated professionals in British Columbia.

5. The respondent, Barry Neufeld (“Neufeld”), is an elected public school board trustee in the Chilliwack School District in British Columbia.

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<sup>1</sup> [Protection of Public Participation Act, S.B.C. 2019, c. 3](#) (“*PPPA*”).

<sup>2</sup> *Protection of Public Participation Act*, 2015, S.O. 215, c. 23, amending the [Courts of Justice Act, R.S.O. 1990 c. C.43](#).

<sup>3</sup> [2020 SCC 22](#) (“*Pointes*”) and [2020 SCC 23](#) (“*Bent*”).

6. On October 23, 2017, Neufeld posted on Facebook the first of many public statements attacking LGBTQ individuals and the use of educational resources designed to increase inclusivity in schools and teach students, in an age-appropriate way, about sexual orientation and gender identity. Neufeld's statements (published over a lengthy period of time) were extreme, using words such as "child abuse", "evil ideology", "eugenics" and "destruction of humanity", mixed with denunciation of same sex marriage and same sex parenting.

7. Neufeld's initial Facebook post led to a number of people in the education field condemning those statements, including Hansman who was approached by various media organizations for his opinion. Hansman opined that Neufeld's views were "bigoted" and inconsistent with his obligations as a school board trustee to provide for safe and inclusive schools. Neufeld continued to make public statements which attracted further criticism from persons in the education field.

8. On January 29, 2018, the BCTF filed a human rights complaint against Neufeld, alleging that his public statements violated sections 7 and 13 of British Columbia's *Human Rights Code*.<sup>4</sup> Section 7(1) prohibits the publication of any statement that "indicates discrimination or an intention to discriminate against a person or a group of class of persons" or "is likely to expose a person or a group of persons to hatred or contempt." Section 13 prohibits discrimination regarding employment.

9. In discussing the human rights complaint in the media, Hansman opined that Neufeld had "tip toed quite far into hate speech" with his statements.

10. In September 2018, in the lead-up to school trustee elections, Neufeld brought a defamation action, declaring an intention in a Facebook post to bring Hansman "DOWN". Neufeld did not sue any other person who had made similar comments in response to his public statements.

11. The British Columbia Supreme Court dismissed Neufeld's defamation action under the *PPPA* but the Court of Appeal restored it. Central to the Court of Appeal's decision was its finding that in weighing the respective public interests stipulated by the statute, the chambers

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<sup>4</sup> [\*Human Rights Code, R.S.B.C. 1996, c. 210.\*](#)

judge had failed to give any weight to the “risk that people would withdraw or not engage in public debate for fear of being inveighed with negative labels and accusations of hate speech with no opportunity to protect their reputation” through a defamation action.<sup>5</sup>

12. The Court of Appeal has misinterpreted the *PPPA*. The purpose of the *PPPA* is to protect the defendant’s expressive activity on matters of public interest, not the plaintiff’s. The statute accounts for the plaintiff’s interests by requiring a court to consider as part of the weighing exercise the harm suffered by the plaintiff, either reputational harm or monetary harm. By adding the additional factor of whether persons will be deterred from speaking out because they will face “negative labels” without recourse to the courts, the Court of Appeal upset the delicate balance achieved by the *PPPA*. Focusing on the expressive activity of the party suing in defamation loses sight of the statute’s objective, namely to protect the expressive rights of the party being sued.

13. If, however, it is appropriate to consider the potential chilling effect on the expressive activity of the person bringing an action in defamation, then it is a matter of public importance to determine how this is to occur. In the applicant’s submission, it is necessary to weigh the value of the expression when deciding where the public interest in any given case lies. The Court of Appeal did not do this. Incredibly, it did not even mention that Hansman’s expressions were directed at protecting and promoting the equality of one of the most vulnerable groups in society, transgender individuals. Guidance from this Court is required on how courts should weigh the competing claims of plaintiffs and defendants for protection of their expressive activities under the *PPPA*.

14. This Court has played an important role in developing legal protections for gay and lesbian individuals. It has not had an opportunity to consider the plight of transgender and non-binary people in Canadian society. This case provides that opportunity in the context of deciding the weight to be given to expressive activity intended to ensure their safety and equality.

15. For all of these reasons, leave to appeal should be granted.

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<sup>5</sup> Court of Appeal Reasons, at para. 65 (Applicant’s Leave Book (“ALB”), Tab B3).

## B. Factual Background

### SOGI 123

16. The term SOGI stands for Sexual Orientation and Gender Identity.<sup>6</sup> SOGI 123 is a collaboration involving a group of organizations including British Columbia’s Ministry of Education, the Faculty of Education at the University of British Columbia, the ARC Foundation, the BCTF and community organisations representing lesbian, gay, bisexual, transgender and queer (“LGBTQ”) persons. The purpose is to share SOGI-inclusive tools and resources in three areas of education resources: policies and procedures, inclusive environments and curriculum resources for educators.<sup>7</sup>

17. There is no particular SOGI curriculum, but SOGI resources that align with the Ministry of Education’s curriculum can be used in many subject areas. The SOGI 123 materials were drafted to be age-appropriate tools for teaching about sexual orientation and gender identity.<sup>8</sup>

### Human Rights Protection for SOGI

18. Since 1992, sexual orientation has been a prohibited ground of discrimination under British Columbia’s *Human Rights Code*. A prohibition against discrimination on the basis of gender identity or expression was added in 2016. Prior to the 2016 amendment, discrimination on the basis of gender identity or expression was addressed under the ground of sex.

19. Shortly after gender identity or expression was added to the *Human Rights Code*, the Ministry of Education issued an updated Ministerial Order that required school boards to include in their codes of conduct a reference to gender identity and expression, in addition to the other prohibited grounds already stipulated in the order, including sexual orientation.<sup>9</sup>

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<sup>6</sup> BCSC Reasons, at para. 7 (ALB, Tab B1); Affidavit #1 of Glen Hansman affirmed April 17, 2019 (“Hansman Affidavit”) at para. 5 (ALB, Tab D3).

<sup>7</sup> BCSC Reasons, at paras. 7, 16 (ALB, Tab B1); Hansman Affidavit, at para. 9 (ALB, Tab D3); Exhibit C to Affidavit #1 of Kaily Wong sworn July 4, 2019 (ALB, Tab D7, p. 287).

<sup>8</sup> BCSC Reasons, at para. 16 (ALB, Tab B1); Hansman Affidavit at para. 9, citing <https://www.sogieducation.org/> which includes lesson plans at this link: <https://bc.sogieducation.org/sogi3>

<sup>9</sup> BCSC Reasons, at para. 15 (ALB, Tab B1). Exhibit A to Hansman Affidavit (ALB, Tab D3, p. 145).

### The First Facebook Post

20. Neufeld has stated that he is critical of only one facet of SOGI 123 resources, namely “the teaching of the theory, as if it was fact, that gender is fluid, that there are more than two genders, and that gender is not based in biology.”<sup>10</sup> However, his public statements reveal a broader set of views about LGBTQ individuals and those who support the use of SOGI 123 resources. This is evident from a review of Neufeld’s first Facebook post on October 23, 2017:

Okay, so I can no longer sit on my hands. I have to stand up and be counted. A few years ago, the liberal minister of education instigated a new curriculum supposedly to combat bullying. But it quickly morphed into a weapon of propaganda to infuse every subject matter from K-12 with the latest fad: Gender theory. The Sexual Orientation and Gender Identity (SOGI) program instructs children that gender is not biologically determined, but is a social construct. At the risk of being labeled a bigoted homophobe, I have to say that I support traditional family values and I agree with the College of paediatricians that allowing little children choose to change gender is nothing short of child abuse. But now the BC Ministry of Education has embraced the LGBTQ lobby and is forcing this biologically absurd theory on children in our schools. Children are being taught that heterosexual marriages is no longer the norm. Teachers must not refer to “boys and girls” they are merely students. The cannot refer to mothers and fathers either. (Increasing numbers of children are growing up in homes with same sex parents) If this represents the values of Canadian society, count me out! I belong in a country like Russia, or Paraguay, which recently had the guts to stand up to these radical cultural nihilists.<sup>11</sup> [Link to news article about Paraguay omitted.]

21. There is evidence in the record that “traditional family values” and “LGBTQ lobby” are phrases frequently employed by persons who are opposed to equality for LGBTQ persons.<sup>12</sup> There is also evidence that Russia and Paraguay are unsafe places for LGBTQ individuals, and at the time of Neufeld’s post there had been significant media coverage about violence against LGBTQ individuals in those countries.<sup>13</sup> Additionally, there is evidence that the “College of paediatricians” mentioned in the post is the American College of Pediatricians (“ACP”), a small,

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<sup>10</sup> Exhibit G to Affidavit #1 of Rosalind Britten sworn May 22, 2019 (“Britten Affidavit”) (ALB, Tab D5, p. 283).

<sup>11</sup> Court of Appeal Reasons, at para. 10 (ALB, Tab B3).

<sup>12</sup> Hansman Affidavit, at para. 15 (ALB, Tab D3).

<sup>13</sup> Hansman Affidavit, at para. 18 (ALB, Tab D3). For further information on the situation in Russia, see [Human Rights Watch, “Russia Censors LGBT Online Groups” \(October 8, 2019\)](#) (reporting that under Russia’s “gay propaganda law” it is illegal to portray same sex relations as socially acceptable).

socially conservative group founded in the United States in 2002 as a protest against the American Academy of Pediatrics' support for adoption by gay couples. The Southern Poverty Law Centre has listed the ACP as a hate group.<sup>14</sup>

### Reaction to the First Posting

22. Reaction to Neufeld's Facebook post appeared on the same day as the post. There were several articles published that included comments from members of the public and the education sector, before Hansman was contacted for comment.<sup>15</sup>

23. There are many examples in the record of comments in response to Neufeld's post. For example, Justine Hodge, the Chilliwack District Parent Advisory Council chair, was reported as saying that Neufeld's "comments promote the exclusion and isolation of a growing subset of children, including those with same-sex parents." She remarked that there are transgender students and teachers in schools and it is Neufeld's "duty to ensure a safe and positive learning environment for all."<sup>16</sup> The Honourable Rob Fleming, the Minister of Education, was quoted as saying Neufeld is "not a role model in the school system on this issue" and Neufeld's views were "outdated and bigoted."<sup>17</sup>

24. Hansman was contacted by media outlets for comment and he opined that Neufeld should step down as trustee and that he "has violated his obligations as a school board trustee to ensure that students have a safe, inclusive environment."<sup>18</sup> Hansman also opined that Neufeld's views were "bigoted" and "whether he likes it or not, members of the LGBT community are here to stay."<sup>19</sup> Hansman's views were informed by his experience as a gay man and member of the LGBTQ community, a teacher in British Columbia's school system and President of the BCTF.<sup>20</sup>

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<sup>14</sup> Hansman Affidavit, at para. 16 (ALB, Tab D3).

<sup>15</sup> BCSC Reasons, at paras. 19-21 (ALB, Tab B1); Hansman Affidavit at para. 12 (ALB, Tab D3).

<sup>16</sup> Chilliwack Progress, October 23, 2017, Exhibit V to Affidavit #1 of Sara Dettman affirmed April 17, 2019 ("Dettman Affidavit") (ALB, Tab D4, p. 263).

<sup>17</sup> News 11, October 24, 2017, Exhibit FF to Dettman Affidavit (ALB, Tab D4, p. 270).

<sup>18</sup> Huffington Post, October 24, 2017, Exhibit F to Hansman Affidavit (ALB, Tab D3, p. 165).

<sup>19</sup> Neufeld alleged these opinions were defamatory: Amended Notice of Civil Claim at para. 15 (ALB, Tab D1). The link to the full nine-minute interview in which these opinions were stated was provided to the British Columbia courts: Hansman Affidavit, at para. 26 (ALB, Tab D3). The interview is available here: <https://globalnews.ca/video/3823083/backlash-after-school-trustee-criticizes-lgbtq-program>

<sup>20</sup> Hansman Affidavit, at paras. 13 and 19 (ALB, Tab D3).

25. On October 25, 2017, Neufeld issued a press release in which he stated he wanted “to apologize to those who felt hurt by my opinion, including members of the Chilliwack Board of Education.” He stated that he was “critical of an education resource, not individuals.” Hansman considered this an attempt to minimise the full impact of the post and to deny what in his view was a clear attack on the people who created and supported the SOGI 123 materials.<sup>21</sup>

### Subsequent Developments

26. On November 21, 2017, Neufeld was a keynote speaker at an event organized by Culture Guard, an organisation which has consistently opposed LGBTQ inclusion efforts in British Columbia schools.<sup>22</sup> At the Culture Guard event, Neufeld described SOGI as “an institutionalization of codependency encouraging and enabling dysfunctional behaviour and thinking patterns” and the “codling and encouraging what I regard as the sexual addiction of gender confusion.”<sup>23</sup> He also stated that using SOGI resources amounted to “gaslighting” and an attack on “the foundation of a child’s being which is child abuse”.<sup>24</sup>

27. On December 18, 2017, Neufeld made another Facebook post in which he said that he had “been suddenly thrown into the role of a prophet: speaking out to the lawmakers in Victoria and trying to motivate lukewarm Christians who are sitting idly by as all of society ‘Slouches towards Gomorrah.’” He described his job as “policy maker” and stated that “the current emphasis is on inclusion” and he did “not want to give in to the self-serving agenda of the LGBTQ+ groups who want to be given priority as the most downtrodden of victims.”<sup>25</sup>

28. Neufeld said that “gender fluidity theory” “has already demonized people of faith who believe that God created humans male and female: in the image of God.” He went on to state that unless the Church pushes back against the “new teaching”, the day will come “(maybe it is already here) when the government will apprehend your children and put them in homes where they will be encouraged to explore homosexuality and gender fluidity.”<sup>26</sup>

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<sup>21</sup> BCSC Reasons, at para. 28 (ALB, Tab B1); Hansman Affidavit, at para. 28 (ALB, Tab D3).

<sup>22</sup> Hansman Affidavit, at paras. 33-34 (ALB, Tab D3).

<sup>23</sup> Hansman Affidavit, at para. 30 (ALB, Tab D3).

<sup>24</sup> Hansman Affidavit, at para. 30 (ALB, Tab D3).

<sup>25</sup> Exhibit B to Dettman Affidavit (ALB, Tab D4, p. 233).

<sup>26</sup> *Ibid.*

29. On January 29, 2018, the BCTF and the Chilliwack Teachers' Association filed a complaint against Neufeld with the British Columbia Human Rights Tribunal. An amended complaint was filed on February 19, 2019.<sup>27</sup> The complaint alleges that Neufeld violated the prohibitions against discrimination regarding employment and publishing statements that indicate discrimination or an intention to discriminate against a person or a group or class of persons, or "is likely to expose a person or a group or class of persons to hatred or contempt."<sup>28</sup>

30. On March 19, 2018, Neufeld made another post on Facebook in which he commented about Caitlyn Jenner. He said "Not everyone is as rich as Bruce Jenner, who with plastic surgery, and tons of cosmetics manages to create a pretty convincing caricature of a woman."<sup>29</sup>

31. In April 2018 Hansman was interviewed by various media outlets about the BCTF's human rights complaint. In one interview Hansman opined that Neufeld had "tip toed quite far into hate speech" and that his statements were "similar to cases the tribunal has heard before so we feel it's really important to pursue this."<sup>30</sup> In another article, it is noted that Neufeld "has a responsibility to uphold the Human Rights Code", and Hansman is quoted as saying that Neufeld "is creating a school environment for both our members and students that is discriminatory and hateful".<sup>31</sup> Other articles published in April 2018 contain similar quotes from Hansman.<sup>32</sup>

#### School Board Elections and the Commencement of Defamation Proceedings

32. In the lead-up to the elections for the Chilliwack School Board on October 20, 2018, Neufeld and others formed an anti-SOGI slate to run together for office.<sup>33</sup>

33. On October 12, 2018, eight days before the election, Neufeld filed his defamation action.<sup>34</sup> In his pleadings, Neufeld alleged that Hansman's intention in making the comments

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<sup>27</sup> Hansman Affidavit, at paras. 40-41 (ALB, Tab D3).

<sup>28</sup> Amended Complaint to the British Columbia Human Rights Tribunal, Exhibit H to Hansman Affidavit (ALB, Tab D3, p. 176).

<sup>29</sup> Exhibit F to Dettman Affidavit (ALB, Tab D4, p. 239).

<sup>30</sup> News 1130, April 22, 2018, Exhibit J to Hansman Affidavit (ALB, Tab D3, p. 195).

<sup>31</sup> Star Vancouver, April 10, 2018, first article appearing in Exhibit D to Affidavit #1 of Jacqueline E.M. Thorsell, affirmed March 25, 2019 (ALB, Tab D2, p. 129).

<sup>32</sup> See Exhibits K and L to Hansman Affidavit (ALB, Tab D3, pp. 199 and 204).

<sup>33</sup> BCSC Reasons, at para. 39 (ALB, Tab B1).

<sup>34</sup> BCSC Reasons, at paras. 38-39 (ALB, Tab B1).

complained of “has been to silence the plaintiff and/or have him removed as a school board trustee, failing which, to prevent his re-election by destroying his reputation.”<sup>35</sup> On his Facebook page, Neufeld stated “This time, Mr. Hansman, you are going DOWN!”<sup>36</sup>

34. In a Facebook post addressing the upcoming trustee elections, Neufeld stated that he was concerned for the safety of children “who are being taught silly ideas that they can choose their gender” and he objected to children being taught to “approve of gay ‘rainbow’ families.” He said this was an “attack on people of faith” and he was critical of Christian churches for “being slow to stand up against this evil agenda.” He lamented the fact that “many of our churches have been infected with ‘Pink Christianity.’” He also described his “opponents” as being “full of furious hatred” and “determined to destroy us, our families and our jobs.”<sup>37</sup>

35. In another Facebook post on October 19, 2018, Neufeld criticized other aspects of SOGI 123, referring to inclusive education teaching about LGBTQ families and gender identity as “an evil ideology affecting children’s mental health.”<sup>38</sup>

36. On October 20 2018, Neufeld was re-elected as a trustee. After the election, Neufeld continued to make posts regarding LGBTQ persons, including a December 9, 2018 Facebook post in which he said the following:

The elites will destroy all gay kids. They are culling them from the gene pool. Make no mistake about it. The trans agenda is eugenics. They are not on the side of LGBT+ Don’t every think they are. Snakes are everywhere. More division and destruction of humanity.<sup>39</sup>

#### Neufeld’s Post-Dismissal Conduct

37. After the British Columbia Supreme Court dismissed his defamation action under the *PPPA*, Neufeld continued to make statements like he had in the past. In one post he stated that Dr. Theresa Tam, the head of the Public Health Agency of Canada, is “suspected” of being transgender and for that reason statements she makes about Covid-19 should not be believed:

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<sup>35</sup> Amended Notice of Civil Claim, at para. 38 (ALB, Tab D1, p. 105).

<sup>36</sup> Exhibit M to Dettman Affidavit (ALB, Tab D4, p. 248).

<sup>37</sup> Facebook post reproduced in PressProgress article dated October 16, 2018, Exhibit WWWW to Dettman Affidavit (ALB, Tab D4, p. 274).

<sup>38</sup> Exhibit I to Dettman Affidavit (ALB, Tab D4, p. 246).

<sup>39</sup> Exhibit Q to Dettman Affidavit (ALB, Tab D4, p. 250).

It has just dawned on me! Who is perpetrating all of this fear over the dreaded Corona virus? Why it is the World Health Organization, the same outfit that claims easy access to abortion is a human right, and that gender is NOT binary: pre pubescent children should be allowed to chose [sic] their gender, sterilize themselves and pretend that that they have successfully changed their gender to comply with what the FEEL they are. And Dr. Theresa Tam, Canadian Head of Public Health is suspected by Wikipedia of being Transgender! If this person, who has spent a major portion of their life deceiving people who she/he truly is and is now a major playing in the corrupt World Health Organization, why should we believe anything he/she says?<sup>40</sup>

38. Neufeld has continued to make a variety of statements on social media, including praise for anti-LGBTQ laws in Hungary and likening the “new gender ideology” to “grooming children for [sexual] abuse.”<sup>41</sup>

### **C. Decisions of Courts Below**

39. On November 26, 2019, Ross J. dismissed Neufeld’s defamation action under the *PPPA*. He found that Neufeld had not discharged his burden of establishing that the defence of fair comment was not valid.<sup>42</sup> In the event he was incorrect, Justice Ross considered whether the action should nevertheless be dismissed under s. 4(2)(b) of the *PPPA* because the public interest in continuing the proceeding did not outweigh the public interest in protecting Hansman’s expressive activity. He noted that Neufeld had presented little evidence of harm causally connected to Hansman’s statements.<sup>43</sup> Moreover, the fact that Neufeld had been re-elected as a trustee was “some evidence of the limited damage that he suffered.”<sup>44</sup> On the other hand,

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<sup>40</sup> Exhibit A to Affidavit of Catherine Flores affirmed August 19, 2021 (“Flores Affidavit”) (ALB, Tab D9, p. 308). See also Exhibit B (ALB, Tab D9, p. 310) where a journalist states that Neufeld has “lambasted Canadian public health physician Dr. Theresa Tam”, suggesting “she is transgender, and as such, shouldn’t be trusted.” If leave is granted Hansman will apply to add these and other documents to the record on the ground that they will be relevant and dispositive evidence if this Court decides that the *PPPA* requires a court to consider whether a defendant’s expressive activity has had a chilling effect on the plaintiff’s expressive activity.

<sup>41</sup> Exhibits C and D to Flores Affidavit (ALB, Tab D9, pp. 314 and 316).

<sup>42</sup> BCSC Reasons, at paras. 108-137 (ALB, Tab B1).

<sup>43</sup> BCSC Reasons, at paras. 147-153 (ALB, Tab B1).

<sup>44</sup> BCSC Reasons, at para. 146 (ALB, Tab B1).

Hansman’s comments were on the need for safe and inclusive schools and as such “deserve significant protection”.<sup>45</sup> He concluded that the public interest weighing favoured dismissal.<sup>46</sup>

40. The Court of Appeal allowed the appeal and reinstated the defamation action. It found there was a basis in the record to conclude that the defence of fair comment would be invalid. It also found that the chambers judge erred in his assessment of the competing public interests.

## PART II – STATEMENT OF ISSUES

41. This case raises the following issues of public importance concerning the public interest weighing exercise prescribed by s. 4(2)(b) of the *PPPA* and the equivalent provision in Ontario:

- (a) Is it permissible, as a matter of statutory interpretation, for a court to consider whether dismissing a plaintiff’s defamation action could have a chilling effect on the expressive activity of the plaintiff or others when deciding whether the public interest in permitting the plaintiff’s action to proceed outweighs the public interest in protecting the defendant’s expression under s. 4(2)(b) of the *PPPA*?
- (b) If the answer to the above question is “yes”, how should courts weigh the concern that dismissing a defamation action could have a chilling effect on the expressive activity of the plaintiff or others against the public interest in protecting the defendant’s expression? In particular, how should courts resolve this issue when the defendant’s expression was made in defence of a vulnerable group in Canadian society?

## PART III – STATEMENT OF ARGUMENT

42. Section 4(2) requires a court to dismiss a proceeding that arises from an expression made by a defendant that relates to a matter of public interest unless the plaintiff satisfies the court:

- (a) there are grounds to believe that
  - (i) the proceeding has substantial merit, and
  - (ii) the applicant [defendant] has no valid defence in the proceeding, and
- (b) the harm likely to have been suffered by the respondent [plaintiff] as a result of the applicant’s [defendant’s] expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

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<sup>45</sup> BCSC Reasons, at para. 160 (ALB, Tab B1).

<sup>46</sup> BCSC Reasons, at para. 161 (ALB, Tab B1).

43. On the section 4(2)(b) part of the case, the Court of Appeal stated the issues thus:

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

- (a) required Mr. Neufeld to prove damages and assumed causation weighed against Mr. Neufeld because others had also made critical comments;
- (b) failed to consider the public interest in the type of expression used, focusing instead on the subject matter of the expression; and
- (c) failed to consider that the public interest in protecting an expression on a matter of public interest was lessened where that expression could have a chilling effect on the other side of the debate.<sup>47</sup>

44. As the focus of this leave application is on the third issue, we will address the first two issues briefly.

45. On the first issue, the Court of Appeal found that the chambers judge erred by failing “to give full effect to the presumption of damages in defamation.”<sup>48</sup> The Court of Appeal was wrong to interfere with the chambers judge’s decision on this basis. The chambers judge accepted that damages are presumed once a statement is found to be defamatory.<sup>49</sup> However, he repeatedly noted, at the weighing stage of the analysis under s. 4(2)(b), that Neufeld had failed to adduce evidence of any harm beyond bare assertions in his affidavit. He was right to consider the paucity of evidence concerning damages as it is at that stage that the “magnitude of the harm becomes relevant”.<sup>50</sup>

46. The Court of Appeal noted that harm is not synonymous with monetary damages but can include reputational harm. No one denied this. The problem was the absence of evidence on this point. Despite the obligation on Neufeld to lead evidence to discharge his burden under the *PPPA*,<sup>51</sup> he chose to file an affidavit that simply swore to the truth of the facts alleged in his Notice of Civil Claim.<sup>52</sup> The chambers judge was entitled to give little weight to this “evidence”.

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<sup>47</sup> Court of Appeal Reasons, at para. 22 (ALB, Tab B3).

<sup>48</sup> Court of Appeal Reasons, at para. 51 (ALB, Tab B3).

<sup>49</sup> BCSC Reasons, at para. 83 (ALB, Tab B1).

<sup>50</sup> *Pointes*, at para. 70.

<sup>51</sup> *Pointes*, at para. 38 (noting that the inquiry must go “beyond the parties’ pleadings to consider the contents of the record”).

<sup>52</sup> BCSC Reasons, at paras. 121-25, 147-48 (ALB, Tab B1). See Affidavit #1 of Barry Neufeld sworn May 30, 2019 (ALB, Tab D6, p. 284).

47. On the question of causation, the Court of Appeal said that the chambers judge “wrongly assumed causation would be difficult to establish because others had made similar comments about Mr. Neufeld.”<sup>53</sup> In the court’s view, Neufeld might recover damages even if Hansman’s comments were “not the sole cause of any harm to Mr. Neufeld’s reputation.”<sup>54</sup> Here the Court of Appeal misapprehended the issue between the parties before the chambers judge. Neufeld had argued that there was “a causal link between the defendant and the negative treatment that he has received from a number of different organizations.” The chambers judge rejected this argument on the evidence, finding that “those organizations made their own decisions about the plaintiff in response to the Facebook Post.”<sup>55</sup> There is no basis to disturb this factual finding.

48. On the second issue, the Court of Appeal found that the chambers judge had erred by failing “to distinguish between the subject matter of public interest and the actual expression complained of.”<sup>56</sup> The subject matter – the need for safe and inclusive schools – was not what Neufeld complained of, the Court of Appeal stated. Rather, it was Hansman’s references to Neufeld “as bigoted, transphobic, anti-immigrant, racist, misogynistic, and hateful” that had to be examined.<sup>57</sup>

49. We note first that Hansman did not refer to Neufeld as racist or anti-immigrant. This comment was made in relation to a different candidate for school trustee who had made negative comments about refugees and immigrants.<sup>58</sup> Secondly, Neufeld did in fact allege that Hansman’s statements about the need for safe and inclusive schools were defamatory of him.<sup>59</sup> Thirdly, the

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<sup>53</sup> Court of Appeal Reasons, at para. 51 (ALB, Tab B3).

<sup>54</sup> Court of Appeal Reasons, at para. 59 (ALB, Tab B3).

<sup>55</sup> BCSC Reasons, at paras. 147, 150 (ALB, Tab B1).

<sup>56</sup> Court of Appeal Reasons, at para. 61 (ALB, Tab B3).

<sup>57</sup> Court of Appeal Reasons, at para. 62 (ALB, Tab B3).

<sup>58</sup> The Court of Appeal noted Hansman denied that his comment about refugees and immigrants applied to Neufeld but concluded there were grounds to believe Neufeld “could establish this as part of his burden in establishing defamation” (Court of Appeal Reasons, at para. 29). The court did not identify those grounds. In fact, at the hearing before the chambers judge, counsel for Neufeld accepted that the comment was “in response to another school board trustee, when you read the article, running for election who’s against SOGI” (Transcript of Proceedings, p. 80, ll. 28-31 (ALB, Tab D8, p. 298)). At the time the article was published there were candidates running for election in all 60 School Boards in the province.

<sup>59</sup> Amended Notice of Civil Claim, at paras. 14, 16, 24 (ALB, Tab D1, p. 105).

chambers judge was clearly alive to the “core” allegations of defamation “emphasized” by Neufeld at the hearing of the *PPPA* application and he read Hansman’s comments in the context of the articles in which they were published.<sup>60</sup> The chambers judge concluded, on the basis of the evidence before him, that Hansman had an honest belief in the opinions he expressed and that Neufeld had not established that a reasonable trier of fact could find that Hansman was motivated by malice.<sup>61</sup> In short, the chambers judge considered the “actual expression” of which Neufeld complained.

50. On the third issue, the Court of Appeal acknowledged that s. 4(2)(b) “refers to ‘the harm likely to have been suffered by the plaintiff’ as a result of the defendant’s expression,” but held that the inquiry extends beyond this to “the public interest in vindicating a potentially meritorious claim.” In the view of the Court of Appeal, this includes consideration of the potential chilling effect on free speech of the plaintiff or others who are witnessing the “public discourse” in which the plaintiff is participating.<sup>62</sup>

51. We submit that the Court of Appeal’s interpretation of the *PPPA* is erroneous. It is contrary to the meaning of the word “harm” in s. 4(2)(b) of the statute and to the purposes of the statute. Nor does the Court of Appeal’s interpretation find support in the extrinsic evidence that led to the passage of the Ontario statute which was then followed by almost identical legislation in British Columbia.

52. Under s. 4(2)(b) the public interest in continuing the proceeding is determined by reference to “the harm” suffered by the plaintiff “as a result of the [defendant’s] expression”. As this Court explained in *Pointes and Bent*, harm can be monetary (e.g. income loss) or non-monetary (reputational). If either of those are significant (and the defendant’s expression is either

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<sup>60</sup> BCSC Reasons, at paras. 24-25 (ALB, Tab B1). The “misogynistic” comment is not one of the core allegations of defamation. Hansman made this comment on October 19, 2018, after the defamation action had been commenced, and was in response to statements attributed to Neufeld in a PressProgress article which ran under the headline “This Man is Probably the Worst School Trustee in British Columbia”. This article is Exhibit WWWW to the Dettman Affidavit (ALB, Tab D4, p. 274).

<sup>61</sup> BCSC Reasons, at paras. 117, 141-42 (ALB, Tab B1).

<sup>62</sup> Reasons of Court of Appeal, at paras. 63-68 (ALB, Tab B3).

not worthy of protection or entitled to diminished protection) then the court may find that the public interest favours continuation of the proceeding.

53. The Court of Appeal’s interpretation of harm to include a speculative chilling effect on a plaintiff’s willingness to speak out if they cannot sue for defamation extends the meaning of “harm” beyond its intended purpose. The Court of Appeal considered this justified as part of a larger societal interest in protecting reputations. However, this societal interest is accounted for already in the notions of harm this Court accepted in *Pointes*. This is consistent with the Ontario Anti-Slapp Advisory Panel report, which stated that courts should consider whether “the action seeks a remedy for only insignificant harm to reputation, business or personal interests.”<sup>63</sup>

54. The Court of Appeal’s interpretation is also contrary to one of the fundamental aims of the legislation which, in the words of the Ontario statute, is “to discourage the use of litigation as a means of unduly limiting expression on matters of public interest.”<sup>64</sup> Plaintiffs sue defendants in defamation, not the other way around. The very purpose of the statute is to screen out such litigation when it unduly limits the defendant’s expressive activity. To allow a claim to proceed because of a concern for the plaintiff’s expressive activity is to turn the Act on its head.

55. Another purpose of this type of legislation, as stated in the Ontario statute, is “to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action”.<sup>65</sup> Again, the concern is for those who may not speak out because they may be sued, not because they may be unable to sue.

56. In *Pointes* and *Bent*, this Court was not called upon to address this interpretive question as the expressive rights of the plaintiffs were not at issue in those cases. Nevertheless, the Court of Appeal found support for its approach in *Pointes*. It noted (at para. 64) that in *Pointes* this Court had provided the following list of factors that may be considered in the weighing exercise:

[80] ... the importance of the expression, the history of litigation between the parties, broader or collateral effects on other expressions on matters of public interest, the potential chilling effect on future expressions either by a party or by others, the defendant’s history of activism or advocacy in the public interest, any

<sup>63</sup> [Anti-Slapp Advisory Panel: Report to the Attorney General \(October 28, 2010\)](#), at para. 38.

<sup>64</sup> [Courts of Justice Act](#), s. 137.1(1)(c).

<sup>65</sup> [Courts of Justice Act](#), s. 137.1(1)(d).

disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the Charter or human rights legislation. I reiterate that the relevance of the foregoing factors must be tethered to the text of s. 137.1(4)(b) and the considerations explicitly contemplated by the legislature to conduct the weighing exercise. [Italics added by this Court; underlining added by the Court of Appeal.]

57. The Court of Appeal considered that a “collateral effect” of dismissing the action was the potential negative impact “on other individual’s willingness to express themselves on issues of public interest in future.”<sup>66</sup>

58. Paragraph 80 of *Pointes* is open to interpretation because the Court does not explicitly state whether it was speaking of persons who might be sued for their expressions or people who might wish to sue as a result of other people’s expressions.

59. The only reference to the status of a party is where the Court identifies as a relevant factor a “defendant’s history of activism or advocacy in the public interest”. This indicates the Court is focussing on the defendant’s expression. The context in which this list of factors appears also supports this interpretation. First, at this point in its analysis the Court has already addressed harm to the plaintiff. This suggests that the Court has now turned to the defendant’s expression. Second, paragraph 80 lists as a relevant consideration whether “the expression or the claim might provoke hostility against an identifiably vulnerable group”. The “expression” would be the defendant’s, while the “claim” would be the plaintiff’s. Consistent with this interpretation of *Pointes*, this Court in *Bent* mentioned the “broader or collateral effects” factor when considering the public interest in protecting the defendant’s expression,<sup>67</sup> after it had concluded its analysis of the plaintiff’s harm and the public interest in permitting the proceeding to continue.<sup>68</sup>

60. If, however, the Court of Appeal was correct that the weighing of harm should include the potential chilling effect on plaintiffs, or others who hold “contentious opinions,” courts in British Columbia and Ontario need guidance from this Court as to the proper approach. This is

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<sup>66</sup> Court of Appeal Reasons, at para. 68 (ALB, Tab B3).

<sup>67</sup> *Bent*, at para. 165.

<sup>68</sup> *Bent*, at paras. 142-62.

important to ensure that the legislation affords consistent protections to Canadians in each province and to ensure that the legislation meets its intended purpose.

61. The Court of Appeal did not provide any insights into this question. In fact, it did not engage in a weighing exercise at all. Having found errors in the chambers judge's weighing of the competing public interests, it was incumbent upon the Court of Appeal to conduct the weighing exercise itself. Instead, the Court of Appeal simply pointed out what it found to be errors in the chambers judge's approach and then allowed the appeal.

62. A consequence of this approach is that nowhere in the court's decision did it assign any weight to the fact that Hansman's expressions were in response to negative comments directed towards the LGBTQ community, a group that has faced significant discrimination and oppression, one constituent of which, transgender persons, are among the most vulnerable groups in society. The only factor the Court of Appeal considered was a speculative one, that persons like Neufeld might withdraw from public debate if they cannot sue for defamation when someone accuses them of making discriminatory or hateful comments. This gives no protection to the expressive rights of the person being sued for defamation and is antithetical to the purposes of the *PPPA*.

63. If courts are going to consider the potential chilling effect on the expressive activity of the plaintiff or others who might wish to sue for defamation, they must assess the relative quality of the two expressions (the plaintiff's and the defendant's) and either reduce or enhance the protection given to the expression depending on the outcome of that comparative exercise. This ensures the public interest in protecting expression is properly measured.

64. In this case the quality of Neufeld's expression is at the lowest end of "the protection-deserving spectrum."<sup>69</sup> He purports to be taking a position only on one "facet of the SOGI 1-2-3 learning resources: the teaching of the theory, as if it was fact, that gender is fluid, that there are more than two genders, and that gender is not based in biology."<sup>70</sup> But a review of his statements shows this is not the case. Neufeld has made a broad array of public statements about the LGBTQ community, including statements about transgender identity, gay marriage and same sex

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<sup>69</sup> *Bent*, at para. 169.

<sup>70</sup> Exhibit G to Britten Affidavit (ALB, Tab D5, p. 283).

parenting. He has also criticized members of the LGBTQ community and others who support the use of age-appropriate materials to educate students about sexual orientation and gender identity. He has offered praise of countries where LGBTQ people are oppressed.

65. For example, Neufeld views “lukewarm Christians... sitting idly by” and failing to “push back” on matters of concern to the LGBTQ community as an indication that society is “slouch[ing] towards Gomorrah.” Persons who are transgender are not recognized by their gender identity. Caitlyn Jenner is not Caitlyn Jenner but “Bruce Jenner” doing an impressive “caricature of a woman”. Persons who are allegedly transgender are deceitful and not to be trusted or believed. The government is going to take children away from their parents and force them to experiment with homosexuality and gender fluidity. People who support gender identity have “an evil agenda”. Christian churches that do not oppose this have been “infected” with “Pink Christianity.” Neufeld has denied the existence of transgender people and stated “the trans agenda is eugenics” contributing to the “destruction of humanity”. This is not informed and constructive debate generating fruitful public discourse. This is ignorance, discrimination, sarcasm and fear-mongering on display. These statements form the basis of two ongoing human rights complaints filed with the BC Human Rights Tribunal.<sup>71</sup> The expressive quality of these statements is dubious at best.

66. On the other hand, Hansman’s expression is aimed at protecting a disadvantaged group in society, members of the LGBTQ community. One segment of that community, transgender individuals, are among the most vulnerable in our society.<sup>72</sup> As recently summarized by the British Columbia Human Rights Tribunal:

And so, despite some gains, transgender people remain among the most marginalized in our society. Their lives are marked by “disadvantage, prejudice, stereotyping” . . . They are stereotyped as “diseased, confused, monsters and freaks” . . . Transpeople face barriers to employment and housing, inequitable access to health care and other vital public services, and heightened risks of targeted harassment and violence. The results include social isolation, as well as

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<sup>71</sup> The Canadian Union of Public Employees, which represents another bargaining unit in the Chilliwack School District, also has an ongoing human rights complaint against Neufeld.

<sup>72</sup> See [C.F. v. Alberta \(Vital Statistics\), 2014 ABQB 237](#) at para. 46 (accepting that the social stigma attached to being transgender is “pretty severe”) and [XY v. Ontario \(Government and Consumer Services\), 2012 HRTO 726](#) at para. 169 (holding “It is abundantly clear that transgendered persons have been and continue to be the subject of stigma and prejudice in our society”).

higher rates of substance use, poor mental health, suicide, and poverty . . . For transgender children, anti-trans bullying leads to higher rates of absenteeism and poorer educational outcomes, which then has ripple effects for their health and future prospects. . . .<sup>73</sup>

67. It is important to understand that statements denying the existence of transgender persons act to “dehumanize transgender people.” Some of Neufeld’s statements fit this description and therefore have a particularly profound impact on transgender people. This, in part, is because, “Most protected groups do not have a social context or history of being told they do not exist and that people who claim to be part of the group are lying or mentally ill.”<sup>74</sup>

68. The high value of Hansman’s expressive activity is in no way diminished by the fact that he has opined that Neufeld “tip toed quite far into hate speech.” Hansman believes this statement. The BCTF has brought a Human Rights complaint alleging just that. There is a public interest in knowing this and his statements were made in that context.

69. It is also problematic that the Court of Appeal’s musings about a chilling effect on the plaintiff or others in his position were speculation. There was no basis in the evidence to support the conclusion that Neufeld or anyone witnessing this “public discourse” would have been deterred from speaking out on matters of public interest. On the contrary, Neufeld has continued to voice his opinions, even after his action was dismissed by the chambers judge under the *PPPA*. If a reasonable observer is apprised of the aims of the *PPPA*, and the facts of this case, they would be surprised to learn that Neufeld’s defamation action has been reinstated.

## **Conclusion**

70. There is no question that the purpose of the *PPPA* is to protect freedom of expression by limiting the circumstances in which a person can be sued in relation to their expressive activity. Whether the *PPPA* also protects the expressive activity of the person who has brought a defamation action and, if it does, how a court should weigh the competing claims of the plaintiff and defendant to protection under the statute are questions of public importance warranting the

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<sup>73</sup> [\*Oger v. Whatcott \(No. 7\)\*, 2019 BCHRT 58](#) at para. 62.

<sup>74</sup> *Ibid.* at paras. 156-57.

attention of this Court. This Court has described the public interest weighing exercise as the “core” or “crux” of the *PPPA*.<sup>75</sup> These are core questions concerning that core analysis.

71. On the latter question, it cannot be right, as the Court of Appeal did, to ignore entirely the public interest in protecting a defendant’s expressive activity and consider only the public interest in the plaintiff’s expressive activity. Here the defendant’s expressive activity was in defence of a vulnerable group while the plaintiff’s expressive activity forms the basis of two human rights complaints.

72. Since the *Charter* came into force this Court has been instrumental in creating legal protections for gay and lesbian individuals in Canada in a variety of different legal contexts.<sup>76</sup> This case provides the Court with a first opportunity to consider similar issues faced by one of the most vulnerable groups in society, transgender individuals. The issues arise here in consideration of what protection should be afforded to persons who speak out in opposition to discriminatory and negative portrayals of such individuals, or in support of other vulnerable groups. This is a pressing issue for the LGBTQ community and other members of Canadian society who face discrimination on a daily basis.

#### **PARTS IV AND V – COSTS AND ORDER SOUGHT**

73. The applicant seeks an order granting leave to appeal with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.




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Robyn Trask  
Michael Sobkin  
Counsel for the Applicant

Dated at Vancouver, British Columbia this 20th day of August, 2021.

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<sup>75</sup> *Pointes*, at paras. 61, 62, 82.

<sup>76</sup> See, for example, *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120; *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86; *Reference re Same-Sex Marriage*, 2004 SCC 79; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32.

## PART VI – TABLE OF AUTHORITIES

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6.	<a href="#"><i>Human Rights Watch, “Russia Censors LGBT Online Groups” (October 8, 2019)</i></a>	21