COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Neufeld v. Hansman,*
2021 BCCA 222

Date: 20210609
Docket: CA46586

Between:

Barry Neufeld

Appellant
(Plaintiff)

And

Glen Hansman

Respondent
(Defendant)

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated November 26, 2019 (*Neufeld v. Hansman*, 2019 BCSC 2028, Chilliwack Docket S35152).

Counsel for the Appellant, appearing via videoconference:	P.E. Jaffe
Counsel for the Respondent, appearing via videoconference:	M.J. Sobkin R.P.M. Trask
Place and Date of Hearing:	Vancouver, British Columbia November 25–26, 2020
Place and Date of Judgment:	Vancouver, British Columbia June 9, 2021

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Voith

Summary:

The appellant was a public school trustee who made negative comments about how a sexual orientation and gender identity program was being implemented in BC schools. The respondent, the then-head of the BC Teachers' Federation, criticized the comments when interviewed by media. The appellant brought a defamation claim, and the respondent applied to have it dismissed under the Protection of Public Participation Act. The chambers judge dismissed the claim, finding there was likely a valid defence of fair comment. The appellant challenges the dismissal.

Held: Appeal allowed. The chambers judge erred in assessing whether there was likely a valid defence of fair comment: the case at hand was distinguishable from WIC Radio Ltd. v. Simpson, as the context and identity of the parties materially differed. The defence of fair comment must be considered for each separately pleaded publication. An application under the PPPA does not prevent a party from seeking documents, which the appellant sought as relevant to proof of malice. The judge erred in weighing the competing public interests. Damages are presumed in defamation, and in cases of concurrent defamation committed by multiple sources, the plaintiff is not required to prove an exclusive causal link. When weighing the interest in allowing the action to proceed, the subject matter of the expressions must be distinguished from the expressions themselves. Finally, the weighing exercise must consider not only the harm to the plaintiff but the public interest in continuing the proceeding. The judge failed to consider the chilling effect the respondent's expression could have on public discourse.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

Introduction

[1] The appellant, Barry Neufeld, is a public school trustee who, in a Facebook post, made negative comments about the way SOGI 123, a program designed to teach children about sexual orientation and gender identity, was being implemented in schools. The respondent, Glen Hansman, the then-president of the BC Teachers' Federation, was highly critical of Mr. Neufeld's statements when interviewed by the media. Mr. Neufeld commenced an action in defamation against Mr. Hansman, but it was dismissed before trial under the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 [*PPPA*]. Mr. Neufeld appeals the dismissal.

[2] The action underlying this appeal arises out of significant philosophical differences about the use of the Ministry of Education's SOGI 123 materials, but, as the chambers judge aptly observed, the application before him had nothing to do

with the "correctness" of either party's position on that issue. The outcome of this appeal likewise turns only on whether the judge erred in his interpretation and application of the *PPPA*. For the reasons that follow, I respectfully conclude that he did so err. I would therefore set aside the order and reinstate the defamation proceeding.

The Protection of Public Participation Act

[3] The *PPPA* came into force in March 2019. The Attorney General described the *Act* as "intended to protect an essential value of our democracy, which is public participation in the debates of the issues of the day." Of particular concern were strategic lawsuits brought by the wealthy and powerful to shut down public criticism. In addressing the purpose of the *PPPA,* he said:

> What the bill proposes to do is strike a balance between a couple of values. One is the value of protecting an individual's reputation or a company's reputation. The other is the value of a robust and rigorous debate that the courts have described as freewheeling, that can be heated, that can result in intemperate comments. But that's part of public debate, and it shouldn't be met with threats of litigation to stop people from talking about the issues of the day. Those are values that this bill is aimed at addressing: British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 4th Sess., No. 198 (14 February 2019) at 7018 (Hon. David Eby).

[4] Section 4 of the *PPPA* authorizes a person who has been sued over an expression to apply to have the action dismissed if the expression relates to a matter of public interest and certain conditions are met. The provision reads as follows:

> **Application to court**
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> **4** (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that
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> (a) the proceeding arises from an expression made by the applicant, and
>
> (b) the expression relates to a matter of public interest.
>
> (2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that
>
> (a) there are grounds to believe that
>
> (i) the proceeding has substantial merit, and

> (ii) the applicant has no valid defence in the proceeding, and
>
> (b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

[5] Unlike other pre-trial applications to dismiss an action, such as under Rule 9-5 (striking pleadings) and Rule 9-6 (summary judgment), the *PPPA* can prevent a plaintiff with a valid cause of action from proceeding with their suit as long as the public interest in protecting the defendant's expression outweighs the public interest in allowing the plaintiff to proceed: *Galloway v. A.B.,* 2020 BCCA 106 at para. 55.

[6] In applying s. 4 of the *PPPA*, the judge relied heavily on two Ontario Court of Appeal decisions, *1704604 Ontario Ltd. v. Pointes Protection Association,* 2018 ONCA 685 [*Pointes CA*] and *Platnick v. Bent,* 2018 ONCA 687 [*Bent CA*], that addressed an almost identical provision in the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1. The judge did not have the benefit of the Supreme Court of Canada's judgments in those cases, which were released prior to the hearing of this appeal.

[7] In *1704604 Ontario Ltd. v. Pointes Protection Association,* 2020 SCC 22 [*Pointes SCC*] and *Bent v. Platnick,* 2020 SCC 23 [*Bent SCC*], the Supreme Court confirmed there are four steps to the analysis. First, the defendant has the burden of establishing that the proceeding against them arises from an expression that relates to a matter of public interest. Once the defendant establishes that point, the burden shifts to the plaintiff for the next three steps. The plaintiff faces dismissal of their action unless they satisfy the motion judge of the following: first, that there are grounds to believe the action has substantial merit; second, that there are grounds to believe the defendant has no valid defence to the action; and third, that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the defendant's expression. The Supreme Court in *Pointes* described the last step as the core of the analysis, allowing the court to scrutinize "what is really going on" in the particular case before them and to open-endedly engage with the

overarching public interest implications that the statute, and anti-SLAPP legislation generally, seeks to address.

[8] With that general review of the legislative framework, I return to the particulars of the present case.

Background

[9] The judge summarized the background of the defamation action this way:

> [14] In 2016, the *Human Rights Code*, R.S.B.C. 1996, c. 210 [*HRC*] was amended to include "gender identity or expression" as a prohibited ground of discrimination. Sexual orientation has been a protected ground under the *HRC* since 1992.
>
> [15] Shortly after the 2016 amendment, the Ministry of Education issued an updated Ministerial Order, requiring that school boards include reference to "gender identity and expression" in their codes of conduct, in addition to the already required references to other prohibited grounds under the *HRC*. That update was announced by the Ministry on September 7, 2016.
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> [16] A group of organizations collaborated to prepare the SOGI 123 resources. That group included the Ministry of Education, UBC Faculty of Education, the BCTF, and members of the communities representing Lesbian, Gay, Bisexual, Transgender, and Queer ("LGBTQ") groups. The materials were drafted with the stated goal of having age-appropriate tools for teaching about sexual orientation and gender identity available for teachers of children in Kindergarten through Grade 12.

[10] The judge stated there was public debate about the use of the SOGI 123 materials, but the appellant says there was no evidence to support that finding—to the contrary, there had been no public debate or debate by any school board in BC about the program before he raised the issue. He did so on October 23, 2017, by way of the Facebook post, which reads in full:

> 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 [to] 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 marriage

> is no longer the norm. Teachers must not refer to “boys and girls” they are merely students. They 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.
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> [A link to a news article about Paraguay omitted.]

[11] There was immediate reaction from major media outlets, which published several online articles. That same day, Mr. Hansman was interviewed and commented about Mr. Neufeld and his post.

[12] Two days after the Facebook post, Mr. Neufeld issued a press release stating in part:

> My post on Facebook has created a lot of controversy and first of all, I want to apologize to those who felt hurt by my opinion, including members of the Chilliwack Board of Education. I am critical of an educational resource, not individuals. Those who have worked with me for over 24 years know that I DO believe in inclusion and a safe learning environment for all of our students: that they should be protected from all forms of bullying and intimidation.
>
> I believe that in a free and democratic society, there should be room for **respectful** discussion and dissent. I firmly believe that implementation of the SOGI 123 resources needs to be reviewed by engaging parents and teachers in conversation on this topic before full implementation.
>
> [Emphasis as appears in original.]

Both men continued to publicly and bluntly express their views over the following year.

[13] The notice of civil claim identifies 11 specific publications in which Mr. Hansman allegedly made defamatory remarks. Mr. Hansman admitted having made all of the statements and that they were published. At the hearing of the *PPPA* application, he also admitted that at least some of the statements were capable of defamatory meaning, although he did not identify which statements. To provide context, four of the eleven impugned expressions are set out below:

1. On April 10, 2018, in an interview with The Star Vancouver newspaper Mr. Hansman said:

This isn't just a simple matter of (Neufeld) philosophically disagreeing with the concept of transgender or supporting students who are transgender, he is creating a school environment for both our members and students that is discriminatory and hateful," he said.

[Emphasis added.]

2. On April 12, 2018, Mr. Hansman spoke to City News1130 saying:

BCTF president Glenn Hansman says the trustee "tiptoed quite far into hate speech" and sent a disturbing message to both students and parents.

Hansman says school trustees and boards of education are responsible for ensuring student safety, and he believes that's something Neufeld failed to do.

"Whether it's a transphobic comment, or a racist one or a misogynistic one, that simply cannot stand because public schools welcome all students, regardless of their race, their culture, their sexual orientation or their gender identity."

[Emphasis added.]

3. On April 13, 2018, Mr. Hansman was quoted by CBC radio and on CBC's world online publication:

The president of the British Columbia Teachers' Federation says a Chilliwack school trustee who made controversial LGBT comments shouldn't be "anywhere near students" and that's why the BCTF has filed a human rights complaint against him.

The complaint says that Barry Neufeld's alleged "hateful" public comments about trans people have created an unsafe work environment for teachers and students, as the province moves to make students of all orientations feel safer in schools.

…

Hansman says the law is well established and clear and Neufeld should know better.

[Emphasis added.]

4. On September 16, 2018, Mr. Hansman gave another interview to City News1130 which did not expressly identify Mr. Neufeld but which is claimed or in respect of him:

"It is extremely problematic to have somebody who is running as a school trustee continuing to spread hate about LGBTQ people – especially trans people – and also be out there, making vile comments about refugees and immigrants, as a group."

[Emphasis added.]

[14] Mr. Neufeld pleaded that Mr. Hansman's statements, both expressly and by innuendo, were understood by the public to mean that he:

i. promoted hatred;
ii. committed hate speech;
iii. was actuated by hatred of certain students;
iv. was discriminatory against gay and/or transgender students;
v. promoted hatred toward gay and/or transgender students in the school system;
vi. made it unsafe for students in the school system;
vii. was unfit to hold public office as a school board trustee;
viii. violated ethical and/or legal duties applicable to school board trustees;
ix. presents a safety risk to students;
x. has bigoted views which threaten the safety and inclusiveness in schools;
xi. has lied to the public about what SOGI 123 includes;
xii. is a religious bigot who imposes his religious views on some students in a manner which makes it unsafe for such students;
xiii. is racist, discriminatory, sexist, misogynist, transphobic and/or homophobic;
xiv. has violated the rights of students under the Canadian Charter of Rights and Freedoms and BC Human Rights Code;
xv. regards people who support transgender students as child abusers;
xvi. is an outlier and part of a vanishing breed of racists;
xvii. published knowingly false statements to injure the public interest; and
xviii. is unfit to be a school board trustee because of his age.

The Hearing Below

[15] The judge began by addressing Mr. Neufeld's preliminary argument that the circumstances of the case did not meet the traditional indicia of a SLAPP suit, that is:

(a) a history of the plaintiff using litigation or the threat of litigation to silence critics;

(b) a financial or power imbalance that strongly favours the plaintiff;

(c) a punitive or retributory purpose animating the plaintiff's bringing of the claim; and

(d) minimal or nominal damages suffered by the plaintiff.

[16] Mr. Neufeld argued that he was simply an individual attempting to protect his reputation and seeking damages for defamation against a defendant who was the president of a powerful union representing more than 45,000 teachers in BC.

[17] The judge rejected that submission, concluding there was no suggestion in the text of the *PPPA* that it was restricted to cases bearing traditional SLAPP characteristics.

[18] Because Mr. Neufeld admitted Mr. Hansman's expression related to a matter of public interest, the judge began with the second step in the s. 4 analysis—whether the claim had substantial merit. He concluded that it did, saying:

> [86] As noted, *Pointes Protection* indicates that the meaning of "substantial merit" is that the claim is shown to be legally tenable and supported by evidence which could lead a reasonable trier to conclude that the claim has a real chance of success. In this context, the word "substantial" does not require that the plaintiff's claim, or damages, be "substantial" in respect of the damages that are expected. It only means that the claim is legally tenable and supported by the evidence, taking into account the early stage in the proceedings.
>
> …
>
> [88] What matters is that the plaintiff has alleged that the defendant made statements that were capable of defamatory meaning. In this hearing, the defendant acknowledged having made the impugned statements, that they were published, and that at least some of them were capable of defamatory meaning. As a result of the defendant's acknowledgement on these points, the elements of the test under s. 4(2)(a)(i) are established. The claim is legally tenable and supported by evidence. It is possible that a trier of the case could find that the plaintiff was defamed by the defendant's statements.
>
> [Emphasis added.]

[19] Moving to the third step, the judge considered the two defences relied on by Mr. Hansman: qualified privilege and fair comment. He observed that privilege attaches to the occasion upon which a communication is made, not to the communication itself, and noted Mr. Hansman was relying on the defence in circumstances that did not fit the generally recognized characteristics of a privileged occasion. The judge concluded there were "grounds to believe that a reasonable

trier of fact could find that the defence of qualified privilege was not applicable": at para. 107.

[20] However, the judge found that a trier of fact would inevitably conclude that the defence of fair comment was valid, relying heavily on the Supreme Court of Canada's decision in *WIC Radio Ltd. v. Simpson,* 2008 SCC 40 [*WIC*]: at para. 137. The judge found *WIC* was indistinguishable from the present case and, finding no reasonable prospect of malice being established, dismissed the claim on this basis: at para. 147.

[21] Although the judge's finding on the validity of the defence of fair comment was sufficient to dismiss the action, he went on to the final consideration under s. 4, finding that the public interest in protecting Mr. Hansman's expressions outweighed the harm suffered by Mr. Neufeld, who had "submitted almost no evidence of damages suffered": at paras. 16 and 152.

Issues

[22] Mr. Neufeld identifies several errors in the judge's reasoning which can be conveniently addressed under two main grounds of appeal:

1. Did the judge err in his assessment of whether there were grounds to believe the defence of fair comment would not succeed at trial because he:

    (a) failed to consider the defence in relation to each of the 11 publications;

    (b) assumed that *WIC* was determinative;

    (c) found that malice could only be established by an admission; and

    (d) assumed that the *PPPA* prohibited applications for documents.

2. 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 expression on the other side of the debate.

Analysis

1. Did the judge err in his assessment of whether there were grounds to believe the defence of fair comment would not succeed at trial?

[23] The question of whether the chambers judge could have found that the defence of fair comment would not succeed raises a question of mixed fact and law. Therefore, I approach this ground of appeal mindful that the standard of review is deferential unless the judge made an extricable error of law or a palpable and overriding factual error: *Pointes CA* at para. 66.

[24] As the Supreme Court of Canada explained in *Pointes,* the plaintiff has the burden of showing that there is a basis in the record and the law—taking into account the stage of the proceeding—for finding that there is no valid defence: at para. 39. In *Bent*, the Supreme Court described this as “the defence not weighing more in favour of the defendant”: at para. 103. What is involved is not a determinative adjudication of the existence of the defence. Introducing too high a standard of proof into what is a preliminary assessment might suggest that the outcome is being adjudicated rather than the likelihood of an outcome: *Pointes SCC* at para. 37.

[25] In my respectful view, the judge made errors in principle in his assessment of this step, to which I turn now.

(a) Failure to address each of the 11 publications pleaded

[26] The judge worked from a summary of the type of comments made by Mr. Hansman rather than addressing the specific expressions in issue. As this Court observed in *Weaver v. Corcoran,* 2017 BCCA 160 at para. 83: “where separate publications are pleaded as independent causes of action, absent referability or other inextricable linkage, the meaning of each should be determined independently, in the immediate context in which the words are used” (emphasis added).

[27] The defence of fair comment must also be considered for each of the separate publications pleaded: Roger D. McConchie & David A. Potts, *Canadian Libel and Slander Actions*, (Toronto: Irwin Law, 2004) at 258. In my view, the judge’s failure to consider the specific expressions led him to overlook the constituent elements of the fair comment defence as applied to each expression. For example, the judge did not ask whether Mr. Hansman’s statements were recognizable as comments based on factual foundations. The ultimate determinant of whether words are comment or fact is how they would strike the ordinary, reasonable reader: Alastair Mullis & Richard Parkes, eds., *Gatley on Libel and Slander*, 12th ed. (London: Sweet & Maxwell, 2013) at ch. 12.8. If a trier characterizes statements as facts rather than comments, the fair comment defence will not succeed: *Bondfield Construction Company Limited v. The Globe and Mail Inc.,* 2019 ONCA 166 at para. 17.

[28] The comment must also explicitly or implicitly indicate, at least in general terms, the facts on which the comment is based. The facts must be sufficiently stated or otherwise known to listeners so that they are able to make up their own minds on the merit of the comments and opinions expressed. It is not enough for the defendant to identify, after the event, facts that could support their comments. If the factual foundation is unstated or unknown, the fair comment defence is not available: *WIC* at para. 31. The Supreme Court of Canada in *WIC* described “a properly disclosed or sufficiently indicated (or so notorious as to be already understood by the audience) factual foundation as an important objective limit to the fair comment defence”: at para. 34.

[29] In my view, there are grounds to believe that Mr. Hansman will not be able to establish that the facts relied on to support the following comments about Mr. Neufeld were either stated in the publications or so notorious as to be known to readers and listeners:

- That he promotes hatred;
- That he creates a school environment for both teachers and students that is discriminatory and hateful;
- That he spreads hate about LGBTQ people—especially transgender people; and
- That he makes vile comments about refugees and immigrants as a group.

Although Mr. Hansman denies that his comments about refugees and immigrants referred to Mr. Neufeld, I conclude there are grounds to believe that Mr. Neufeld could establish this as part of his burden in establishing defamation.

[30] I note that the judge placed an inordinate burden on Mr. Neufeld by requiring him to provide evidence on the fair comment defence to establish there was no basis for the defamatory comments. It was sufficient for Mr. Neufeld to rely on the 11 impugned publications.

[31] In summary on this point, and with great respect to the judge, he erred by not considering whether each of the publications included statements that were recognizable as comments founded on identifiable facts. There are grounds to believe that Mr. Hansman's defence of fair comment is not valid for at least some of the expressions in issue in the action.

(b) Assumption that WIC was determinative of the fair comment defence

[32] The defence of fair comment is available if the defendant establishes the following, as set out in *WIC* at para. 1:

(a) the comment must be on a matter of public interest;

(b) the comment must be based on fact;

(c) the comment, though it can include inferences of fact, must be recognizable as comment;

(d) the comment must satisfy the following objective test: could anyone honestly express that opinion on the proved facts?

(e) even though the comment satisfies the objective test, the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice.

[33] The judge relied heavily on the Court's ruling on the fair comment defence in *WIC* to find that Mr. Neufeld had not met his burden of establishing grounds to believe that the defence of fair comment would fail, as he had tendered very little evidence on either the merits of the case or the defence of fair comment: at paras. 121–124. The judge concluded *WIC* could not be distinguished from the present case and would inevitably lead a trier of fact to conclude that the defence of fair comment was valid: at para. 137.

[34] In my view, the judge erred in so concluding. Although the two cases deal with similar subject matter and the competing interests of free speech and protection of reputation, they differ in material ways.

[35] The first point of distinction is the identity of the defendant. In *WIC*, the defendant, Rafe Mair, was a well-known and often controversial commentator on matters of public interest in BC. He hosted a talk show designed to provoke controversy, described by the Supreme Court as "a shock jock show, as much entertainment as journalism": *WIC* at paras. 3 and 47. Mr. Mair's listeners expected to hear extravagant editorial opinions. In contrast, Mr. Hansman was the president of a professional union of 45,000 teachers speaking in an official capacity about a school trustee.

[36] Second, Mr. Mair's commentary in *WIC* clearly identified, in the single publication in issue, the basis of his editorial comment. The record in the present case is much more complex, and, as I have noted, there are grounds to believe that the facts were not clearly stated or the statements were not recognizable as comment for at least some of the publications. In contrast, the trial judge in *WIC* found that the defendant had proved that every element of the factual foundation was either stated or publicly known, that Mr. Mair was aware of them all, and that they were all substantially true: *WIC* at para. 34.

[37] Third, when Mr. Mair broadcast his comments, the plaintiff, Kari Simpson, was a well-known social activist with a public reputation as a leader of those opposed to schools teaching acceptance of a gay lifestyle. She was described as someone who "relished her role as a public figure" and as "the person associated by the media with the anti-gay side": *WIC* at paras. 4 and 7. In contrast, at the time of Mr. Neufeld's Facebook post, there was no evidence that he was associated with an "anti-LGBTQ side" or that the views he held were so notorious that listeners or readers would know the contents of his position.

[38] Fourth, the context of the expressions in *WIC*, namely, an editorial opinion piece, meant that Mr. Mair's listeners understood his expressions to be comment, not statements of fact: *WIC* at para. 27. The interviews in which Mr. Hansman made his statements were not as clear-cut.

[39] Finally, it is worth noting that the court's ruling on the fair comment defence in *WIC* was based on a full trial. In contrast, the judge in the present case was assessing the potential success of the defence at a very early stage of the proceeding, prior to disclosure of documents and examinations for discovery.

[40] In summary on this point, in my view, the judge erred in concluding that the reasoning in *WIC* would preclude a trier of fact from finding a defence of fair comment in the present case.

(c) Proof of malice & production of documents

[41] The judge recognized that malice can defeat an otherwise sound defence of fair comment if the plaintiff can prove that the defendant published the comment in any one of the following circumstances:

(a) Knowing it was false;

(b) With reckless indifference as to whether it is true or false;

(c) For the dominant purpose of injuring the plaintiff because of spite or animosity; or

(d) For some other dominant purpose that is improper or indirect.

[42] However, the judge concluded there was "no prospect of a finding that the defendant made the statements, either knowing them to be false or with reckless indifference" because Mr. Hansman's affidavit made it clear that he honestly held the beliefs he expressed: at paras. 117 and 141. He considered that "absent Mr. Hansman providing a full admission of malice under cross-examination, it is not reasonable to perceive that a reasonable trier of the case would find that he was motivated by malice": at para. 141.

[43] In my view, there are two errors in this analysis. First, to the extent that the judge understood Mr. Hansman to have expressly stated he had an honest belief in the defamatory expressions published, that was an error of fact. His affidavits do not contain that assertion.

[44] Second, it is an error in principle to suggest that, once a defendant explains and asserts a belief in their comments, malice can only be proved by a "full admission on cross-examination." To the contrary, malice may be gleaned from the nature of the words themselves and the context in which the statements were made: *Salager v. Dye & Durham Corporation,* 2018 BCSC 438 at para. 149. Further, Mr. Neufeld sought to establish malice through production of communications between Mr. Hansman, the local branch of the BCTF, and several other parties that

Mr. Neufeld pleaded had been a part of a "smear campaign." Mr. Neufeld made a demand for production of that category of documents on February 19, 2019, which the defendant refused on March 5. On April 1, the plaintiff filed an application to compel production of those documents before the June 11 and 12 examinations for discovery. Mr. Hansman filed the *PPPA* application on April 23, taking the position that no further steps could be taken in the action, including the document production motion, until the *PPPA* application had been determined.

[45] Mr. Neufeld renewed his application for document production as part of the *PPPA* hearing, seeking an adjournment of the *PPPA* motion until the documents had been produced. The judge refused to entertain that application, concluding that he did not have jurisdiction to do so once a *PPPA* application was filed, pointing to s. 5 of the *PPPA*:

> **No further steps**
>
> **5** (1) Subject to subsection (2), if an applicant serves on a respondent an application for a dismissal order under section 4, no party may take further steps in the proceeding until the application, including any appeals, has been finally resolved.
>
> (2) Subsection (1) does not apply to an application for an injunction.

The judge concluded that, in the process provided for in the *PPPA,* documents could be ordered in relation to cross-examination on affidavits but not independent of that step.

[46] The judge did not have the benefit of this Court's decision on the issue in *Galloway,* which came to the contrary conclusion:

> [46] At the threshold is the question of the court's authority to contemplate the making of document disclosure orders as part of the process leading to the hearing and disposition of a dismissal application under s. 4 of the *PPPA*.
>
> [47] That authority cannot be doubted. It is expressly conferred by Rule 22-1(4)(c). It is an independent discretion to order production whether or not it is requested in the context of a cross-examination on a deponent's affidavit.
>
> [Emphasis added.]

[47] Although the judge decided he could not order production of documents, he expressed the view that, in any event, Mr. Neufeld's application amounted to a

fishing expedition because there was no evidence that the documents he sought existed. However, Mr. Neufeld identified three specific examples of documents he had obtained that had not been produced by Mr. Hansman. Further, Mr. Hansman had not denied the existence of such documents; rather**,** he objected to production based on relevance, privilege, and not having possession and control. In addition, Mr. Hansman acknowledged at para. 16 of his amended response that he "worked with members of the BCTF to make their concerns about the plaintiff's statements and the Facebook post known to the public and to school board officials".

[48] Finally, the judge was of the view that even if the documents established malice on the part of Mr. Hansman, that would only negate the defence of fair comment and would not affect the weighing of interests in the final stage of the s. 4 assessment, which the judge said would go against Mr. Neufeld regardless, "so his action would still be dismissed": at para. 175. To the extent that this resulted in a more cursory review of the merits of the application to produce documents, the judge erred in principle. The existence of malice is also a relevant factor to the weighing of the competing interests required at the last stage of the s. 4 analysis: *Pointes SCC* at para. 75. I turn now to that step.

2. Did the judge err in his assessment of the competing public interests?

[49] The final step under s. 4(b) requires the judge to consider whether the harm to the plaintiff is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting the defendant's expression. Deference is owed to a judge's weighing of these competing interests, absent an identifiable legal error or a palpable and overriding error of fact: *Pointes CA* at para. 97.

[50] As noted above, the judge, in conducting this part of his assessment, did not have the benefit of the Supreme Court of Canada's decisions in *Pointes* and *Bent*. Nor did he have the assistance of the defendant, who chose not to make submissions on this issue. For the reasons that follow, I am of the view that the judge erred in his assessment of the competing public interests.

(a) The judge's assessment of harm and causation

[51] Establishment of harm is of principal importance if the plaintiff is to meet their burden under s. 4(2)(b). The statutory language requires them to show the existence of harm and that the harm was suffered as a result of the defendant's expression. In my respectful view, the judge failed to give full effect to the presumption of damages in defamation and wrongly assumed causation would be difficult to establish because others had made similar comments about Mr. Neufeld.

[52] The judge repeatedly noted that Mr. Neufeld had not adduced evidence of harm other than bare assertions in his affidavit: at paras. 147, 152–153, and 158. The judge cited *Pointes CA* as standing for the proposition that "bald assertions of fact, unsupported by any evidence, are not sufficient," especially where the motion materials reveal sources apart from the defendant's expression that could well have caused the damages: at paras. 149–150. However, *Pointes* involved an action for damages for breach of contract and must be read in that context.

[53] In that case, the plaintiff wanted to develop a subdivision in Sault Ste. Marie. The defendants, who opposed the development on environmental grounds, brought an application for judicial review of the city council decision approving the development. While that application was pending, the plaintiff appealed to the Ontario Municipal Board from another city council decision refusing to amend the city's official plan to accommodate the development. Before the OMB appeal could be heard, the parties settled the judicial review proceeding. The settlement agreement provided that, in any future legal proceedings relating to the development, the defendants would not take the position that the decision of the conservation authority "was illegal or invalid or contrary to the provisions of the *Conservation Authorities Act,* R.S.O. 1990 c. C.27": *Pointes SCC* at para. 88. In the course of the OMB hearing of the plaintiff's appeal, one of the defendants testified that, in his opinion, the proposed development would cause substantial environmental damage. The OMB dismissed the appeal, and the development did not proceed. The plaintiff started an action against the defendants for breach of contract, alleging they had breached the terms of the settlement agreement by

giving evidence at the OMB hearing about the potential environmental impact of the development. The defendants applied to strike out the action under the Ontario equivalent of the *PPPA*, succeeding on that application in the Court of Appeal.

[54] In the circumstances of *Pointes,* it was highly significant that the plaintiff could not provide any evidence of losses flowing from the defendant's testimony at the OMB hearing. As Doherty J.A. described it, the plaintiff's theory was opaque: it did not lay the failure to obtain the development approval at the defendant's feet, and without evidence of damages, the plaintiff's claim for harm caused by the defendant was "weak indeed": *Pointes CA* at paras. 121–123.

[55] In contrast, general damages are presumed in a defamation case. The plaintiff bears no obligation to prove actual loss or injury: *Weaver* at para. 70; *Pan v. Gao,* 2020 BCCA 58 at para. 13.

[56] The defendant submits that the magnitude of the damages in a defamation case will be important nonetheless in assessing whether the harm to the plaintiff is sufficiently serious to outweigh the public interest in protecting the public expression, relying on *Bent SCC* at para. 144. I agree with that submission. However, the Supreme Court in *Bent* also observed that harm is not synonymous with monetary damages, saying:

> [146] In addition, reputational harm is eminently relevant to the harm inquiry under s. 137.1(4)(b). Indeed, "reputation is one of the most valuable assets a person or a business can possess": *Pointes Protection*, at para. 69 (citing "agreement" with the words of the Attorney General of Ontario at the legislation's second reading). This Court's jurisprudence has repeatedly emphasized the weighty importance that reputation ought to be given. Certainly, "[a] good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws": *Hill*, at para. 107; see also *Botiuk*, at paras. 91-92.
>
> [Emphasis added.]

[57] Although Mr. Neufeld was re-elected as a trustee, a point the judge took to suggest the limited nature of the damages he suffered, the potential for loss of his position was only one type of harm: at para. 146. Mr. Neufeld claimed he had been prevented from attending meetings and events open to other Trustees as a result of

the defamation. General damages in defamation are intended to compensate the plaintiff for loss of reputation, injury to feelings, such as embarrassment and anxiety, and to console the plaintiff and to vindicate them so that their reputation may be re-established: *Bent SCC* at para. 148.

[58] Mr. Neufeld identified several factors recognized in the jurisprudence as contributing to the damages suffered, including the office held by the accuser, the breadth of the distribution of the comments, and the repetition of the comments for over a year.

[59] The judge recognized that the plaintiff cannot be expected to present a fully developed damages brief. Instead, he found it will often suffice if there is sufficient evidence to draw a causal connection between the challenged expression and damages that are more than nominal: at para. 157. However, the judge heavily discounted Mr. Neufeld's potential damages because others had made similar comments in response to his Facebook post: at para. 150. Although it may well be found that Mr. Hansman was not the sole cause of any harm to Mr. Neufeld's reputation, it must be remembered that "no definitive determination of harm or causation is required" at this stage of the inquiry: *Pointes SCC* at para. 71. Nor is causation an "all-or-nothing proposition": *Pointes SCC* at para. 72. As Mr. Neufeld points out, in cases of concurrent defamation committed by multiple sources, it would be virtually impossible for plaintiffs to prove an exclusive causal link to damages from the words of just one of the defamers. In *Gatley on Libel and Slander* at ch. 8.2, the authors describe the principle this way:

> If the claimant elects to sue one of them separately, it is no defence that the others are jointly liable with him, nor will such fact mitigate the damages recoverable …

(b) The judge did not consider the nature of the expression in weighing the competing interests

[60] In assessing the other side of the equation—the public interest in protecting the actual expression that is the subject matter of the lawsuit, the judge said:

> [160] In this case, the plaintiff's allegations of defamation include many of the defendant's statements. Viewed objectively, many of the defendant's

> statements commented on the need for inclusive and safe schools, or did not mention the plaintiff. Those statements deserve significant protection. The entirety of the debate revolved around an issue that the plaintiff concedes is an important one.
>
> [Emphasis added.]

[61] In my view, the judge failed to distinguish between the subject matter of public interest and the actual expression complained of. It must be remembered that the statutory provision requires weighing the public interest in protecting "that expression." This distinction is an important one. As the Supreme Court explained in *Pointes*, the term "public interest" is used differently in this part of s. 4 than it is in the first stage of the assessment, which requires the defendant to establish that the comment relates to an underlying matter of public interest. That initial assessment concerns only whether the expression is directed at a topic of public interest, not the quality of the expression or value of its content. In contrast, at the final stage of the analysis, where the protection of free expression is being weighed against permitting the action to continue, both the quality of the expression and the motivation behind it are relevant: *Pointes SCC* at para. 74. (The latter point underscores the judge's error in concluding that proof of malice would not be relevant to the ultimate weighing exercise, but only to the defence of fair comment.) The Court continued:

> [75] Indeed, "a statement that contains deliberate falsehoods, [or] gratuitous personal attacks . . . may still be an expression that relates to a matter of public interest. However, the public interest in protecting that speech will be less than would have been the case had the same message been delivered without the lies, [or] vitriol" (C.A. reasons, at para. 94, citing *Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785, 410 D.L.R. (4th) 380, at paras. 82-84 and 96-103, aff'd 2018 ONCA 690, 428 D.L.R. (4th) 568).
>
> [76] While judges should be wary of the inquiry descending into a moralistic taste test, this Court recognized as early as *R. v. Keegstra*, [1990] 3 S.C.R. 697, that not all expression is created equal: "While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(*b*)" (p. 760).
>
> [Emphasis added.]

[62] Mr. Neufeld did not complain about Mr. Hansman's statements concerning the need for inclusive and safe schools. Rather, Mr. Neufeld identified particular

statements referring to him as bigoted, transphobic, anti-immigrant, racist, misogynistic, and hateful. The weighing exercise required the judge to consider the statements identified as containing the defamatory sting and to weigh whether those statements deserved protection. By focusing on the subject matter and the many non-defamatory components of the publications, the judge fell into error.

(c) Failure to consider that the defendant's expression could have a chilling effect on free speech

[63] This case differs from *Pointes* and *Bent* because, unlike these cases, the "conduct" giving rise to Mr. Hansman's expression was also an expression relating to the same matter of public interest. As events unfolded, it appears the parties became protagonists in an ongoing debate about how sexual orientation and gender identity should be addressed in Chilliwack elementary and high schools. Although the statutory language refers to "the harm likely to have been or to be suffered by the plaintiff" as a result of the defendant's expression, it requires the judge to assess the public interest in continuing the proceeding. It is thus not only the harm to the plaintiff that is being weighed, but the public interest in vindicating a potentially meritorious claim: *Pointes SCC* at para. 63. That public interest is grounded in the important societal value of protecting reputation: *Bent SCC* at para. 146. Those who engage in public discourse should not do so only at the risk of sacrificing their reputation.

[64] The Supreme Court in *Pointes* and *Bent* emphasized the importance of the weighing stage of the analysis. In *Pointes,* the Court said:

> [62] As I have often mentioned in these reasons, this provision is the core of s. 137.1. The purpose of s. 137.1 is to function as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions. While s. 137.1(4)(a) directs a judge's specific attention to the merit of the proceeding and the existence of a valid defence in order to ensure that the proceeding is meritorious, s. 137.1(4)(b) open-endedly engages with the overarching concern that this statute, and anti-SLAPP legislation generally, seek to address by assessing the public interest and public participation implications. In this way, s. 137.1(4)(b) is the key portion of the s. 137.1 analysis, as it serves as a robust backstop for motion judges to dismiss even technically meritorious claims if the public interest in protecting the expression that gives

> rise to the proceeding outweighs the public interest in allowing the proceeding to continue.
>
> [Emphasis added.]

Although the exercise is not tethered to classic indicia of SLAPP suits, it enables courts to scrutinize "what is really going on" in the particular case before them: *Pointes SCC* at para. 81. The Court identified a number of additional factors that may be considered in the weighing exercise, including:

> [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* expression either by a party or by others, the defendant's history of activism or advocacy in the public interest, any 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.
>
> [Emphasis in original.]

[65] The judge in the present case did not consider the potential chilling effect on future expression by others who might wish to engage in debates on this or other highly charged matters of public interest—that is, 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.

[66] Accusations of hate speech may have both criminal and human rights connotations. Section 319(2) of the *Criminal Code* proscribes the wilful communication of any statement that "promotes hatred against any identifiable group." Similarly, s. 7(1)(b) of the BC *Human Rights Code,* R.S.B.C 1996, c. 210 states that a "person must not publish, issue or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that is likely to expose a person or a group or class of persons to hatred or contempt."

[67] "Hatred" also has a very narrow definition. In *Saskatchewan (Human Rights Commission) v. Whatcott,* 2013 SCC 11, the Court clarified that hatred is limited to only the most intense and extreme emotions of detestation and vilification, saying:

> [57] … "hatred" or "hatred or contempt" is to be interpreted as being restricted to those extreme manifestations of the emotion described by the words "detestation" and "vilification". This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects.

[68] Defamatory comments that accuse someone of committing hate speech can inflict serious reputational harm. The judge's error was in failing to consider the collateral effect that preventing Mr. Neufeld from defending himself from such serious accusations could have on other individual's willingness to express themselves on issues of public interest in future.

[69] Indeed, the risk of being tarred with negative labels (and corresponding self-censorship) is most pronounced for people who hold contentious opinions on hotly debated topics. As Prof. Jamie Cameron notes in "Giving and Taking Offence: Civility, Respect, and Academic Freedom" (2013) Osgoode Comparative Research in Law & Political Economy Research Paper No. 48 at 303, the risk of opprobrium is most acute for inflammatory expressions or opinions outside the mainstream:

> Freedom is fragile because those who seek its protection are often or invariably the ones who are least sympathetic. Their expressive activities invite attention and oversight because they are offensive, confrontational, and even abusive: they reject the standards the rest of us observe, and that offends our sensibilities. As much as we may disapprove of the content or manner of their expression, that is not reason enough to silence or punish their interventions. Unless and until they cross a threshold of harm that justifies a regulatory response, transgressions that are merely offensive must be tolerated and addressed by other means.

[70] Based on the record before this Court, there are aspects of the expressions used by both parties that fall short of what one would hope to find in the public discourse of those in positions of authority. Having said that, I recognize that freedom of expression is "the cornerstone of a pluralistic democracy" and that there must be room for views to be forcefully and even intemperately presented in the

public forum. A determination of whether the expressions in the present case are defamatory or defensible is not before this Court. Nothing in these reasons should be taken as prejudging the merits of the action. But in my view, in the circumstances of this case, Mr. Neufeld's claim deserves a trial on the merits and should not have been summarily screened out at this early stage under s. 4 of the *PPPA*.

Disposition

[71] I would accordingly allow the appeal, set aside the order, dismiss the s. 4 application, and reinstate the action. In keeping with s. 7(2) of the *PPPA*, I make no order as to costs of the *PPPA* application in the court below. The appellant is entitled to costs of the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Mr. Justice Voith"