IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Neufeld v. Hansman,*
2019 BCSC 2028

Date: 20191126
Docket: S35152
Registry: Chilliwack

Between:

Barry Neufeld

Plaintiff

And

Glen Hansman

Defendant

Before: The Honourable Mr. Justice A. Ross

(In Chambers)

Reasons for Judgment

Counsel for the Plaintiff:	P. Jaffe E. Magnussen, A/S
Counsel for the Defendant:	R. Trask C. Veinotte J. Cooper, A/S
Place and Date of Hearing:	Vancouver, B.C. July 11-12, 2019 August 6, 2019
Place and Date of Judgment:	Chilliwack, B.C. November 26, 2019

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New Legislation and Introduction to this Application

[1] On March 25, 2019, the *Protection of Public Participation Act*, S.B.C. 2019, c.3 [*PPPA* or *Act*] received Royal Assent and came into force in British Columbia. It applies to actions commenced after May 15, 2018.

[2] As the title of the *PPPA* suggests, its purpose is to protect public participation in matters of public interest. In recent years, there has been a trend toward lawsuits being commenced to silence or punish a person's or company's critics. Those actions have come to be known as Strategic Lawsuits against Public Participation or "SLAPP" suits.

[3] The *PPPA* creates a new procedure that is designed to screen out actions that have the effect of limiting a defendant's participation in public debate. In that respect, the *PPPA* seeks to balance the rights of individuals to protect their reputations against the obvious benefit to a democratic society of protecting free speech and rigorous debate on issues of public interest.

[4] Section 4 of the *PPPA* sets out the tests that are to be applied when a defendant applies under the *Act* to have an action dismissed. It provides:

> **Application to court**
>
> 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
>
> (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] In this hearing, the defendant applies to dismiss the plaintiff's defamation action pursuant to s. 4 of the *PPPA*. He argues that the plaintiff sued him because of comments that he made in relation to a subject that was of public interest. He says the facts of this action satisfy the screening test established under the new *Act*.

[6] The plaintiff opposes the application on the basis that this is not the type of claim anticipated by the *Act*. He also argues that the defendant's application should fail on the merits. Finally, he says that if there is a question regarding whether he has established any burden upon him for this application, this application should be dismissed or adjourned, and his application for further document production from the defendant should be granted.

Background

[7] The background to this action lies within a philosophical dispute over the British Columbia Ministry of Education's publication of tools and resources relating to sexual orientation and gender identity ("SOGI 123"). The Ministry published those tools to teachers with the stated goal of promoting inclusive environments, policies, and procedures in respect of sexual orientation and gender identity.

[8] The plaintiff, an elected trustee of the Chilliwack School Board, does not agree with the use of SOGI 123 materials in schools.

[9] The defendant was, at the material times, the President of the British Columbia Teachers' Federation ("BCTF"). Prior to his election to that post, he was a teacher. He has now returned to being a teacher. It is a matter of record that the defendant is a gay man.

[10] The plaintiff posted certain criticisms of the Ministry's SOGI 123 resources on his Facebook page. His post attracted criticism and news media attention. In his capacity as the President of the BCTF, the defendant was interviewed about the plaintiff's post. The plaintiff alleges that the defendant defamed him in that interview, and in subsequent statements that were broadcast and published in the press and online.

[11] This application comes before this Court as a matter of first instance in this province. Both parties place considerable weight on the reasoning of the Ontario Court of Appeal in cases applying analogous legislation in Ontario. I am informed that the Supreme Court of Canada granted leave to appeal to parties in two of those cases; the appeals have been heard and are now on reserve. That judicial history suggests that the goal of a screening test to achieve early dismissals and reduce litigation costs is, in many cases, illusory.

[12] Both parties rely on evidence of the circumstances that surround this dispute, although the defendant tendered the vast majority of that evidence. The plaintiff argues that the collateral information provides context to his defamation claim, including the alleged innuendo in the defendant's statements and the alleged "smear campaign" in which the defendant and others engaged. The defendant says that the evidence is important in order for the court to have the full context of the public debate and to draw the necessary inferences that the plaintiff brought the defamation action in circumstances that meet the criteria of the *PPPA*.

[13] I have set out below a brief contextual history, followed by a chronology of the events that form the basis of this action and this application.

The Background and Allegations of Defamation

[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.

[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.

[17] There was public debate regarding the use of the SOGI 123 materials in schools.

[18] On October 17, 2017, the plaintiff posted on his Facebook page the following (the "Facebook Post"):

> Ok, 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 had 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. 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. [A link to a news article about Paraguay omitted.]

[19] The plaintiff posted that statement on Facebook at some point prior to 1:23 P.M. on October 23, 2017. Mainstream media outlets, including Global News, CBC News, and CTV News published online articles about the post within hours. The defendant's submissions describe the reaction to the Facebook Post as immediate and widespread. There was a substantial amount of criticism of the Facebook Post.

[20] The defendant's affidavit material attaches numerous news articles regarding the Facebook Post that were published in the ensuing hours and days. The time and chronology of the news articles is noted on the exhibits.

[21] Mr. Hansman was first interviewed on the evening of October 23, 2017, in his capacity as the President of the BCTF. His comments were published in an online article on the website of News 1130, a local news radio station. He argues that other news articles demonstrate that his own comments were not the first, nor the only, criticism of the Facebook Post. His comments did, however, form the basis of this action.

[22] The public debate regarding use of the SOGI 123 materials continued over the next year and into the next election campaign for the Chilliwack School Board. The plaintiff continued to promote his own position in speeches and further Facebook posts. As set out in more detail below, the defendant was interviewed on several subsequent occasions.

The Chronology of Facts Relevant to This Action

[23] In his amended notice of civil claim, the plaintiff alleges that the defendant made defamatory statements on a number of dates, and in a number of broadcasts and publications. The amended notice of civil claim alleges a range of statements with a range of defamatory meanings. There are numerous types of damage alleged by the plaintiff. The causative relationship between the defendant's statements and the alleged damage suffered by the plaintiff also falls along a spectrum.

[24] The primary allegations of defamation are aimed at the defendant's statements that were personal attacks against the plaintiff. In his submissions, the plaintiff emphasized the following statements made by the defendant in interviews. Each statement is taken from the notice of civil claim with the emphasis as it appears in that document:

> "He [Neufeld] should step down or be removed,"
>
> "regardless of **his bigoted views**…….he has responsibilities….for ensuring a safe and inclusive school …"
>
> "Sometimes our beliefs, values, and responsibilities as professional educators are challenged by those who promote hatred."
>
> "For some reason, because his comments have been largely restricted to **transphobic comments**… some are willing to give him a pass on this."

> BCTF President Glen Hansman says the trustee "tip toed quite far into **hate speech**" and sent a disturbing message to both students and parents.
>
> The president of the British Columbia Teacher's Federation says a Chilliwack school trustee who has made controversial LGBT comments **shouldn't be "anywhere near students**" and that's why the BCTF has filed a human rights complaint against him.

[25] The plaintiff argues that these statements suggest that he is bigoted, hates homosexuals and transgender people, that he had committed the criminal offence of hate speech, and that he should not be allowed near children. Those statements are the core of the plaintiff's defamation case against the defendant; although, as noted, there are numerous other statements by the defendant that are delineated in the amended notice of civil claim.

[26] I have set out below the chronology and the context of the statements made by the defendant.

[27] Following the Facebook Post on October 23, 2017, the defendant was interviewed by News 1130, the Vancouver Sun, Global News, and the Huffington Post for articles that were broadcast and published in print and online within the next two days. The plaintiff alleges that during these interviews, the defendant's statements suggested that the plaintiff:

a) should step down from his position as a school board trustee;

b) violated his obligations as a school board trustee by not being in favour of safe schools for all students;

c) was allowing his religious views to affect his role as an elected official in a secular school system; and

d) is bigoted.

[28] On October 25, 2017, the plaintiff 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."

[29] On November 21, 2017, the plaintiff spoke at a rally organized by a group called "Culture Guard". The rally was attended by people who supported Mr. Neufeld's opinions and by protesters who did not.

[30] On January 16, 2018, the Chilliwack Teachers' Association passed a resolution of non-confidence in the Chilliwack Board of Education in response to that board's failure to take a strong stand on the plaintiff's attack on SOGI 123.

[31] On January 17, 2018, the defendant made statements to several community newspapers in the Fraser Valley. The plaintiff alleges that during these interviews, the defendant suggested that the plaintiff promoted hatred.

[32] On January 19, 2018, the Chilliwack School Board and the Ministry of Education requested that the plaintiff resign from his position. He did not.

[33] On January 29, 2018, the BCTF (which is not a party to this action) filed a human rights complaint against the plaintiff, alleging that the plaintiff violated ss. 7 and 13 of the *HRC*. The complaint was accepted for filing by the BC Human Rights Tribunal on April 20, 2018.

[34] Between April 10 and 22, 2018, the defendant was interviewed by several local newspapers and radio stations, in articles broadcast on radio and television and published in print and online, regarding the human rights complaint. The plaintiff alleges that during these interviews, the defendant suggested that the plaintiff:

i. had created an unsafe work environment for teachers;

ii. exposed transgender people to hatred;

iii. was transphobic;

iv. should be removed from office;

v. discriminated against people based on their gender identity; and

vi. should not be anywhere near students.

[35] On April 22, 2018, the defendant was interviewed by a radio station for a story that was broadcast and published online regarding public rallies that were held to demonstrate for and against the SOGI 123 resources. The plaintiff alleges that during that interview, the defendant made statements suggesting the plaintiff had made hateful comments.

[36] On September 16, 2018, a radio station interviewed the defendant, broadcast the interview, and published it online. The plaintiff alleges that during that interview, the defendant suggested that certain people running in the school trustee election had spread hate against LGBTQ people and had made vile comments about refugees and immigrants as a group. The defendant also said that racism and misogyny exist in the school system, and that anyone seeking office should not be spreading hate and bigotry. The plaintiff says that, by innuendo, the defendant was referring to him.

[37] The plaintiff retained counsel, who sent a letter to the defendant on September 19, 2018. The letter outlined numerous alleged defamatory statements of the defendant, and demanded an apology and retraction (the “Demand Letter”). The contents of the Demand Letter were published the next day in an online newspaper called the “Valley Voice.” The contents of the Demand Letter, including the specifics of the alleged incidents of defamation, were quoted in the article.

[38] On October 12, 2018, this action was commenced.

[39] The school board election was held on October 20, 2018. The plaintiff was re-elected as a trustee. In that election, he was part of a slate of candidates who grouped together based on their collective opposition to the SOGI 123 resources being used in schools along with other similar issues.

[40] In addition to the allegations in the amended notice of civil claim addressing the comments attributed to the defendant, the plaintiff also alleges that comments

made by other individuals, who are not defendants, were part of a "smear campaign" in which the defendant participated. Those allegations include:

a) comments made by Morgane Oger, a "transgender activist and the vice president of the British Columbia New Democratic Party", on October 25, 2017;

b) comments made by Rob Fleming, "who represents the riding of Victoria-Swan Lake in the Legislative Assembly of British Columbia and is presently the Minister of Education", on November 23, 2017, January 9, 2018, and September 17, 2018;

c) public demonstrators who displayed placards that republished and amplified the defendant's comments about the plaintiff in rallies held in April 2018; and

d) comments made by the Chilliwack Teachers Union on October 3, 2018.

[41] The amended notice of civil claim alleges that the "defendant's false and defamatory statements" meant, both expressly and by innuendo, and were understood by the public to mean that the plaintiff:

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.

[42] The amended notice of civil claim also alleges that:

(a) the defendant's statements were intended to convey the meaning that the plaintiff's comment constituted criminal conduct, being the spreading of false news or the public incitement of hatred;

(b) the defendant's comments were actuated by malice;

(c) on October 19, 2018 (after the commencement of this action), the defendant made further defamatory comments about the plaintiff by directing the public to an "obscure website" called "Press Progress" which published a "false and defamatory attack on the plaintiff" on October 16, 2018; and

(d) on October 22, 2018, the defendant made further defamatory statements to CBC Radio.

[43] The allegations particularized in the amended notice of civil claim are, of course, only allegations. I discuss below the proper analysis of the onus and burden of proof in the screening process established by the *PPPA*.

[44] I note at this point that the parties made helpful and reasonable admissions and acknowledgements in their submissions that assisted in the analysis of the facts. In particular:

a) the defendant acknowledged that he made all of the statements described in the amended notice of civil claim;

b) the defendant admitted that the statements had been published;

c) the defendant acknowledged that at least some of those statements are capable of defamatory meaning; and

d) the plaintiff acknowledged that the SOGI 123 issue was a matter of public interest.

The Purpose of the *PPPA* and the Ontario Legislation

[45] I noted above that this application comes before this Court as a case of first instance. There is, however, substantial judicial analysis of similar legislation.

[46] The *PPPA* is modeled on s. 137.1 of the *Ontario Courts of Justice Act*, R.S.O. 1990, c. C. 43. Section 137.1 is entitled “Dismissal of proceeding that limits debate” (“*OCJA* Provisions”). Those provisions have been considered by the Ontario Court of Appeal including *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 [*Pointes Protection*]; *Platnick v. Bent*, 2018 ONCA 687.

[47] In this application, both parties rely on the reasoning contained in the decisions of the Ontario Court of Appeal as being correct, although each party emphasizes different statements. Both parties agree that the court’s analysis is correct. Neither party argues that the analysis undertaken by the Ontario Court of Appeal was wrong or is not applicable to the BC legislation. Having reviewed the decisions, I find the analysis helpful and the reasoning persuasive, although I have distinguished those cases in some respects. Where the wording of the *OCJA* Provisions differs from the BC *PPPA*, I have noted the different wordings and discussed whether they are consequential.

[48] As noted, the *OCJA* Provisions spawned a number of applications for dismissal of actions that were alleged by the defendants to be SLAPP suits.

[49] The rulings in six of the dismissal applications were appealed from the Ontario Superior Court of Justice to the Ontario Court of Appeal. To avoid inconsistent findings by different panels, the Ontario Court of Appeal heard all six

appeals at the same time. The court's main analysis of the *OCJA* Provisions is set out in *Pointes Protection*. That analysis was then applied to the other cases.

[50] The *Pointes Protection* decision discusses the background, legislative history, applicable tests, burdens, and purpose of the *OCJA* Provisions. I discuss below the Ontario Court of Appeal's description of the *OCJA* Provisions, their purpose, and their applicability in British Columbia.

[51] One major difference between the legislation in BC and the Ontario equivalent is that the *OCJA* Provisions contain a preamble setting out their purpose. The *OCJA* Provisions state:

> **137.1** (1) The purposes of this section and sections 137.2 to 137.5 are,
>
> (a) to encourage individuals to express themselves on matters of public interest;
>
> (b) to promote broad participation in debates on matters of public interest;
>
> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
>
> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

[52] The Ontario Court of Appeal in *Pointes Protection* discussed the purpose of the *OCJA* Provisions:

> [45] The purpose of s. 137.1 is crystal clear. Expression on matters of public interest is to be encouraged. Litigation of doubtful merit that unduly discourages and seeks to restrict free and open expression on matters of public interest should not be allowed to proceed beyond a preliminary stage. Plaintiffs who commence a claim alleging to have been wronged by a defendant's expression on a matter of public interest must be prepared from the commencement of the lawsuit to address the merits of the claim and demonstrate that the public interest in vindicating that claim outweighs the public interest in protecting the defendant's freedom of expression.

[53] The *Pointes Protection* decision also sets out that the legislation does not create any new substantive defences to defamation claims:

> [46] Significantly, the Act does not, except in a minor way, alter the substantive law as it relates to claims based on expressions on matters of public interest. There are no new defences created for those who speak out on matters of public interest. The law of defamation remains largely

> unchanged. Similarly, nothing in the Act affects the substantive law applicable to [the plaintiff's] breach of contract claim. [Footnote omitted.]

[54] Although there is no preamble to the *PPPA*, both parties point to the following statement by the Attorney General made while introducing the Bill for Second Reading in the B.C. Legislature in February 2019:

> This is a bill that is intended to protect an essential value of our democracy, which is public participation in the debates of the issues of the day, and in particular, to respond to a mischief that has arisen, which is people who are powerful and wealthy and able to afford lawyers initiating lawsuits or threatening lawsuits against individuals who are critical of them in order to stop them from participating in that public debate.
>
> 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 1120 (Hon David Eby).)

[55] While the Attorney General's statements do not change or affect the interpretation of the provisions of the *PPPA*, they assist in determining its purpose and the mischief that the government sought to address. I discuss below the portion of the Attorney General's statement, relied upon by the plaintiff, regarding the prospect that the *Act* anticipates a plaintiff who is "powerful and wealthy … initiating … lawsuits".

[56] Earlier this year, Justice Murray, in *Galloway v. A.B.*, 2019 BCSC 1417, reviewed the *PPPA* provisions on a procedural application for production of documents and cross-examination on affidavits. Justice Murray rephrased the purpose concisely:

> [2] The purpose of the *Act* is to enhance public participation by protecting expression on matters of public interest from defamation litigation which is brought to stop people from talking: Hansard, (February 13, 2019) at 6974. Lawsuits brought to silence or punish one's critics have come to be known as Strategic Lawsuits Against Public Participation (SLAPP).

[57] There is no real distinction between the purposes expressed in the preamble to the *OCJA* Provisions, the excerpts from Hansard and from Murray J.'s concise statement in *Galloway*. The expressed purposes are very broad. They are similar to the obvious intent of the *PPPA* as disclosed in the wording of the *Act*. The *PPPA* is aimed at preventing SLAPP lawsuits and encouraging public participation in debate on matters of public interest. It provides a screening mechanism whereby the plaintiff is required to address the merits of the claim and show that the interests of the plaintiff outweigh the public interest in free and open debate.

[58] In most applications under the *PPPA*, the plaintiffs will be claiming some form of defamation or damage to reputation by the defendants. One of the questions that will arise will be the purpose or motive of the plaintiff in bringing the action. Plaintiffs will always argue that the actions were brought for the purpose of obtaining damages and protecting their reputations. Defendants will argue that the actions were designed to thwart or stifle discussion.

[59] However, the motive or purpose of the plaintiff is not a primary consideration in the tests set out in the *PPPA*. That issue was discussed by the court in *Pointes Protection*:

> [47] Nor does s. 137.1 invoke the abuse of process model favoured in the now repealed British Columbia Anti-SLAPP legislation. Aside from the discretionary damages provision in s. 137.1(9), s. 137.1 does not fix on the plaintiff's purpose or motive in bringing the claim as the determining factor, but instead assesses the potential merits of the claim and the effects of permitting the claim to proceed on competing components of the public interest. The emphasis on the litigation's effect over its purpose is said to provide a more streamlined and accurate assessment of the legitimacy of the claims: Anti-SLAPP Advisory Panel, at paras. 32-35. That said, the purpose of the lawsuit can be an important consideration on a s. 137.1 motion. If the motion judge determines that the plaintiff's actual purpose in bringing in the lawsuit was to "gag" the target of the lawsuit on a matter of public interest, it seems highly unlikely that the lawsuit would clear the public interest hurdle in s. 137.1(4)(b). [Footnote omitted.]

[60] The proper considerations for the court when applying the *PPPA* screening tests are set out in the provisions of the *Act*. Those assessments relate to the merits and effects of the plaintiff's claim balanced against the competing element of public

interest. The plaintiff's motives in commencing the action are not a consideration unless the court makes a specific determination that the action was brought to gag the defendant. In such a case, it would be difficult for the plaintiff to satisfy the other burdens set out in the *Act*.

[61] Because this type of application is usually a preliminary screening procedure with limited evidentiary material, in most cases it will be exceedingly difficult to make a finding that the plaintiff's motives were improper on the material available.

[62] In this case, as a preliminary matter, the plaintiff urges upon me that the circumstances of this action do not fit the purposes for which the *PPPA* was intended. He points to the fact that he is an individual, albeit an individual in an elected position. He is not the "powerful and wealthy" litigant anticipated by the Attorney General in the quote from Hansard above. Nor does this action have the hallmarks of "SLAPP" litigation. The plaintiff points to the decision in *Platnick* where the court stated:

> [99] The *indicia* of a SLAPP suit include:
>
> - a history of the plaintiff using litigation or the threat of litigation to silence critics;
> - a financial or power imbalance that strongly favours the plaintiff;
> - a punitive or retributory purpose animating the plaintiff's bringing of the claim; and
> - minimal or nominal damages suffered by the plaintiff.

[63] The plaintiff says that he has no history of using the threat of litigation and there is no imbalance of power between the two parties. He argues that he is simply an individual who is attempting to protect his reputation and seek damages for defamation. He says, to the contrary, the defendant was the president of a powerful union that represents more than 45,000 teachers in British Columbia.

[64] On the other side, the defendant argues that this action has all the hallmarks of a SLAPP litigation. He notes that he was the only named defendant despite the fact that multiple people and publications criticized the plaintiff in a manner that was similar to his statements. He argues that he was targeted in order to silence his

voice on this issue. He also argues that the timing of the commencement of the action is important. The Demand Letter was sent, and then published, in the heat of the plaintiff's campaign for re-election as a school board trustee. The action was filed eight days before the election. The defendant submits that the inference to be drawn from these facts is that the plaintiff was using the action as a tool in his election campaign.

[65] I am not satisfied that there is sufficient evidence to draw the inference or make the finding that the defendant urges upon me, nor do I think it would be appropriate to make that leap at this stage, based upon the available evidence.

[66] Turning to the plaintiff's argument, I do not accept his submission regarding the purpose and applicability of the legislation. There is no suggestion in the text of the *PPPA* that it is limited in application based on the circumstances of the parties. There is no part of the tests under s. 4 that inquire into the ability of the parties to fund litigation or pay damages. The tests to be applied relate to the merits of the action, the merits of the defences, and the balancing of interests. There is no provision for a pre-screening test to be applied before the screening process set out in s. 4 of the *PPPA* based on the financial circumstances of the parties.

[67] I now discuss the relevant elements of the *PPPA* and the tests set out in s. 4.

Threshold Test—Public Interest (s. 4(1)(b))

[68] Section 4 provides a two-stage process with the second step requiring the plaintiff to meet three separate requirements:

(a) First, the defendant/applicant must persuade the court that the action arises from an expression that relates to a matter of public interest.

(b) Second, if the first part of the test is satisfied, then the onus shifts to the plaintiff/respondent who must establish that:

i. There are grounds to believe that:

- the proceeding has substantial merit, and

- the applicant has no valid defence in the proceeding, and

ii. The harm suffered, or to be suffered, by the plaintiff/respondent from the defendant/applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

[69] The first part of the test under the *PPPA* is found in s. 4(1):

> **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
>
> (a) the proceeding arises from an expression made by the applicant, and
>
> (b) the expression relates to a matter of public interest.

[70] The onus on the defendant/applicant is to establish that the expression relates to a matter of public interest.

[71] As noted above, the defendant concedes that he made the impugned expression, and the plaintiff concedes that the issues that formed the background to the statements of the defendant were matters of public interest. Hence, the defendant has satisfied the first part of the test.

[72] Although the plaintiff's admission satisfies the initial onus on the defendant (public interest), Mr. Hansman filed material and made submissions on the other parts of the test. He says that the plaintiff's claim does not have substantial merit and that the defences advanced are valid. He did not make any submissions regarding the third part of the test (the balancing of interests between public expression and private rights).

[73] It should also be noted that, having satisfied the onus in s. 4, the defendant has very little remaining burden. There is, however, an implicit onus on the defendant to establish that there is at least one viable defence to the plaintiff's claim. As discussed in *Pointes Protection* at para. 83:

> [83] I would add two further observations with respect to the "no valid defence" requirement in s. 137.1(4)(a)(ii). That provision requires the plaintiff to satisfy the motion judge that there are reasonable grounds to believe that the defendant has "no valid defence" to the plaintiff's claim. The section would be unworkable if the plaintiff were required to address all potential defences and demonstrate that none had any validity. I think the section contemplates an evidentiary burden on the defendant to advance any proposed "valid defence" in the pleadings, and/or in the material filed on the s. 137.1 motion. That material should be sufficiently detailed to allow the motion judge to clearly identify the legal and factual components of the defences advanced. Once the defendant has put a defence in play, the persuasive burden moves to the plaintiff to satisfy the motion judge that there are reasonable grounds to believe that none of the defences put in play are valid.

[74] Thus, despite the apparent reversal of the onus in s. 4, there is some evidentiary burden remaining on the defendant to identify the legal and factual components of the defences on which they could rely, to the extent necessary for the court to be able to determine that the grounds for the defence exist. Once a defence is "in play" to that standard, the onus shifts to the plaintiff to establish that there are reasonable grounds to believe that none of the proffered defences are valid. The nature and extent of that burden is discussed below.

[75] Further, defendants also bear some onus to establish the value to the public of their forms of speech for the court to assess the balancing of interests that is required under the final part of the test.

The Plaintiff's Claim Has Substantial Merit (s. 4(2)(a)(i))

[76] Once the defendant has satisfied the requirements of s. 4(1), the analysis then moves to s. 4(2), and the onus shifts to the plaintiff:

> (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.

[77] The first point to note is that the different parts of the test are conjunctive. The plaintiff must satisfy the court that there are grounds to believe his or her claim has substantial merit, and grounds to believe there are no valid defences, and the balancing of interests weighs in the plaintiff's favour.

[78] Although the analysis of this section requires separate considerations of the terms "satisfy", "grounds to believe", and "substantial merit", the overall burden on the plaintiff under s. 4(2)(a)(i) must be considered on the basis that it comprises all of those phrases together.

[79] First, it is clear that the plaintiff's evidentiary burden is not high. The hearing can be held at an early stage in the action in order to screen out the types of claims that are contemplated by the *PPPA*. Because it is a screening process, the plaintiff is not required to establish his or her case on a balance of probabilities. However, there is some limited weighing of the evidence by the chambers judge. The nature of the burden on the plaintiff was addressed in *Pointes Protection* which provides the following analysis:

(a) The screening process is not an alternate means to try the merits of the case, and it is not akin to a summary trial (para. 73).

(b) The screening process does not involve findings of fact, determinations of credibility, or any ultimate assessment of the merits of any element of the action (para. 74).

(c) The test to be applied is whether a trial judge could reasonably conclude that the plaintiff's case has substantial merit (para. 75).

(d) The timing of the application, and limits on cross-examination, mean that neither party will be putting their best foot forward (para. 76).

(e) The screening process is not appropriate to investigate credibility, competing facts, or the inferences to be drawn from them. It is not the

correct place for a “deep dive” or investigation into the merits of the claim (para. 78).

(f) The role of the judge on the screening application is to determine “whether it could reasonably be said, on an examination of the motion record, that the claim has substantial merit” (para. 79).

[80] The burden on the plaintiff is further modified by the phrases “grounds to believe” and “substantial merit”. The plaintiff must satisfy the court that there are “grounds to believe”. *Pointes Protection* considered the use of these phrases and set out the following analysis:

(a) The “grounds to believe” established by the plaintiff must be “reasonable” grounds to believe. The word “reasonable” is implicit. The concept of judicial decision-making is antithetical to decisions based on unreasonable or speculative grounds (para. 69).

(b) The use of the word “substantial” to modify “merit” means that there is more than “some chance” of success. It means that the claim is legally tenable and supported by evidence. The determination is whether those factors could lead a reasonable judge to conclude that the claim has a real chance of success (paras. 80-81).

(c) It is not sufficient for the plaintiff to argue that bare assertions in the pleadings should be taken at face value. The use of the words “grounds to believe” contemplates a limited weighing of the evidence (paras. 80-82):

> [82] … An evaluation of potential merit based on a “grounds to believe” standard contemplates a limited weighing of the evidence, and, in some cases, credibility evaluations. Bald allegations, unsubstantiated damage claims, or unparticularized defences are not the stuff from which “grounds to believe” are formulated. …

(d) Although the screening process is not a summary trial, the judge is able to weigh and dismiss allegations that have no merit or no chance of success at trial:

> [82] … Similarly, if on a review of the entirety of motion material, the motion judge concludes that no reasonable trier could find a certain allegation or piece of evidence credible, the motion judge will discount that allegation or evidence in making his or her evaluation under s. 137.1(4)(a). …

(e) Each allegation and piece of evidence should be reviewed to see whether a reasonable trier of fact could find it credible. If the motion judge determines that no reasonable trial judge or jury could find the allegation or evidence credible, then the plaintiff's overall claim must be evaluated without that evidence or allegation (para. 82).

(f) The standard is not whether the motion judge accepts the evidence, it is whether there are reasonable grounds to believe a reasonable trier could accept the evidence (para. 82).

[81] In addition, the court in *Pointes Protection* cautioned that judges must appreciate the very significant consequences to the plaintiff if the motion is allowed:

> [98] In making the determination required under s. 137.1(4)(b), the motion judge will bear in mind that the plaintiff has the onus under the legislation. In applying that burden, however, the motion judge must appreciate the very significant consequences to the plaintiff if the motion is allowed under s. 137.1(4)(b). The courtroom door will be closed on the plaintiff even though the claim may have ultimately succeeded on the merits. The Anti-SLAPP Advisory Panel envisioned this result only if the plaintiff had a "technically valid cause of action" and had suffered "insignificant harm". The language of s. 137.1(4)(b) does not contain those limitations. However, I think the Panel's words do describe the kind of case that should be removed from the litigation process through s. 137.1(4)(b).

[82] Based on this reasoning, the plaintiff argues that the burden on him is low. He alleges that he was defamed. The statements are not denied by the defendant. If those statements are found to have defamatory meaning, then he has established the legal and evidentiary basis of his cause of action. He argues that a reasonable

trier of the case could accept the evidence upon which he relies and make an award of damages. Hence, his action has substantial merit according to the test in s. 4.

[83] The plaintiff also argues, and I accept, that the *PPPA* does not alter the common law or create new defences in defamation claims: see *Pointes Protection* at para. 46. He argues, correctly, that if he establishes that the statements were defamatory, then they are presumed to be false, and damage is assumed: *Holden v. Hanlon*, 2019 BCSC 622.

[84] In his submissions, the defendant argues that the plaintiff has failed to provide any evidence that the impugned comments caused any substantial damage, or any damage, at all. He points to the fact that other critics made statements that, he argues, had a greater effect on the plaintiff. He also points to the fact that the plaintiff was re-elected in the 2018 election.

[85] In addition, Mr. Hansman argues that different parts of the amended notice of civil claim contain allegations that, he says, cannot be supported and could not reasonably be found by a trier of fact to be credible. In particular, he points to the alleged “smear campaign” that the plaintiff claims was undertaken by a group of people that included the defendant. Mr. Hansman says there is no evidence of any such conspiracy. He also says that certain of the allegations impute defamatory meanings to his comments that the words cannot reasonably bear. On this basis, he says that the claim does not have “substantial merit.”

[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.

[87] As described above, the defendant criticizes several elements of the plaintiff's amended notice of civil claim. At this stage of the analysis I do not have to decide on the strength or weakness of any of the individual allegations in the pleadings. It does not matter, for this analysis, whether some of the allegations may not be accepted at trial. As noted in paras. 23-25, above, there are a range of statements by the defendant.

[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.

[89] On that basis, I find that that burden on the plaintiff under the first part of the test (s. 4(2)(a)(i)) has been met.

Reason to Believe There are No Valid Defences (s. 4(2)(a)(ii))

[90] The next stage of the test involves an assessment of the defences tendered by the defendant, and the arguments against those defences by the plaintiff. As noted above, there are no concessions by either party in respect of defences.

[91] Before arguing the merits of either of the defences proffered, the plaintiff argues that there are elements of this case that are important to be aired at trial so that this Court can comment on, and inform the public about, the limits on free speech in the context of public debate. He says that if this *PPPA* application sweeps this case "under the rug", then the public will be deprived of the court's guidance on this important issue.

[92] I reject that argument. First, Mr. Neufeld is making a claim for damages against an individual. The purpose of his action should be the restoration of his

reputation and the quest for damages from the defendant. He should not be seeking further publicity or public debate by way of this action when he alleges that his reputation has been damaged by the defendant's statements.

[93] Second, whatever the result of this application, the plaintiff was always going to obtain commentary from the court on the allegations and defences in this case. That commentary would either come from these reasons, or from the eventual trial if this application was to be dismissed.

[94] In this part of the test, the plaintiff must establish that there are grounds to believe that the defendant has no valid defences. The Ontario Court of Appeal made the following observations regarding this part of the test in *Pointes Protection* at paras. 83-84:

a) there is a tacit evidentiary burden on the defendant to advance "valid defences", including the legal and factual components of those defences (para. 83);

b) once the defendant has put a defence "in play", the "persuasive burden" shifts to the plaintiff to satisfy the court that there are reasonable grounds to believe that those defences are not valid (para. 83);

c) the word "valid" means successful (para. 84);

d) the plaintiff must establish that at trial, a trier "could conclude that none of the defences advanced would succeed" (paras. 83-84); and

e) the chambers judge should view the claim through the "reasonableness lens" to determine whether any of the defences might succeed (para. 84).

[95] For other parts of the screening process, it is stated that the burden on the plaintiff is low because of the nature of the application. However, by necessity, there is a shifting burden on the plaintiff under this subsection. The terms "persuasive burden" and "reasonableness lens" suggest that part of the test relates to a consideration of the strength of any defence that is put into play. It follows that the

burden on the plaintiff must be higher in circumstances where the defendant advances a strong argument that the facts and law support a particular defence. A shifting evidentiary burden is the only way for the court to consider whether there are "grounds to believe" that there is "no valid defence" to the claim. If the elements of a particular defence are established on the evidence before the chambers judge, there must be a higher standard on the plaintiff to meet the test in this subsection to satisfy the chambers judge that there are reasonable grounds to believe that the defence proffered by the defendant is not valid.

[96] Although the burden on the plaintiff may increase, the plaintiff needs only establish that a reasonable trier of fact "could conclude" that the defences would not succeed. The burden does not rise to a full balance of probabilities based on a full assessment of the evidence. Having said that, the test must have some applicability. The plaintiff cannot rely on pure speculation. The analysis must be based on what a reasonable trier of fact could find. Put another way, the legislature must have anticipated that there would be cases where s. 4(2)(a)(ii) would apply.

[97] I am also mindful of the cautions invoked in *Pointes Protection*. A finding for the defendant will lead to the dismissal of a possibly meritorious defamation claim. Further, the chambers judge should be careful to avoid taking a "deep dive" into the ultimate merits of the claim or the defences. This application is not a summary trial. It is a screening exercise. However, the fact that the legislation provides a test for "valid" defences means that legislature must have foreseen circumstances where the chambers judge would find that a defence would, in all likelihood, be successful at any reasonable trial. Otherwise, this subsection of the *PPPA* is meaningless.

[98] It is also important to keep in mind the particular shifting of the onus of proof in defamation claims. Once the required elements of the tort are established by the plaintiff, the onus shifts to the defendant to establish the defence. As stated in *Grant v. Torstar Corp*., 2009 SCC 61 at paras. 28-29:

> [28] A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's

> reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism: see, e.g., R. A. Smolla, "Balancing Freedom of Expression and Protection of Reputation Under Canada's *Charter of Rights and Freedoms*", in D. Schneiderman, ed., *Freedom of Expression and the Charter* (1991), 272, at p. 282. (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous *per se*: R. E. Brown, *The Law of Defamation in Canada* (2nd ed. (loose-leaf)), vol. 3, at pp. 25-2 and 25-3.) The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.
>
> [29] If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

[99] In this case, the defendant puts forward two defences: qualified privilege and fair comment.

Qualified Privilege

[100] The elements of the defence of qualified privilege were set out by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 143:

> 143 Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. As Lord Atkinson explained in *Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334:
>
> > … a privileged occasion is … an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[101] From *Hill*, it is evident that the privilege attaches to the occasion. In the usual application of the defence, the defamatory words are spoken by a person with an interest or duty to make the communication, and it is made to a person who has a corresponding duty to receive it. Hence, statements to the news media, and hence to the public, would not fit within the usual application of the defence

[102] The plaintiff argues that qualified privilege is grounded in special relationships characterized by a duty to communicate the information and a reciprocal interest in

receiving it (*Grant* at para. 34). The defence is rarely available for widely circulated publications. The defendant's statements were published without limitation.

[103] The plaintiff further argues that the defence of qualified privilege does not apply because, he says, the statements exceeded the occasion. For example, the defendant commented that the plaintiff should not be anywhere near children. The inference to be drawn from this statement, he argues, is that the plaintiff is a danger to children. He also argues that the defendant's reference to "hate speech" suggested that the plaintiff had committed the criminal offence of hate speech as defined in the *Criminal Code*, R.S.C. 1985, c. C-46. The plaintiff asserts that these were extremely defamatory statements that far exceeded the occasion.

[104] The defendant cites *Douglas v. Tucker* (1951), [1952] 1 S.C.R. 275 and *Ward v. Clarke*, 2000 BCSC 979, rev'd 2001 BCCA 724 as examples of the proper analysis of the defence of qualified privilege. He says that the Facebook Post and the plaintiff's later speeches attacked the individuals and groups who created and promoted the SOGI 123 materials. He says that his comments were made in reply to Mr. Neufeld's posts and that they were all germane and reasonably appropriate. He argues that he had reasonable grounds for the statements that he made.

[105] The plaintiff, in response, submits that the decisions in *Douglas* and *Ward* were fact specific, involving "off the cuff" comments. In this case, he argues, the defendant made prepared statements on several different occasions.

[106] The problem that the defendant faces, in seeking to apply the reasoning in the *Douglas* and *Ward* cases on this application, is that the facts in those cases led to different results at different levels of court. They are, as the plaintiff noted, fact specific. Further, the defendant is proffering the defence in circumstances that are not "textbook" for qualified privilege. As noted, the usual application of the defence involves a statement to a limited audience, as opposed to general publication. It is evident that, although the defence may be successful at trial, a reasonable trial judge might reject it. Applying the defence of qualified privilege requires a "deep dive" into the merits and case law which would be inappropriate at this stage.

[107] Given that s. 4 is a screening process, and the burden on the plaintiff is relatively low, I find that there are grounds to believe that a reasonable trier of fact could find that the defence of qualified privilege was not applicable.

Fair Comment

[108] The requisite elements of the defence of fair comment were set out in the leading case on the defence, *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 [*WIC*] at para. 1:

> [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 recognisable as comment;
>
> (d) the comment must satisfy the following objective test: could any man 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. …

[109] The defendant argues that his comments meet all of these criteria. He says that the context of his statements is important. He says:

a) that the debate between himself and the plaintiff related to a matter of public interest, being the SOGI 123 initiative and later, the school board election;

b) that in each case, the facts that formed the basis of the defendant's comments were contained in the plaintiff's Facebook Post;

c) that all of his statements were recognisable as comments;

d) that both he, and other people, could honestly express the opinions based on the Facebook Post; and

e) that there was no malice.

[110] Mr. Hansman further notes that, in each instance, the media sought him out for interviews about Mr. Neufeld's public statements. He argues that the audience would have known that he (Mr. Hansman) was the President of the BCTF, a member of the LGBTQ community, and a supporter of the SOGI 123 resources.

[111] Mr. Hansman argues that the facts in the present case are very similar to the facts in *WIC*. He notes that the "Culture Guard" rally, at which the plaintiff spoke (see para. 29 above), was organized by Ms. Kari Simpson, who was the plaintiff in *WIC*. The criticisms levelled at Mr. Neufeld by Mr. Hansman were along the same lines as the defamatory comments in *WIC*. As a result, the defendant argues, the reasoning of the Supreme Court of Canada in *WIC* hovers over the facts in this case.

[112] It is also clear that the Supreme Court's decision in *WIC* sought to achieve a similar balance in relation to the value of vindicating reputations, fostering public debate, preventing SLAPP suits, and protecting freedom of expression. Justice Binnie wrote for the majority:

> [15] The function of the tort of defamation is to vindicate reputation, but many courts have concluded that the traditional elements of that tort may require modification to provide broader accommodation to the value of freedom of expression. There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a defamation action. Investigative reports get "spiked", the Media Coalition contends, because, while true, they are based on facts that are difficult to establish according to rules of evidence. When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but in actions launched simply for the purpose of intimidation. Of course "chilling" false and defamatory speech is not a bad thing in itself, but chilling debate on matters of *legitimate* public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements.
>
> [Emphasis in original.]

[113] The background to *WIC* involved positions taken by Ms. Simpson, who had a public reputation as a vocal spokesperson opposed to positive portrayals of homosexuality. In 1999, she spoke out against any positive portrayal of a gay lifestyle in public schools. Mr. Mair took issue with her position in an on-air editorial. His comments were harsh. Among other analogies, he compared the implications of

her speech to that of Hitler against the Jews, or Governor George Wallace against the integration of schools.

[114] Ms. Simpson sued the radio station, claiming that, among other things, Mr. Mair's defamatory words were meant to convey that: she thought gay people should not be in public schools; she would condone violence toward gay people; she preaches hatred toward gay people; she would employ tactics against gay people similar to those used by Hitler, the Ku Klux Klan, and other bigots; and she was a dangerous bigot apt to cause harm to gay people.

[115] As noted by the Supreme Court of Canada, at para. 12, the trial judge in *WIC* found that the comparisons to Hitler and the KKK, among others, meant that Ms. Simpson would condone violence. Mr. Mair's statements were found to be defamatory. The trial judge also found that there was evidence that Mr. Mair proceeded with intrinsic malice toward Ms. Simpson, with "personal animosity" and a "desire to harm her reputation". However, "his malice was not a dominant motive for the offending editorial and so, did not defeat the defence of fair comment" (at para. 12).

[116] It should be immediately evident that the circumstances in *WIC* are analogous to the present action. The nature of the public debate, the allegations of defamatory meaning, the employment of the defence of fair comment, and the discussion of malice are very similar to the allegations in this case.

[117] Mr. Hansman's affidavit in support of the application sets out the background and context of his statements, and states that he honestly held the views that he expressed.

[118] The defendant further argues, in respect of the "honest belief" requirement, that the evidence in the news articles establishes that other people expressed the same opinions about the plaintiff. Hence, other people held, and expressed, their honest belief that the plaintiff was a person with characteristics along the lines that the defendant described in his impugned statements.

[119] As a result, in this application, the defendant argues that the reasoning in *WIC* is applicable to the facts in this case. He put forward the defence of fair comment. He argues a leading authority from the Supreme Court of Canada. That case was decided on very similar facts. He argues that the corresponding burden on the plaintiff, under s. 4(2)(a)(ii) to establish that fair comment is not a valid defence, is significant.

[120] In responding to the defendant's argument on the fair comment defence, the plaintiff can counter it by means of evidence that eliminates, or sheds doubt upon, the requisite elements of the defence. Alternatively, he can proffer evidence of malice (discussed below) or point to case law indicating that the defence may not succeed.

[121] I note, at the outset, that the plaintiff has tendered very little evidence in defence of this application. His affidavit material in response to this application is skeletal at best. His first affidavit is three paragraphs long. The first paragraph contains no relevant information about the alleged defamation. The affidavit continues as follows:

> 2. That, the public portrayal of me as a hateful, intolerant, homophobic, religious bigot and a threat to the safety of children commenced with the defendant's statement on October 24, 2017 as I have pleaded herein.
>
> 3. That, as to damages herein, the facts set out in paragraphs 46 and 47 of my Amended Notice of Civil Claim are true.

[122] For reference, paragraph 46 of the amended notice of civil claim alleges that the plaintiff has suffered damages to his reputation professionally, socially, and generally within his community, across Canada, and internationally. He also alleges to have suffered indignity, personal harassment, stress, anxiety, and mental and emotional distress.

[123] Paragraph 47 of the amended notice of civil claim describes specific incidents that, the plaintiff says, are examples of the stigmatization, humiliation, and isolation he has endured as part of the damages suffered because of the defendant's defamation. Paragraph 47 lists four incidents wherein entities unrelated to the

defendant or the BCTF took steps to exclude the plaintiff from certain activities and sought his resignation from the school board.

[124] The plaintiff's allegations in relation to paras. 46-47 of the amended notice of civil claim do not touch upon the issues related to the defence of fair comment.

[125] Mr. Neufeld's second affidavit is equally brief and does not touch on the merits of the case or the defence of fair comment.

[126] Hence, there is no evidence tendered by the plaintiff that would form the basis of an argument against the validity of the fair comment defence. I note the plaintiff's application for further disclosure of documents at the outset of these reasons. That issue is discussed below.

[127] In answer to the defence of fair comment, the plaintiff points to the Ontario Court of Appeal decision in *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163 which was decided under the *OCJA* Provisions. In that case, the motions judge allowed the defendant's application to dismiss the action on the basis that the defence of fair comment was likely to succeed. The Ontario Court of Appeal overturned the lower court, stating:

> [33] In my view, the motion judge erred in her analysis in one principal respect. The burden on the appellant under s. 137.1(4)(a)(ii) is not to show that a given defence has no hope of success. To approach s. 137.1(4)(a)(ii) in that fashion risks turning a motion under s. 137.1 into a summary judgment motion. Rather, all that the appellant need show is that it is possible that the defence would not succeed. As Doherty J.A. stated in *Pointes,* at para. 84:
>
> > The onus rests on the plaintiff to convince the motion judge that, looking at the motion record through the reasonableness lens, a trier could conclude that none of the defences advanced would succeed. If that assessment is among those reasonably available on the record, the plaintiff has met its onus.
>
> [34] In my view, a reasonable trier could conclude that the defence of fair comment would not succeed. It would be open to a trier to conclude that the statements made about the appellant – namely, that he supported terrorists – were uttered as statements of fact, not as statements of opinion. Further, even if the statements are viewed as opinion, a trier could also conclude that, on the available facts, a person could not honestly express that opinion based on the proved facts. The fact that a person supports a parent, whose child has committed a terrible act, does not make that person a supporter of

> the child's actions. A trier might also conclude that the respondent's repetition of the statements, after the appellant expressly disavowed support for terrorism, made the defence of fair comment unavailable.

[128] I note, for context, that the plaintiff, Mr. Lascaris, was a human rights advocate and a member of the shadow cabinet of the federal Green Party of Canada. The defendant published an article stating that the plaintiff "Advocates on Behalf of Terrorists". That statement was based on a one-sided interpretation of certain facts. In an interview less than a week later, the plaintiff confirmed his view that terrorism is an atrocity, and he condemned attacks by anybody on innocent civilians or civilian infrastructure. The defendant later re-published the same article via its Twitter account. Despite the clarification of his views, the plaintiff was removed from his position in the Green Party.

[129] The defendant, B'nai Brith Canada, applied under the *OCJA* Provisions to have Mr. Lascaris' action dismissed. The motion judge granted the defendant's application, stating that Mr. Lascaris had not met the evidentiary burden. In effect, the judge accepted that the defence of fair comment would likely succeed.

[130] The Ontario Court of Appeal, in the paragraphs quoted above, set out a number of scenarios wherein a trial judge or jury could find that the defence of fair comment would not apply.

[131] In answer to this application, and in reliance on *Lascaris*, the plaintiff argues that a reasonable trier of this case could find:

a) that the impugned statements were statements of fact; or

b) that no person could honestly express that opinion based on those proved facts; or

c) that repetition of the statements after the plaintiff clarified and modified his Facebook Post indicates that the defence was not available.

[132] However, the facts in *Lascaris* were significantly different from the current scenario, and the reasoning in that case was dependant upon the particular facts of that case. As noted above, the facts in this case are very similar to the facts in *WIC* where the statements were found to be comments and based on proven facts.

[133] The plaintiff further argues that the defendant could have countered his statements without attacking the plaintiff personally. However, the defence of fair comment applies in circumstances where the defendant's words were, in fact, defamatory. If the defendant had not attacked the plaintiff personally, then there would be no basis for a defamation action. Further, as discussed in *WIC*, very similar statements have been found to be comments, not statements of fact.

[134] The plaintiff also argues that there is no factual basis for any of the defendant's comments suggesting that the plaintiff was a bigot, or that he hated homosexuals and transgender people. As noted above, the defendant says that all of his comments were based on the fact of the plaintiff's Facebook Post. In that post, the plaintiff himself noted that, by posting his opinion, he risked being "labeled a bigoted homophobe." Hence, it is difficult, if not impossible, for him to argue that there was no factual basis for Mr. Hansman's comments. The same reasoning also applies to the requirement that any person could honestly express the same opinion.

[135] The burden on the plaintiff is to establish that a reasonable trier of this case at trial "could conclude that none of the defences advanced would succeed" (*Pointes Protection* at para. 84). Based on the analysis set out above, I find that, subject to a finding of malice (which I address below) the plaintiff has not met the evidentiary burden required of him. He has not met the persuasive burden of establishing that there are grounds to believe that a reasonable trier of the case could find that there were no valid defences.

[136] In assessing the plaintiff's arguments, it is not sufficient for the plaintiff to state that there may be a finding against the defendant without supporting that argument with evidence and law. Any such argument must be based on the "reasonableness lens" (*Lascaris* at para. 33). The legislature must have intended that this part of test

would be applicable in some circumstances. It is not sufficient that a plaintiff submit that the defendant may fail to prove some aspect of the defence at trial. In this case, as noted, the defendant will argue the *WIC* case at trial. The facts of this case are very close to the facts in *WIC*. The reasoning in *WIC* would apply to the trial of this action.

[137] I find that no reasonable trier of this case could distinguish the facts in this case from the facts in *WIC*. The defence of fair comment is valid.

Malice

[138] The plaintiff alleges that the defendant's statements were motivated by malice. Malice, if proven, can defeat an otherwise sound defence of fair comment or qualified privilege. The test for establishing malice was recently stated by Sharma J. in *Pan v. Gao*, 2018 BCSC 2137:

> [142] However, even if the defendant successfully invokes the fair comment defence, he may still be liable if the plaintiff can establish malice. Malice focuses on the personal motives of the defendant. The burden of proving malice is on the plaintiff: *WIC Radio* at para. 28. In *Smith v. Cross*, 2009 BCCA 529, Madam Justice Kirkpatrick summarized the circumstances in which a finding of malice can be made at para. 34:
>
> > A defendant is actuated by malice if he or she publishes the comment:
> >
> > i) Knowing it was false; *or*
> >
> > ii) With reckless indifference whether it is true or false; *or*
> >
> > iii) For the dominant purpose of injuring the plaintiff because of spite or animosity; *or*
> >
> > iv) For some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.

[139] In respect of both defences, the plaintiff pleads and argues that the defendant's statements were actuated by malice. He says that the evidence of malice can either be inferred from the statements themselves, or may be disclosed in the production of documents or an examination for discovery that have not yet occurred. As noted, the plaintiff filed no affidavit evidence that would support an inference or a finding of malice.

[140] Mr. Hansman argues that there is no evidence of any malice. First, he notes that the amended notice of civil claim alleges that his malice was indicated, in part, by his intended goal of seeing Mr. Neufeld removed from public office. Mr. Hansman argues that seeking the removal of a public official from office through democratic means is at the core of a democratic society and cannot be considered malice. I agree with that position to the extent that it applies to normal public debate. I question, without deciding, whether a deliberately false and extremely defamatory statement about a person running for public office could be considered malicious. However, as noted above, Mr. Hansman has put forward a very strong argument that his statements were protected by the defence of fair comment. One of the elements of that defence is "honest belief".

[141] Analysing the test articulated in *Pan*, I note that Mr. Hansman's affidavit sets out the background and context of his statements. His affidavit makes it clear that he did honestly hold the views that he expressed in the interviews. Hence, on the evidence before me, there is no prospect of a finding that the defendant made the statements, either knowing them to be false or with reckless indifference whether they were true or false. It is also clear from his affidavit that his purpose in making the statements was to promote the use of the SOGI 123 materials and schools that were safe and inclusionary for transgender people. While it is possible that he might have held some degree of animus toward the plaintiff, absent Mr. Hansman providing a full admission of malice under cross-examination, it is not reasonable to foresee that a reasonable trier of the case would find that he was motivated by malice. As discussed below, the *Act* provides for parties to conduct cross-examination on affidavits within a *PPPA* application. The plaintiff did not take that step.

[142] Put another way, the plaintiff has not met the persuasive burden of establishing that a reasonable trier of fact could find that the defendant was motivated by malice.

[143] It follows that I find that there is no evidence of malice and no reasonable prospect that it will be established. The defence of fair comment is valid. Having failed to meet the test set out in s. 4(2)(a)(ii), the defendant's application should be allowed, and the action should be dismissed.

The Balancing of Interests (s. 4(2)(b))

[144] It follows from my reasoning above that the defendant's application should be allowed and the action be dismissed on the basis that there is a valid defence. As a result, the analysis of balancing interests under s. 4(2)(b) is not required.

[145] However, if my analysis set out above is incorrect, and if the balancing analysis were engaged, I find that the balancing of interests favours the defendant and that the public interest in protecting the defendant's expression outweighs the harm suffered, or to be suffered by the plaintiff.

[146] In coming to this conclusion, I note, on this issue, that the plaintiff was re-elected as a Chilliwack School Board Trustee. That is some evidence of the limited damage that he suffered.

[147] I note again that the plaintiff has not adduced any evidence apart from the bare assertions set out in his affidavit (see paras. 121–125 above) alleging that the negative public portrayal of him "commenced" immediately after the defendant's statement. By using the word "commenced" in his affidavit, the plaintiff attempts to establish a causal link between the defendant and the negative treatment that he has received from a number of different organizations.

[148] The plaintiff's affidavit also references two paragraphs from his amended notice of civil claim and says that the facts alleged therein are true.

[149] *Pointes Protection* states that the plaintiff has the onus of proving that there is a causal link between the defendant's expression and the damages claimed:

> [92] Equally important to the quantification of damages, the plaintiff must provide material that can establish the causal link between the defendant's expression and the damages claimed. Evidence of this connection will be

> particularly important when the motion material reveals sources apart from the defendant's expression that could well have caused the plaintiff's damages.

[150] The reasoning in *Pointes Protection* is clear that bald assertions of fact, unsupported by any evidence, are not sufficient. I put no weight on, and I discount completely, the allegations of fact in para. 47 of the amended notice of civil claim as referenced in the plaintiff's first affidavit. Based on the evidence before me, the fact that other entities, some governed by elected officials, took steps against Mr. Neufeld cannot be traced to Mr. Hansman's comments. It is clear from the news reports that other people and entities reacted negatively to Mr. Neufeld's position on the SOGI 123 issue. Based on the present sparse evidence, it strains credulity to accept that the actions of unrelated organizations were influenced or affected by Mr. Hansman's statements. The clear inference is that those organizations made their own decisions about the plaintiff in response to the Facebook Post.

[151] The allegations in para. 46 of the amended notice of civil claim simply repeat the plaintiff's allegation that he has suffered damage.

[152] As a result, this Court is left with precious little evidence from the plaintiff that can be weighed as part of the balancing of interests.

[153] I further note that evidence of the damages suffered would be solely in the knowledge or possession of the plaintiff. He had the opportunity to provide that evidence for this hearing.

[154] The plaintiff points to case law supporting his position on damages. He relies on *Wenman v. Pacific Press Ltd.*, 1991 CanLII 270 (B.C.S.C.). In that case, the plaintiff, a Member of Parliament, made comments as a witness in a criminal trial. The Province newspaper published an editorial under the headline "MP MUST STAY ON SIDE OF LAW". The editorial expressed the opinion that Mr. Wenman should not be a Member of Parliament and should be ashamed of his statements in court. The editorial was found to contain defamatory material, and Mr. Wenman was awarded damages of $50,000 for the injury to his reputation.

[155] Mr. Neufeld also argues that the nature and circumstances of the defamation will increase the damages in this case. He points to the *Holden*, where Dardi J. noted the following factors:

> [292] A similar list of relevant factors was identified in *Leenen v. Canadian Broadcasting Corp.* (2000), 2000 CanLII 22380 (ON SC), 48 O.R. (3d) 656 (Ont. S.C.J.) at para. 205, aff'd (2001), 54 O.R. (3d) 612 (Ont. C.A.), leave to appeal ref'd, [2001] S.C.C.A. No. 432:
>
> a) the seriousness of the defamatory statement;
>
> b) the identity of the accuser;
>
> c) the breadth of the distribution of the publication of the libel;
>
> d) republication of the libel;
>
> e) the failure to give the audience both sides of the picture and not presenting a balanced view;
>
> f) the desire to increase one's professional reputation or to increase ratings of a particular program;
>
> g) the conduct of the defendant and defendant's counsel through to the end of trial;
>
> h) the absence or refusal of any retraction or apology; and
>
> i) the failure to establish a plea of justification.

[156] The plaintiff argues that Mr. Wenman's damages were substantial in 1991 dollars and would be greater if his action was decided in 2019 or 2020. The plaintiff says that his submissions on damages at trial will be based, in part, on the award in *Wenman* as well as the reasoning in *Holden*. He notes that the facts in *Wenman* occurred before the advent of the internet. He says that the defendant's statements were published to a much broader audience and, as a result, the prospect of damages is increased. On this basis, he says that the quantum of damages exceeds the concept of "nominal" damages.

[157] The Ontario Court of Appeal in *Pointes Protection* stated, at para. 90, that 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". The court also noted that the plaintiff cannot be expected to present a fully developed damages brief.

[158] However, the plaintiff presents no evidence, apart from one paragraph in his affidavit, that could be said to establish that he has suffered any damage that can be causally linked to the defendant's statements. As noted, the affidavit says that the negative treatment "commenced" with the defendant's first statement. It is clear that other organizations with whom the plaintiff interacted had a negative reaction to his Facebook Post. One of those organizations was the Chilliwack School Board. As noted above, I discount the allegations of a causal relationship between the defendant's statements and the reaction of other organizations.

[159] I noted above that the defendant did not make submissions on the balancing aspect of the *PPPA*. However, the second side of the equation that must be balanced against the merits of Mr. Neufeld's claim is the public interest in protecting the actual expression that is the subject matter of the lawsuit. In this respect, there is a further burden on the defendant, as noted in *Pointes Protection*:

> [93] Turning to the other side of the balancing exercise in s. 137.1(4)(b), the public interest in protecting the defendant's freedom of expression, the motion judge must assess the public interest in protecting the actual expression that is the subject matter of the lawsuit. On a general level, the importance of freedom of expression, especially on matters of public interest, both to the individual and to the community, is well understood: see *Grant v. Torstar Corp*., at paras. 32-57. However, if the defendant asserts a public interest in protecting its expression beyond the generally applicable public interest, the evidentiary burden lies on the defendant to establish the specific facts said to give added importance in the specific circumstances to the exercise of freedom of expression.

[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.

[161] Hence, were I tasked with attempting to balance the plaintiff's potential damages against the public interest in this debate, I would find in favour of the public debate on the evidence before me. As noted, the plaintiff submitted almost no evidence of damage suffered.

The Plaintiff's Application for Further Discovery of Documents

[162] As noted at para. 6 of these reasons, the plaintiff seeks to have his application for further production of documents from the defendant heard at the same time as the defendant's application under the *PPPA*. The plaintiff made further submissions in November 2019 arguing that recent decisions, delivered since the hearing, supported his application in this regard.

[163] The plaintiff's argument, as I understand it, is that the production of further documents, such as emails and texts from the defendant, could uncover facts that would expose evidence of the defendant's malice toward the plaintiff. I do not understand that any potential documents in the possession of Mr. Hansman could be relevant to any other issue in the proceeding.

[164] I note, at the outset, that there is a procedural issue within the *PPPA* that the plaintiff must address. The *PPPA* does not allow for further steps to be taken in the action (or "proceeding") once an application under s. 4 is served. Section 5 states:

> **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.

[165] The plaintiff argues that two recent cases have commented upon the availability of other steps once the *PPPA* application has been served.

[166] First, the plaintiff cites the decision of Murray J. in *Galloway*. In that decision, Murray J. allowed the plaintiff's application for the production of documents that the plaintiff requested during the cross-examination of the defendant on his affidavit. Justice Murray ruled that the plaintiff's requests were valid and the documents should be disclosed before the hearing of the defendant's *PPPA* application.

[167] *Galloway* does not assist Mr. Neufeld. In *Galloway*, the plaintiff was pursuing the cross-examination of the defendant on his affidavit. The affidavit was filed in the

application. The *PPPA* provides certain steps that can be taken within the application. One such step is cross-examination on an affidavit. During that cross-examination, the plaintiff requested documents. The parties then fought over whether the production of the documents sought during the cross-examination was a step in the application, or a step in the proceeding. Justice Murray ruled that it was a step in the application and directed that the production to occur before the hearing of the *PPPA* application.

[168] Conversely, in this case, Mr. Neufeld did not avail himself of any of the procedures under the *PPPA*. Instead, he sought to proceed with a step in the action: his application for production of documents.

[169] As noted, s. 5 of the *PPPA* requires a stay of all steps in the proceeding. The decision in *Galloway* does not affect the interpretation of that section.

[170] The plaintiff also relies on the decision in *Zoutman v. Graham*, 2019 ONSC 4921. He notes that in *Zoutman*, the court allowed the plaintiff's summary trial application to proceed at the same time as the defendant's anti-SLAPP application.

[171] The circumstances in *Zoutman* are distinguishable from the current case. In *Zoutman*, the plaintiff advised the defendant that he intended to set his defamation claim down for a summary trial. He then assembled his material and had a fully formed evidentiary basis for the summary trial. Two months after receiving notice of the summary trial, the defendant brought his anti-SLAPP application.

[172] It is clear that on the facts, the court was concerned that the defendant was using the anti-SLAPP application to forestall the plaintiff's ability to seek judgment. Although the court allowed the two applications to be heard at the same time, the court dismissed the anti-SLAPP application on the basis that the defendant did not meet the first part of the test (whether it was a matter of public interest).

[173] The reasoning in *Zoutman* indicates that the court should not allow a frivolous anti-SLAPP application to derail other meaningful steps in the action. To the extent that it allowed two applications to proceed at the same time, it does not assist

Mr. Neufeld. I note that the court dealt with the anti-SLAPP application first and dismissed it. Presumably, if that application had merit, the action would have been dismissed before the plaintiff's summary trial was heard.

[174] In addition to the issues discussed above, I also note that any documents the plaintiff seeks from the defendant would be in the nature of a fishing expedition. There is no evidence or indication that the defendant shared his views about the plaintiff with anyone by email or text or otherwise in writing. In effect, the plaintiff's application for documents is made in the hope that there may be something in the documents that provides a foundation for his allegation of malice. There is no evidence that such documents exist.

[175] I further note that the best result that the plaintiff could obtain, if further documents were disclosed, would be the ability to establish, or argue, that Mr. Hansman acted with malice. If established, that would negate the defence of fair comment. However, it would not address the balancing of interests that I discussed earlier. In other words, in the best-case scenario for Mr. Neufeld, he could establish malice, but it would not affect the balancing of interests. His action would still be dismissed.

[176] On that basis, I decline to grant the plaintiff's application for further disclosure of documents.

Summary

[177] This action arises out of significant philosophical differences regarding the propriety of the Ministry of Education's SOGI 123 materials. However, the outcome of this application has nothing to do with the "correctness" of either party's position on that issue.

[178] Rather, this is a decision under the new *PPPA* legislation, which allows for the dismissal of an action if certain criteria are met. The plaintiff commenced a defamation action against the defendant in relation to a matter of public interest. The defendant concedes that some of his words could be capable of defamatory

meaning. However, he argues that there is strong precedent from the Supreme Court of Canada, on very similar facts, stating that the defence of fair comment would apply to his statements. I have found that, viewing the facts through the "reasonableness lens", no reasonable trier of this case could distinguish the facts in this case from the facts in *WIC*.

[179] I have further found that the *PPPA* requires me to balance the seriousness of the harm suffered by the plaintiff and the public interest in continuing the proceeding against the public interest in protecting the defendant's expression. The plaintiff has an interest in claiming damages and clearing his good name. However, the public has an interest in protecting expressions that relate to public debate. In balancing those interests, I find that the interest in public debate outweighs the interest in continuing the proceeding on these facts.

[180] On the basis of the evidence before me and the analysis set out above, I find that the defendant has established the necessary grounds for a dismissal of the plaintiff's action against him under the *PPPA*.

[181] The defendant's application is granted, and the action is dismissed.

Costs

[182] On the issue of costs, the plaintiff's counsel sought an adjournment to address the defendant's claim that he is entitled to costs on a full indemnity basis under s. 7 of the *PPPA*. I grant that adjournment on the issue of costs. If the parties are unable to reach a resolution on that issue, they may appear before me for further submissions.

"A. Ross J."