



SUPREME COURT OF CANADA

CITATION: Hansman v. Neufeld,
2023 SCC 14

APPEAL HEARD: October 11, 2022

JUDGMENT RENDERED: May 19,
2023

DOCKET: 39796

BETWEEN:

Glen Hansman
Appellant

and

Barry Neufeld
Respondent

- and -

**Attorney General of British Columbia, QMUNITY, Skipping Stone
Scholarship Foundation, Canadian Human Rights Commission, Canadian
Civil Liberties Association, Community-Based Research Centre, Canadian
Centre for Gender & Sexual Diversity, West Coast Legal Education and
Action Fund, B.C. General Employees' Union, Egale Canada and Centre for
Free Expression**
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and
O'Bonsawin JJ.

**REASONS FOR
JUDGMENT:** Karakatsanis J. (Wagner C.J. and Rowe, Martin, Jamal and
(paras. 1 to 122) O'Bonsawin JJ. concurring)

**DISSENTING
REASONS:** Côté J.
(paras. 123 to 179)

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Glen Hansman

Appellant

v.

Barry Neufeld

Respondent

and

**Attorney General of British Columbia,
QMUNITY,
Skipping Stone Scholarship Foundation,
Canadian Human Rights Commission,
Canadian Civil Liberties Association,
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Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Courts — Dismissal of proceeding that limits debate — Defamation — Public interest weighing exercise — Valid defence — Fair comment — British Columbia framework for dismissal of strategic lawsuits against public participation (SLAPPs) — Defamation action concerning statements made by defendant in response to school board trustee plaintiff's opposition to sexual orientation and gender identity initiative dismissed under provincial anti-SLAPP legislation by chambers judge — Whether chambers judge erred in public interest weighing exercise — Whether chambers judge erred in finding that plaintiff did not show grounds to believe defendant had no valid fair comment defence — Protection of Public Participation Act, S.B.C. 2019, c. 3, s. 4(2).

N, a public school board trustee in Chilliwack, British Columbia, made online posts criticizing a provincial government initiative designed to equip educators to instruct students about gender identity and sexual orientation. Many considered his comments to be derogatory of transgender and other 2SLGBTQ+ individuals. H, a gay man, teacher, and former president of a large teachers' union in the province, was prominent among the dissenting voices and made statements to media. H called N's views bigoted, transphobic, and hateful; accused him of undermining safety and inclusivity for transgender and other 2SLGBTQ+ students in schools; and questioned whether he was suitable to hold elected office.

N sued H for defamation. H then applied to have N's defamation action dismissed as a strategic lawsuit against public participation ("SLAPP") under s. 4 of British Columbia's *Protection of Public Participation Act* ("PPPA"). The chambers judge allowed the application and dismissed the action. He held both that H had a valid fair comment defence and that the value in protecting his expression outweighed the resulting harm done to N. The Court of Appeal disagreed on both counts and reinstated the action.

Held (Côté J. dissenting): The appeal should be allowed.

Per Wagner C.J. and **Karakatsanis**, Rowe, Martin, Jamal and O'Bonsawin JJ.: The chambers judge did not err in concluding that the public interest weighing exercise mandated dismissal of the underlying action or that N failed to adequately challenge the validity of H's fair comment defence. Accordingly, his order dismissing the defamation action should be restored.

Section 4 of the *PPPA* creates a pretrial screening mechanism that instructs a judge to dismiss an action arising from expression on a matter of public interest unless the plaintiff can satisfy the judge that their action has substantial merit (s. 4(2)(a)(i)); the defendant has no valid defence in the proceeding (s. 4(2)(a)(ii)); and the harm to the plaintiff as a result of the defendant's expression is serious enough to outweigh the public interest in protecting that expression (s. 4(2)(b)). A s. 4 application first requires the defendant to prove that the proceeding arises from expression that relates to a matter of public interest (s. 4(1)), at which point the onus shifts to the plaintiff under s. 4(2).

The order in which a judge chooses to address each of the elements under s. 4(2) is at the discretion of the court, but the court must dismiss the proceeding if the plaintiff does not meet its onus as to either s. 4(2)(a) or 4(2)(b). Section 4 is nearly identical to the pretrial screening mechanism established by subs. (3) and (4) of s. 137.1 of Ontario's *Courts of Justice Act*: the core feature of both laws is the recognition that even claims with substantial merit will be dismissed where the public interest in preserving free debate outweighs the harm to the plaintiff that the litigation purports to address. Given the substantial similarity between the laws, the Court's interpretation of s. 137.1 in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, [2020] 2 S.C.R. 587, and *Bent v. Platnick*, 2020 SCC 23, [2020] 2 S.C.R. 645, applies with equal force to s. 4 of the *PPPA*.

Under s. 4(2)(b) of the *PPPA*, on one side of the public interest weighing exercise, the factor to be considered in favour of the public interest in continuing the proceeding is the likely harm to the plaintiff as a result of the defendant's expression. Although general damages are presumed in defamation law, the weighing exercise prescribed by s. 4(2)(b) requires that the harm to the plaintiff be serious enough to outweigh the public interest in protecting the defendant's expression. While the presumption of damages can establish the existence of harm, it cannot establish that the harm is serious.

To succeed on the weighing exercise, a plaintiff must provide evidence that enables the judge to draw an inference of likelihood of harm of a magnitude sufficient

to outweigh the public interest in protecting the defendant's expression. Moreover, the legislation requires some evidence that enables the judge to infer a causal link between the defendant's expression and the harm suffered. Where the defendant is not the only one speaking out against the plaintiff, inferring a causal link between the defendant's expression and the harm suffered by the plaintiff becomes both more important and more difficult. In the instant case, given the dearth of evidence from N on harm, the chambers judge did not err in concluding that N had adduced almost no evidence of damage suffered as a result of H's statements.

The harm relevant to the public interest weighing exercise is harm to the plaintiff caused by the defendant's statements, not by the plaintiff's inability to sue. The loss of a right to sue is a possible outcome of the public interest weighing exercise, not an input. In the instant case, the Court of Appeal's consideration of a chilling effect flowing from a plaintiff's inability to pursue a defamation claim turns the concept on its head. The Court's freedom of expression jurisprudence addresses the concern that the possible imposition of a legal penalty would cause speakers to refrain from commenting on matters of public interest. Instead, the Court of Appeal held that the inability to inflict a legal penalty on H would chill N's expression and those of others who wish to express unpopular views. There is no chilling effect in barring potential plaintiffs from silencing their critics and collecting damages through a defamation suit.

The other side of the weighing exercise evaluates the public interest in protecting the defendant's expression. In making this assessment, s. 2(b) *Charter*

jurisprudence grounds the level of protection afforded to the defendant's expression in the nature of the expression. Similarly, s. 15(1) considerations may factor into the weighing analysis. As the Constitution recognizes, not all expression is created equal, and the level of protection to be afforded to any particular expression can vary widely according to the quality of the expression, its subject matter, the motivation behind it, or the form through which it was expressed. The closer the expression lies to the core values of s. 2(b), including truth-seeking, participation in political decision-making and diversity in the forms of self-fulfillment and human flourishing, the greater the public interest in protecting it.

Some speakers seek to contribute to public discourse by countering ignorant or harmful expression with an informed or compassionate response. In s. 2(b) jurisprudence, this idea of "counter-speech" inheres in the recognition that the open exchange of ideas is a precondition to unlocking the value of free expression. While counter-speech is not necessarily a complete solution to harmful expression, its close proximity to the values at the core of s. 2(b) is beyond doubt. Counter-speech motivated by the defence of a vulnerable or marginalized group in society also engages the values at the core of s. 15(1); namely, the equal worth and dignity of every individual. Targets of degrading expression belonging to a vulnerable group in society may lack the ability or authority to effectively combat the harmful speech themselves. Discourse can then take on an uneven quality, making protective counter-speech by the group or individual's more powerful advocates all the more influential and important.

In the instant case, H's expression is counter-speech motivated by a desire to promote tolerance and respect for a marginalized group in society. H spoke out to counter expression he perceived to be untrue, prejudicial towards transgender and other 2SLGBTQ+ individuals, and potentially damaging to transgender youth. The transgender community is undeniably a marginalized group in Canadian society. The history of transgender individuals in Canada has been marked by discrimination and disadvantage. Transgender and other gender non-conforming individuals were largely viewed with suspicion and prejudice until the latter half of the 20th century, and have been stereotyped as diseased or confused simply because they identify as transgender. Significant legal advancements in transgender rights have only come in the last 35 years, with most change taking place in the last decade, and judicial recognition of the plight of transgender individuals in Canada is growing in the wake of legislative progress. Yet, despite some gains, courts and tribunals have recognized that transgender people remain among the most marginalized in Canadian society, and continue to live their lives facing disadvantage, prejudice, stereotyping, and vulnerability.

H's counter-speech fell close to the core of s. 2(b). His expression served a truth-seeking function, and in speaking out, he sought to counter expression that he and others perceived to undermine the equal worth and dignity of marginalized groups. There is a great public interest in protecting H's freedom of speech on such matters. The subject matter of H's speech (commenting on the value of a government initiative, the need for safe and inclusive schools, and the fitness of a candidate for public office),

the form in which it was expressed (solicited by the media to present a counter-perspective within an ongoing debate), and the motivation behind it (to combat discriminatory and harmful expression and to protect transgender youth in schools) are all deserving of significant protection. The chambers judge's conclusion that the public interest in protecting H's expression outweighed the public interest in remedying the harm to N should be affirmed.

The chambers judge also did not err in concluding that N failed to challenge the validity of the fair comment defence. Section 4(2)(a)(ii) of the *PPPA* provides that a court must make a dismissal order unless the plaintiff satisfies the court that there are grounds to believe that the defendant has no valid defence in the proceeding. The fair comment defence is premised on the idea that citizens must be able to openly declare their real opinions on matters of public interest without fear of reprisal in the form of actions for defamation. The fair comment defence has five elements: the comment must be on a matter of public interest; be based on fact; be recognisable as a comment; satisfy an objective test (could any person honestly express that opinion on the proved facts?); and the speaker cannot be actuated by express malice. Consideration of the elements of the fair comment defence requires an assessment of the defamatory words used in the full context surrounding their use.

In the instant case, N failed to adequately challenge the fair comment defence. First, N has not shown grounds to believe that H's statements lacked a factual basis. To constitute fair comment, a factual basis for the impugned statement must be

explicitly or implicitly indicated within the publication itself or the facts must be so notorious as to be already understood by the audience. There is, however, no requirement that the facts support the comment, in the sense of confirming its truth. At trial, H need not demonstrate that N is bigoted, transphobic, or promoted hatred, as the question is merely whether the statement can be tethered to an adequate factual basis so the reader can be an informed judge. N's original online post could provide the requisite factual basis for most statements at issue, as N's views were available to readers and grounded H's statements. Additionally, this was a high-profile local controversy that spanned over a year, involving two public figures. N's statements had likely achieved a level of notoriety such that they would have been known to the reading audience.

Furthermore, the chambers judge was entitled to find that the sting of H's statements was comment and it would have been understood as such by readers. For expression to constitute fair comment, the statement must be one that would be understood by a reasonable reader as a comment, rather than a statement of fact. Context is essential in distinguishing comment from fact. N has not shown grounds to believe that H's statements would not be seen as a comment in the context of the instant case. An allegation of bias or prejudice is a debatable assertion as to a state of mind and will typically be classified as a comment. Similarly, an allegation that a politician has not lived up to their obligations is generally understood to be a critique, not a declaration of fact. Finally, accusations of hate speech would not necessarily be understood by ordinary readers as referring to a *Criminal Code* offence. Such

allegations have permeated public discourse in a way that well exceeds their narrow meaning within the legal system. It is clear, when read in context, that H's statements were an expression of H's beliefs based on his own interpretation of N's statements.

Finally, the chambers judge did not err in his malice assessment. A finding of a subjective honest belief negates the possibility of finding malice; such a finding can be based on the thrust of the defendant's evidence, read as a whole. Ultimately, the chambers judge found that H's affidavit made it clear that he honestly believed the views he espoused, and he was entitled to do so.

Per Côté J. (dissenting): The appeal should be dismissed. The question is not whether the Court agrees with either party's expression, but whether N's action should be dismissed at this early stage of the proceeding. It should not. N deserves to have his day in court.

There is disagreement with the structure of the majority's analysis, which begins with the public interest weighing exercise and then examines the validity of H's fair comment defence. That is not how the analysis must be conducted. When an application is brought under s. 4 of the *PPPA*, the plaintiff in the proceeding must first overcome a merits-based hurdle by demonstrating that there are grounds to believe that the proceeding has substantial merit and demonstrating that there are grounds to believe that the applicant under the *PPPA* has no valid defence in the proceeding. Only then should the court conduct the public interest weighing exercise mandated by s. 4(2)(b), which is the final step of the analysis. In asserting that the order in which a judge

chooses to address each of the elements under s. 4(2) is at the discretion of the court, the majority is effectively ignoring the Court's recent decision in *Pointes*, and undermining the legislative objective behind s. 137.1 of Ontario's *Courts of Justice Act* and s. 4 of the *PPPA* alike, namely, to ensure that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to vindicate that claim.

Under s. 4(2)(a)(ii) of the *PPPA*, the plaintiff must demonstrate that the defendant has no valid defence in the proceeding. The standard is not a very demanding one: it requires showing that there is a basis in law and in the record for finding that there is no valid defence, taking into account the stage of the proceeding at which the application is brought. To succeed, the plaintiff does not have to establish that the defendant has no valid defence for every impugned statement; it suffices that a valid defence is unavailable for some statements or even only one. For this reason, it is important to examine the defamatory sting and the context of each of the impugned statements in order to assess the availability of a defence. This is particularly critical where a fair comment defence is being advanced. Assessing the availability of such a defence requires a careful review of the impugned statement in the context of the publication in which it appeared to determine whether it is recognizable as a comment rather than as a statement of fact.

There is a difference between comment or criticism and allegations of fact. A defining feature of a comment is that it is generally incapable of being proven. Similarly, a comment must be clearly recognizable as such and not be so entangled

with allegations of fact that inferences cannot be distinguished from facts. Any ambiguity in this regard must benefit the plaintiff. The inquiry is an objective one aimed at discerning the perception of the reasonable viewer or reader. The chambers judge cursorily examined this issue. He concluded that the impugned statements could not be distinguished from those in *WIC Radio v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, which were found to be comments. Characterizing speech as a comment or as a statement of fact involves a contextual analysis, the result of which is at most a finding of mixed law and fact. Transposing a finding of mixed law and fact to another case is a questionable practice that should be avoided.

In the instant case, there are grounds to believe that the fair comment defence is not available for two of H's statements because they were made as statements of fact and not comments. Those statements carry the defamatory sting that N engaged in hate speech. Affirming that N engaged in hate speech is quite different from expressing a judgment or making a remark incapable of proof. Read in their context, such allegations appear similar to allegations of fraud, theft or other criminal conduct that have been found to be statements of fact for which a fair comment defence is not available.

At the public interest hurdle under s. 4(2)(b) of the *PPPA*, what is required of a plaintiff is not to prove harm or causation but only to provide evidence for the judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link. The seriousness of the harm can be inferred from the gravity of

the impugned statements, and allegations of hate speech rank high on the scale of seriousness. Regardless of whether such conduct is characterized as a criminal offence or as the subject matter of a human rights complaint, accusing a person of hate speech or promoting hatred against an identifiable group is extremely damaging to that person's reputation.

The absence of an apology is another aggravating factor increasing harm, as is the stature of the defendant. The greater the reputation of the defendant, the greater the impact that defamation can be expected to have on the plaintiff. In addition, the context of the publication and the platform on which the impugned statements were published should have been considered. The anonymity offered by the Internet, combined with the increased accessibility and information sharing, can result in greater harm to a person's reputation. Moreover, it is an error to discount the part played by a defendant in a plaintiff's harm because others had expressed similar criticism towards the plaintiff. A definitive determination of a defendant's part in a plaintiff's harm is not required at this stage of the proceeding. Further, the fact that a plaintiff was not silenced by a defendant's statements does not negate any harm suffered.

The role of the court in the public interest weighing exercise under the *PPPA* is not and should not be to evaluate the soundness of the parties' respective positions on an issue. Freedom of expression is content-neutral and would be seriously undermined if the outcome of the weighing exercise depended on the alignment between the views expressed by the defendant and those held by the court. The majority

follows an improper path of reasoning when it justifies reinstating the chambers judge's dismissal order on the basis that H's expression promotes equality. Equality is not one of the competing values at play under legislation designed to discourage SLAPPs; the protection of individual reputation and freedom of expression are. Moreover, the promotion of equality is not one of the core values underpinning freedom of expression. Assigning any role to the promotion of equality in the assessment of the public interest in protecting expression goes against the doctrine of content neutrality embraced by the Court in its jurisprudence. More importantly, the promotion of equality is in no way a factor tethered to the text of s. 4(2)(b), and for this reason alone, is not a relevant factor in the public interest weighing exercise.

Finally, restricting the availability of tort actions for defamation can have a chilling effect. In the context of defamatory counter-speech, interpreting s. 4 of the *PPPA* so as to deprive defamed parties who have suffered serious harm of their day in court could very well be detrimental to public debate. It could prevent those who hold controversial or unpopular views from entering the public arena to share them. This conclusion does not turn the concept of chilling effect on its head. The deprivation, through a court order, of a party's right to vindicate a legitimate claim imposes a legal penalty on that party.

In the instant case, the chambers judge erroneously ignored factors aggravating the harm likely to have been or to be suffered by N, despite the fact that they were specifically argued by him. In addition, he gave little consideration to the

competing public interests and failed to direct his mind to the quality of the expression, which constitutes a reviewable error. The chambers judge also erred in failing to consider the chilling effect that the dismissal of N's claim might have on future expression by others. The harm likely to have been or to be suffered by N strongly militates in favour of allowing the proceeding to continue, and the public interest in allowing N's claim to proceed to trial outweighs the public interest in protecting H's expression.

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By Karakatsanis J.

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Construction Company Ltd. v. Globe and Mail Inc., 2019 ONCA 166, 144 O.R. (3d) 291; *Pan v. Gao*, 2020 BCCA 58, 33 B.C.L.R. (6th) 211; *Mondal v. Evans-Bitten*, 2022 ONSC 809, 82 C.C.L.T. (4th) 327; *Awan v. Levant*, 2016 ONCA 970, 133 O.R. (3d) 401; *Bernier v. Kinsella*, 2021 ONSC 7451, 73 C.P.C. (8th) 280; *Smith v. Cross*, 2009 BCCA 529, 314 D.L.R. (4th) 457; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *Barendregt v. Grebliunas*, 2022 SCC 22.

By Côté J. (dissenting)

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APPEAL from a judgment of the Court of Appeal for British Columbia (Willcock, Fenlon and Voith JJ.A.), 2021 BCCA 222, 50 B.C.L.R. (6th) 217, 459

D.L.R. (4th) 121, [2021] 12 W.W.R. 488, 71 C.C.E.L. (4th) 191, 74 C.C.L.T. (4th) 216, [2021] B.C.J. No. 1245 (QL), 2021 CarswellBC 1816 (WL), setting aside a decision of Ross J., 2019 BCSC 2028, 59 C.C.E.L. (4th) 205, 61 C.C.L.T. (4th) 107, [2019] B.C.J. No. 2269 (QL), 2019 CarswellBC 3513 (WL). Appeal allowed, Côté J. dissenting.

Robyn Trask and Michael Sobkin, for the appellant.

Paul E. Jaffe, for the respondent.

Chantelle Rajotte, Emily Lapper and Steven Davis, for the intervener the Attorney General of British Columbia.

Brendan MacArthur-Stevens and Renee Reichelt, for the interveners QMUNITY and the Skipping Stone Scholarship Foundation.

Caroline Carrasco, for the intervener the Canadian Human Rights Commission.

Lillianne Cadieux-Shaw and Alexi N. Wood, for the intervener the Canadian Civil Liberties Association.

Dustin Klaudt, M. Tristan Miller and Grace McDonell, for the interveners the Community-Based Research Centre and the Canadian Centre for Gender & Sexual Diversity.

Adrienne S. Smith and *Kate Feeney*, for the intervener the West Coast Legal Education and Action Fund.

Jitesh M. Mistry and *Thom Yachnin*, for the intervener the B.C. General Employees' Union.

Adam Goldenberg and *Solomon McKenzie*, for the intervener Egale Canada.

Justin Safayeni and *Yadesha Satheaswaran*, for the intervener the Centre for Free Expression.

The judgment of Wagner C.J. and Karakatsanis, Rowe, Martin, Jamal and O'Bonsawin JJ. was delivered by

KARAKATSANIS J. —

I. Introduction

[1] At the core of defamation law are two competing values: freedom of expression and the protection of reputation. Each is essential to maintaining a functional democracy. This appeal presents an opportunity to clarify the proper equilibrium between these two values where the expression at issue relates to a matter of public interest.

[2] Defamation suits are a way to vindicate an individual's personal or professional reputation in the face of attack, but can have the undesirable effect of suppressing the open debate that is the cornerstone of a free and democratic society. For this reason, certain provincial legislatures have targeted strategic lawsuits against public participation (SLAPPs), or actions that disproportionately suppress free expression on matters of public interest. This case concerns the application of s. 4 of British Columbia's anti-SLAPP statute, the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 (*PPPA*).

[3] The defamation suit at the heart of this proceeding arises out of a high-profile public debate — spanning traditional print media, the internet, rallies, protests, and a local election — on British Columbia's efforts to combat discrimination against transgender and other 2SLGBTQ+ youth.

[4] The parties are both local public figures. Barry Neufeld, a public school board trustee in Chilliwack, British Columbia, made online posts criticizing a provincial government initiative designed to equip educators to instruct students about gender identity and sexual orientation. Mr. Neufeld's posts triggered significant local controversy, spurring protests and calls for Mr. Neufeld to resign. Many considered his comments to be derogatory of transgender and other 2SLGBTQ+ individuals. Glen Hansman, a gay man, teacher, and former president of the British Columbia Teachers' Federation (BCTF), a large teachers' union in the province, was prominent among the dissenting voices and made statements to media. Mr. Hansman called Mr. Neufeld's

views bigoted, transphobic, and hateful; accused him of undermining safety and inclusivity for transgender and other 2SLGBTQ+ students in schools; and questioned whether he was suitable to hold elected office.

[5] Mr. Neufeld sued for defamation. Mr. Hansman then applied to have Mr. Neufeld's defamation action dismissed as a SLAPP under s. 4 of the *PPPA*. The core feature of the *PPPA* is that it instructs courts to dismiss even meritorious claims where the public interest in protecting the defendant's freedom of expression outweighs the public interest in remedying the harm done to the plaintiff. It also requires the plaintiff to meet a merits threshold by demonstrating grounds to believe that the underlying proceeding has substantial merit and that the defendant has no valid defence in the proceeding.

[6] The chambers judge found that Mr. Neufeld's defamation action had the effect of unduly suppressing debate on matters of public interest and dismissed the suit (2019 BCSC 2028, 59 C.C.E.L. (4th) 205). The chambers judge held both that Mr. Hansman had a valid fair comment defence and that the value in protecting his expression outweighed the resulting harm done to Mr. Neufeld. The Court of Appeal disagreed on both counts and reinstated the action (2021 BCCA 222, 50 B.C.L.R. (6th) 217).

[7] I agree with the chambers judge. Mr. Neufeld argued in the courts below and in this Court that he only criticized a policy; he never expressed hatred towards the transgender community, nor did his words create an unsafe school environment for

transgender students. But his submissions miss the mark. Mr. Neufeld's right to criticize a government initiative is not in dispute. Rather, the central issue is whether Mr. Hansman had a right to respond to Mr. Neufeld in the way he chose without the threat of civil liability. In my view, he did.

[8] The fair comment defence asks whether a person could honestly hold the views Mr. Hansman expressed and whether Mr. Hansman's statements related to a matter of public interest and were recognizable as comments based on facts. The chambers judge found that Mr. Neufeld did not adequately challenge any of these elements and he was entitled to dismiss the proceeding on this basis.

[9] Even if Mr. Neufeld had discharged his burden as to the fair comment defence, however, the chambers judge was entitled to dismiss the defamation claim because the public interest in protecting Mr. Hansman's expression is not outweighed by the limited harm to Mr. Neufeld. Mr. Hansman's words were not a disproportionate or gratuitous response to Mr. Neufeld's statements, and there is a substantial public interest in protecting his counter-speech. Mr. Hansman spoke out to counter expression that he and others perceived to be discriminatory and harmful towards transgender and other 2SLGBTQ+ youth — groups especially vulnerable to expression that reduces their worth and dignity in the eyes of society and questions their very identity. Not only does protecting Mr. Hansman's expression preserve free debate on matters of public interest, it also promotes equality, another fundamental democratic value.

[10] I would restore the order of the chambers judge dismissing the defamation action.

II. Background

[11] The public debate from which this appeal arises centered on provincial efforts to promote inclusion and counter discrimination against transgender and other 2SLGBTQ+ people in schools. In 2016, British Columbia amended its *Human Rights Code*, R.S.B.C. 1996, c. 210, to include a prohibition against discrimination based on “gender identity or expression”. Gender identity refers to one’s deeply felt and inherent sense of self in relation to gender, or the social system of roles, behaviours, and expressions associated with sex at birth.¹ Gender identity is distinct from gender expression, which refers to the way one outwardly expresses gender, through clothes, behaviour, speech, pronouns, and more.² While gender was once understood only in the binary of “male” or “female”, today, society’s understanding of gender has broadened to encompass a spectrum of gender identities, modes of expression, and related terminology, all of which continue to evolve.³

[12] Transgender people are individuals whose gender identity does not align with the sex assigned to them at birth.⁴ In April 2022, Canada became the first country

¹ American Psychological Association, “Guidelines for Psychological Practice With Transgender and Gender Nonconforming People” (2015), 70 *Am. Psychol.* 832, at p. 834.

² A. Veltman and G. Chaimowitz, “Mental Health Care for People Who Identify as Lesbian, Gay, Bisexual, Transgender, and (or) Queer” (2014), 59:11 *Can. J. Psychiatry* 1, at p. 4.

³ American Psychological Association, at p. 834.

⁴ Veltman and Chaimowitz, at p. 5.

in the world to publish census data on transgender and non-binary people.⁵ The census estimated that, as of May 2021, there were over 100,000 transgender or non-binary people aged 15 and older in Canada — about 1 out of every 300 people.

[13] Shortly after British Columbia’s amendment to its *Human Rights Code* in 2016, the Ministry of Education ordered school boards in British Columbia to add “gender identity or expression” as a prohibited ground of discrimination in their student codes of conduct. The Ministry also collaborated with others, including the BCTF, to develop Sexual Orientation and Gender Identity 123 (SOGI 123), an initiative to guide educators on instruction about sexual orientation and gender identity. The aim of SOGI 123 is to foster inclusion and respect for students who, because of their identity or expression, may face discrimination in British Columbia schools.

[14] Mr. Neufeld publicly criticized SOGI 123. His first critique was posted on Facebook on October 23, 2017. In it, he called SOGI 123 a “weapon of propaganda” that teaches the “biologically absurd theory” that “gender is not biologically determined, but is a social construct” (A.R., vol. III, at p. 16). He also lamented that children were “being taught that heterosexual marriage is no longer the norm” (p. 16). He voiced his support for “traditional family values” and heralded countries like Russia and Paraguay, which have “had the guts to stand up to these radical cultural nihilists”

⁵ Statistics Canada, “Canada is the first country to provide census data on transgender and non-binary people”, in *The Daily*, April 27, 2022 (online).

(p. 16). He acknowledged that he posted at the risk of “being labelled a bigoted homophobe”, but felt his voice needed to be heard (p. 16).

[15] Mr. Neufeld’s post was met with quick and forceful criticism. Within hours, major media outlets reported on the post, quoting members of the public, educational professionals, and other public figures denouncing Mr. Neufeld’s views. The former chair of the Vancouver School Board called for Mr. Neufeld to resign and apologize. The Chilliwack District Parent Advisory Council chair said that Mr. Neufeld’s “comments promote the exclusion and isolation of a growing subset of children, including those with same-sex parents” and transgender students in contravention of Mr. Neufeld’s “duty to ensure a safe and positive learning environment for all” (A.R., vol. III, at p. 144).

[16] Mr. Hansman was among Mr. Neufeld’s more vocal critics. At issue in this appeal are 11 publications quoting statements made by Mr. Hansman to the media in his capacity as president of the BCTF. Mr. Hansman has admitted making the statements as alleged (Chambers Judge’s Reasons, at para. 44).

[17] The first three were published the day after Mr. Neufeld’s Facebook post, when Mr. Hansman was contacted by the media for comment. An article by the *Vancouver Sun* included the following quote:

[Mr. Neufeld] should step down or be removed

It's not OK. The public school system in this province and in Canada have the obligation to ensure safe and inclusive school environments for all kids regardless of race, nationality, or religion. They have to proactively address sexism and misogyny, they have to address transphobia and homophobia and racism.

And Mr. Neufeld, I'm doubtful that Mr. Neufeld did not know that. I'm doubtful that he's not aware if he's been around as a trustee for some time.

(Amended notice of civil claim, A.R., vol. I, p. 80 (ANCC), at para. 14) (Statement 1)

[18] Then, in an interview with Global News, Mr. Hansman described Mr. Neufeld's views as "intolerant", "bigoted" and stated that "whether [Mr. Neufeld] likes it or not, members of the LGBTQ school community are here to stay" (ANCC, at para. 15) (Statement 2).

[19] Finally, a *Huffington Post* article reported that Mr. Hansman "said Neufeld should resign because he ha[d] violated his obligations as a school board trustee to ensure that students and staff have a safe, inclusive environment (ANCC, at para. 16). This article also reported that "Hansman said trustees with faith-based views need to figure out how they'll work in a secular public school system" or should look to work elsewhere (ANCC, at para. 16) (Statement 3).

[20] Others contributed to the chorus of public critiques condemning Mr. Neufeld's Facebook post, including the president of the British Columbia School Trustees Association, other members of the Chilliwack School Board, transgender activists, and the Minister of Education, who called Mr. Neufeld's views "outdated and

bigoted” (A.R., vol. III, at p. 169). Many people posted statements of opposition or statements of support on Mr. Neufeld’s Facebook page.

[21] Two days after his post, Mr. Neufeld issued a public apology on his Facebook page, in which he stated that he was “critical of an educational resource, not individuals” and that he “believe[s] in inclusion and a safe learning environment” for all students (C.A. Reasons, at para. 12).

[22] But that was not the end of the matter. Both Mr. Neufeld and Mr. Hansman continued to express themselves publicly during the next year. Others also continued to speak out against Mr. Neufeld.

[23] About a month after his original post, Mr. Neufeld spoke at a rally organized by a group called Culture Guard, which has a mandate to end the “political tyranny of politically-correct idiotology” (A.R., vol. IV, at p. 70). As part of its efforts, Culture Guard seeks to “STOP SOGI 123” (p. 87). During his speech, Mr. Neufeld described SOGI 123 as “an institutionalization of codependency: encouraging and enabling dysfunctional behavior and thinking patterns” and as “coddling and encouraging what I regard as the sexual addiction of gender confusion” (A.R., vol. V, at p. 10). He claimed that using SOGI 123 resources in classrooms amounts to “[g]aslighting” and an “attack [on] the foundation of a child’s being which is child abuse” (p. 10).

[24] Mr. Neufeld's remarks at the rally were not limited to SOGI 123. He also commented that "gender is . . . rooted in biology", and lamented that media coverage of famous transgender individuals has spurred a "new fad" of "gender confusion" (p. 11). He stated that "rushing into the use of puberty blockers, hormone therapy and gender reassignment [is] child abuse" and referred to gender reassignment surgery as "lopping off perfectly good body parts" (pp. 10-11).

[25] In January 2018, the Chilliwack Teachers' Association (CTA) passed a motion of non-confidence in the Chilliwack Board of Education for its failure to intervene in the wake of Mr. Neufeld's statements about SOGI 123. In a letter to the media, the CTA cited growing concerns for "the emotional and physical safety of students, staff and teachers" (A.R., vol. IV, at p. 157). Mr. Hansman was quoted in the letter as stating that: "[s]ometimes our beliefs, values, and responsibilities as professional educators are challenged by those who promote hatred" (ANCC, at para. 20) (Statement 4). That letter was published in two local newspapers.

[26] Subsequently, the Chilliwack School Board and the Minister of Education asked Mr. Neufeld to resign from office. He refused and issued a press release declaring that he supports all students, regardless of sexual orientation, gender identity, race, religion, or background. He concluded:

I have simply taken issue with one facet of the SOGI 1-2-3 learning resources; the teaching of the controversial gender-fluid theory as fact. Despite the pressure to resign, I believe that I must remain on the Board to be a lonely voice protecting impressionable children who I believe will be

confused and harmed, resulting in increased occurrences of gender dysphoria in at-risk children.

(A.R., vol. V, at p. 18)

[27] Gender dysphoria is a clinical diagnosis received by some transgender and other gender diverse people. It denotes an “aversion to some or all of [the] physical characteristics or social roles” associated with the sex one was assigned at birth.⁶

[28] At the end of January 2018, the BCTF and the CTA jointly filed a complaint against Mr. Neufeld in the British Columbia Human Rights Tribunal, alleging that Mr. Neufeld had violated British Columbia’s *Human Rights Code*. The complaint alleges that Mr. Neufeld created a discriminatory work environment for union members, and published statements that are discriminatory or are “likely to expose transgender individuals to hatred” (A.R., vol. II, at p. 116). The local branch of the Canadian Union of Public Employees (CUPE) had filed a similar complaint against Mr. Neufeld and the Chilliwack School Board earlier that month.

[29] In April 2018, Mr. Hansman was interviewed by various media outlets about the teachers’ human rights complaint. In one article, Mr. Hansman is quoted as calling Mr. Neufeld’s comments “transphobic” and alleging that Mr. Neufeld was “creating a school environment for [BCTF] members and students that is

⁶ American Psychological Association, Task Force on Gender Identity and Gender Variance, *Report of the Task Force on Gender Identity and Gender Variance* (2009), at p. 28, quoting American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000), at p. 823; see also American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. rev. 2022), at p. 511.

discriminatory and hateful” (ANCC, at para. 24) (Statement 5). In another, Mr. Hansman is quoted as saying that Mr. Neufeld “tip toed quite far into hate speech” and did not fulfill his duty to ensure student safety (para. 25) (Statement 6). A third article said the human rights complaint referred to Mr. Neufeld’s comments as “hateful” and that they created an unsafe school environment, and quoted Mr. Hansman as stating that Mr. Neufeld should not be “anywhere near students” (para. 26) (Statement 7).

[30] Also in April, duelling rallies were held outside the BCTF office, one supporting SOGI 123 and another, organized by Culture Guard, against it. When interviewed by media about the rallies, Mr. Hansman said he was glad to see the public show of support for SOGI 123, given “the hateful comments” made by Mr. Neufeld and the need for schools to be free from discrimination and safe for all students (ANCC, at para. 28) (Statement 8).

[31] As the October 2018 Chilliwack civic election approached, Mr. Hansman was interviewed by media about his thoughts on an anti-SOGI slate of candidates vying for seats on the Chilliwack School Board. In September, an article was posted by a local news outlet quoting Mr. Hansman as stating:

It is extremely problematic to have somebody who is running as a school trustee continuing to spread hate about LGBTQ people — especially trans people

(ANCC, at para. 29) (Statement 9)

Mr. Hansman also commented that racism and misogyny still exist in the British Columbia school system, and that trustee candidates need “to commit to eradicating those things, not spreading hate and not spreading bigotry” (A.R., vol. II, at p. 34). The article did not name Mr. Neufeld or any other candidate, but noted that “some candidates” had shared “controversial views surrounding issues like refugees and LGBTQ supports in schools” (p. 33).

[32] One month before election day, counsel for Mr. Neufeld wrote to Mr. Hansman demanding that he retract the statements he had made “over a number of months” about Mr. Neufeld (A.R., vol. II, at p. 139). The letter stated that proceedings would be launched unless a retraction and an apology were received within 10 days.

[33] The next day, Mr. Neufeld declared that he was suing Mr. Hansman for defamation in an interview with a local news outlet. Counsel for Mr. Hansman wrote to Mr. Neufeld, explaining that Mr. Hansman would not be issuing an apology, given that interview. The letter contended that the request for an apology was “insincere at best, and most likely a political ploy” given that, as Mr. Neufeld was “demanding an apology as a way to avoid litigation”, he was simultaneously “declaring his intention to proceed with that litigation” (A.R., vol. II, at pp. 147-48).

[34] Eight days before election day, Mr. Neufeld filed and served his defamation action against Mr. Hansman. The media picked up on the lawsuit and contacted Mr. Hansman for comment. Mr. Hansman told a local newspaper that he stood by his statements and that, along with Mr. Neufeld’s remarks about SOGI 123,

“[h]is other misogynist and problematic statements reported by Press Progress are also cause for alarm and not becoming of a school trustee” (ANCC, at para. 42) (Statement 10).

[35] The Press Progress article to which Mr. Hansman was referring was entitled “This Man is Probably The Worst School Trustee in British Columbia” (A.R., vol. II, at p. 46). In addition to describing Mr. Neufeld’s campaign against SOGI 123, the article included screenshots of other past Facebook posts by Mr. Neufeld, including one in which Mr. Neufeld contended that male seminal fluid is “[o]ne of the most under-rated natural anti-depressants for women” (p. 49). He claimed that women who regularly have unprotected sex are happier and less suicidal than women who have protected sex, sharing a link to an article about a controversial study that had found the same. The Press Progress article quoted another Facebook post in which Mr. Neufeld wrote that he and other trustee candidates “are worried about the safety of children who are being taught silly ideas that they can choose what gender they can be and are being told that they must approve of gay ‘rainbow’ families” (p. 50). Mr. Neufeld criticized Christian churches for being “slow to stand up against this evil agenda” and claimed that more tolerant churches were infected with “Pink Christianity” (p. 50).

[36] Mr. Neufeld was re-elected to another term on the Chilliwack School Board. Mr. Hansman was interviewed about the results of the election, where he spoke about the human rights complaint the BCTF had filed against Mr. Neufeld, and declared

that “[h]ate and bigotry have no place on school boards” (ANCC, at para. 44) (Statement 11).

[37] Mr. Neufeld’s defamation action was set for hearing in December 2019. In March, the *PPPA* was enacted. Mr. Hansman moved under s. 4 of the *PPPA* to dismiss Mr. Neufeld’s defamation action against him. Section 4 creates a pretrial screening mechanism that instructs a judge to dismiss an action arising from expression on a matter of public interest unless the plaintiff can satisfy the judge that their action has substantial merit; the defendant has no valid defence in the proceeding; and the harm to the plaintiff as a result of the defendant’s expression is serious enough to outweigh the public interest in protecting that expression.

III. Procedural History

A. *British Columbia Supreme Court, 2019 BCSC 2028, 59 C.C.E.L. (4th) 205 (Ross J.)*

[38] The chambers judge granted Mr. Hansman’s application for dismissal. He concluded that Mr. Neufeld had not established grounds to believe that Mr. Hansman had no valid defences in the proceeding (para. 135). He held that Mr. Hansman had a valid fair comment defence, relying on this Court’s reasoning in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, and on the lack of a compelling challenge to the defence by Mr. Neufeld (paras. 126 and 137).

[39] If he was wrong as to the validity of the fair comment defence, the chambers judge considered the final step of his analysis: the public interest weighing exercise (paras. 144 et seq.). He determined that the public interest in protecting Mr. Hansman's expression outweighed the harm likely suffered by Mr. Neufeld (para. 145). Mr. Neufeld had "submitted almost no evidence of damage suffered" (para. 161), nor did he offer any evidence that would allow the judge to draw a causal link between any alleged harm and Mr. Hansman's statements (paras. 147-50 and 158).

[40] The chambers judge considered that many of Mr. Hansman's statements either commented on the need for safe and inclusive schools or did not mention Mr. Neufeld. Those statements deserved significant protection. The weighing exercise thus favoured dismissing the action (para. 160).

B. *Court of Appeal for British Columbia, 2021 BCCA 222, 50 B.C.L.R. (6th) 217 (Willcock, Fenlon and Voith J.J.A.)*

[41] Fenlon J.A., writing for the Court of Appeal, allowed the appeal and reinstated the defamation action. She concluded that the chambers judge erred in his assessment of the fair comment defence in several ways. The chambers judge erred in relying on *WIC Radio*, given material differences between that case and this one, and by "work[ing] from a summary of the type of comments made by Mr. Hansman rather than addressing the specific expressions" (paras. 26-27 and 34). This analytical approach caused the chambers judge to overlook elements of the fair comment defence (paras. 27-29). In Fenlon J.A.'s opinion, there were grounds to believe that several

statements were not based on fact, making the defence unavailable. Fenlon J.A. further held that the chambers judge erred in his assessment of malice.

[42] Fenlon J.A. also concluded that the chambers judge erred in the public interest weighing analysis. First, the chambers judge focused on the subject matter of Mr. Hansman's statements to the exclusion of the defamatory sting of those statements (paras. 61-62). Second, the chambers judge erred in his harm analysis by "fail[ing] to give full effect to the presumption of damages in defamation and wrongly assum[ing] causation would be difficult to establish because others had made similar comments about Mr. Neufeld" (para. 51).

[43] Finally, Fenlon J.A. held that the chambers judge ought to have considered as part of the weighing analysis "the potential chilling effect on future expression" by the plaintiff, or others in his position, about "this or other highly charged matters of public interest" that might occur if the action were dismissed (para. 65).

IV. Analysis

[44] This appeal presents two issues:

- (i) Did the chambers judge err in the weighing exercise set out in s. 4(2)(b) of the *PPPA* by concluding that the public interest in protecting Mr. Hansman's expression mandates dismissal of the underlying action?

(ii) Did the chambers judge err in finding that Mr. Neufeld did not show, under s. 4(2)(a)(ii) of the *PPPA*, grounds to believe Mr. Hansman had no valid fair comment defence?

[45] Answering either of these questions in the negative would result in the dismissal of the action. I would answer “no” to both. The Court of Appeal should not have overturned the chambers judge’s findings on the fair comment defence. More significantly, even if Mr. Neufeld had disproved the validity of Mr. Hansman’s fair comment defence, the public interest in protecting Mr. Hansman’s expression mandates dismissal of the underlying action. Before turning to the two questions before the Court, I summarize the applicable statutory framework.

A. *Section 4 of the PPPA*

[46] A SLAPP is a tactical action that seeks to suppress expression on matters of public interest. The goal of a SLAPP is not necessarily a legal victory, but a political one: to intimidate and suppress criticism with the threat of costly litigation (V. Pelletier, *Strategic Lawsuits against Public Participation (SLAPPs) (and other abusive lawsuits)*, August 2008 (online), at para. 4). A key feature of a SLAPP is thus the strategic use of the legal system to silence contrary viewpoints. Binnie J. aptly described the problem posed by such litigious tactics in *WIC Radio*:

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. . . .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; para. 15.]

[47] SLAPPs first emerged in the United States as a tendency of some powerful businesses to use the threat of litigation to frustrate public mobilization efforts against them (R. A. Macdonald, P. Noreau and D. Jutras, *Les poursuites stratégiques contre la mobilisation publique — les poursuites-bâillons (SLAPP)* (2007), at p. 2). Because of these origins, the archetypal SLAPP is generally described as a powerful or wealthy plaintiff, who has suffered only nominal damage, using litigation against a comparatively under-resourced defendant to silence criticism (see *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60, at para. 99).

[48] But SLAPPs do not always embody the hallmarks of the archetype. A SLAPP may be initiated by the rich and powerful, but not always. Similarly, the plaintiff may not have a history of using litigation or the threat of litigation to silence critics. In any case, however, the consistent defining feature of a SLAPP is that the proceeding acts to silence the defendant, and more broadly, to suppress debate on matters of public interest, rather than to remedy serious harm suffered by the plaintiff.

[49] Anti-SLAPP legislation, such as the *PPPA*, creates a procedure for screening proceedings arising from expression on matters of public interest at an early stage. Legislative anti-SLAPP solutions have now been passed into law in British Columbia, Ontario, and Quebec. In Ontario, the *Protection of Public Participation Act, 2015*, S.O. 2015, c. 23, s. 3, amends the province's *Courts of Justice Act*, R.S.O. 1990, c. C.43, by adding s. 137.1, which introduces a pretrial screening mechanism designed to weed out SLAPPs. This Court recently analyzed s. 137.1 in two decisions released concurrently: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, [2020] 2 S.C.R. 587, and *Platnick v. Bent*, 2020 SCC 23, [2020] 2 S.C.R. 645.

[50] British Columbia's *PPPA* was modelled after the *Uniform Protection of Public Participation Act (2017)*, May 1, 2017 (online), adopted by the Uniform Law Conference of Canada, which, in turn, is based on Ontario's statute. Like s. 137.1 of Ontario's *Courts of Justice Act*, s. 4 of the *PPPA* creates a pretrial screening procedure that enables a defendant to apply to the court to dismiss a proceeding against them, provided certain criteria are satisfied. Section 4 reads:

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.

[51] Section 4 is nearly identical to the pretrial screening mechanism established by subss. (3) and (4) of s. 137.1. The core feature of both laws is the recognition that even claims with substantial merit will be dismissed where the public interest in preserving free debate outweighs the harm to the plaintiff that the litigation purports to address. In this way, anti-SLAPP legislation instructs judges to deny claimants a day in court on a meritorious claim, given a more compelling social goal (*Pointes*, at para. 62).

[52] Given the substantial similarity between the Ontario and British Columbia laws, this Court's interpretation of s. 137.1 in *Pointes* and *Bent* applies with equal force to s. 4 of the *PPPA*.

[53] A s. 4 application first requires the applicant (the defendant) to prove, on a balance of probabilities, that the proceeding arises from expression that relates to a matter of public interest (s. 4(1); see *Pointes*, at paras. 18 and 31). If the defendant does so, the onus shifts to the respondent (the plaintiff) under s. 4(2) to satisfy the court there are grounds to believe that: (1) the proceeding has substantial merit (s. 4(2)(a)(i)), and (2) the defences raised by the defendant are not valid, in that they can be said to have

no real prospect of success (s. 4(2)(a)(ii)). If the court is not satisfied the plaintiff has met their onus as to one or both criteria, it must dismiss the proceeding. Even if, however, the plaintiff meets their burden, the court must conduct a public interest weighing exercise under s. 4(2)(b), in which the plaintiff must satisfy the court that the harm they are likely to have suffered or are likely to suffer due to the defendant's expression outweighs the public interest in protecting that expression. In other words, once the court is satisfied that the proceeding arises from expression that relates to a matter of public interest, it must dismiss the proceeding if the plaintiff does not meet its onus as to *either* s. 4(2)(a) or (b). The order in which a judge chooses to address each of the elements under s. 4(2) is, of course, at the discretion of the court.

[54] Only the "no valid defence" requirement (s. 4(2)(a)(ii)) and the public interest weighing exercise (s. 4(2)(b)) are at issue in this appeal.

[55] As with a motion filed under s. 137.1, a s. 4 motion has evidentiary requirements distinct from other preliminary motions. A motion for summary judgment, for example, permits the parties to file an extensive record, while a motion to strike is adjudicated based on the pleadings alone. Section 4, by contrast, contemplates that parties will put forward a record beyond the pleadings, though a limited one, given that an anti-SLAPP motion is not the place for an ultimate adjudication of the issues (*Pointes*, at para. 38). The *PPPA* provides that evidence must be given by affidavit and the affiant may be called for limited cross-examination (see s. 9(4) and (5)).

[56] Absent reviewable error, an application judge's determination on a s. 4 motion is entitled to deference (*Bent*, at para. 77, citing *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8 and 36).

B. *Issue 1: Public Interest Weighing*

[57] The key issue in the appeal before us is whether the chambers judge erred in the public interest weighing exercise under s. 4(2)(b). This issue was the most contentious in this Court, and invited considerable attention from parties and interveners, alike. Accordingly, although the chambers judge addressed the issues in a different order, I evaluate his findings as to the public interest weighing exercise before turning to his conclusion that Mr. Hansman had a valid defence in the proceeding.

[58] Even when a plaintiff shows the proceeding has substantial merit and the defendant has no valid defence, "it remains vulnerable to summary dismissal as a result of the public interest weighing exercise . . . , which provides courts with a robust backstop to protect freedom of expression" (*Pointes*, at para. 53). *Pointes* described this weighing exercise as the core of the analysis, as it allows the court to strike an appropriate balance between the protection of individual reputation and freedom of expression, the competing values at the heart of anti-SLAPP legislation.

[59] Section 4(2)(b) requires the plaintiff to prove on a balance of probabilities that — due to "the harm likely to have been or to be suffered" by the plaintiff as a result of the defendant's expression — the public interest in allowing the proceeding to

continue outweighs the proceeding's "deleterious effects on expression and public participation" (*Pointes*, at para. 82).

[60] In *Pointes*, this Court outlined several factors that may help judges undertake the weighing exercise, provided those factors can be "tethered to the text of [the provision] and the considerations explicitly contemplated by the legislature to conduct the weighing exercise" (para. 80):

For example, the following factors, in no particular order of importance, may be relevant for the motion judge to consider: the importance of the expression, the history of litigation between the parties, broader or collateral effects on *other* expressions on matters of public interest, the potential chilling effect on *future* expression either by a party or by others, the defendant's history of activism or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the *Charter* or human rights legislation. [Emphasis in original; para. 80.]

[61] The chambers judge found that Mr. Neufeld had not shown harm substantial enough to outweigh the significant public interest in Mr. Hansman's expression. The Court of Appeal held that the chambers judge had erred both in his analysis of the harm to Mr. Neufeld and in his assessment of the public interest in protecting Mr. Hansman's expression. Specifically, the Court of Appeal found the chambers judge ought to have considered as part of the harm analysis "the potential chilling effect on future expression by" potential plaintiffs who might wish to engage in highly charged public debates, but would opt not to "for fear of being inveighed with negative labels and accusations of hate speech with no opportunity to protect their

reputation” (para. 65). Finally, the Court of Appeal held that the chambers judge imposed too great a burden on Mr. Neufeld to prove harm and erred in affording Mr. Hansman’s speech significant protection. On this basis, and without conducting any explicit weighing, the Court of Appeal determined that Mr. Neufeld’s action deserved to go on to a trial.

[62] As I explain below, I disagree with the Court of Appeal both as to the extent of the harm to Mr. Neufeld and as to the public interest in protecting Mr. Hansman’s expression. First, Mr. Neufeld failed to identify any specific harm flowing from the statements serious enough to outweigh the public interest in protecting Mr. Hansman’s expression. Second, the Court of Appeal’s consideration of the “chilling effect” factor was divorced from a proper interpretation of s. 4(2)(b) and runs contrary to how a chilling effect has been conceived of in freedom of expression jurisprudence. Third, Mr. Hansman’s expression is counter-speech motivated by a desire to promote tolerance and respect for a marginalized group in society. His expression is deserving of significant protection. I would affirm the chambers judge’s conclusion that the public interest in protecting Mr. Hansman’s expression outweighed the public interest in remedying the harm to Mr. Neufeld.

- (1) Harm Likely to Have Been or to Be Suffered by the Plaintiff as a Result of the Defendant’s Expression

[63] Under s. 4(2)(b), the factor to be considered in favour of the public interest in continuing the proceeding is the likely harm to the plaintiff as a result of the defendant's expression.

(a) *Evidence of Harm and Causation*

[64] Mr. Neufeld pleaded generally that he suffered reputational harm and associated emotional distress due to Mr. Hansman's statements. He contended that these assertions were corroborated by a few examples of steps taken against him by other entities: the Chilliwack School Board sought his resignation and directed him to stay away from schools (he refused and continued to serve as a trustee); he was uninvited from an annual trustee meeting; and he was uninvited from delivering high school commencement addresses. Mr. Neufeld also argued that harm could be inferred based on circumstantial factors, including the identity of the accuser, the breadth, and distribution of the statements, and the republication of the statements (Chambers Judge's Reasons, at para. 155).

[65] The chambers judge recognized that Mr. Neufeld was not expected to present a fully developed damages brief on a s. 4 application (para. 157). Still, he found that Mr. Neufeld had presented only "bare assertions" of harm, leaving him with "precious little evidence" to weigh on Mr. Neufeld's side of the equation under s. 4(2)(b) (paras. 147 and 152). He found further that, "apart from one paragraph in his affidavit", Mr. Neufeld presented no evidence that would link the minimal harm he alleged to Mr. Hansman's statements (para. 158).

[66] The Court of Appeal found two errors with the chambers judge's analysis. First, the chambers judge failed to give effect to the general principle that damages are presumed in defamation law (para. 51). The Court of Appeal also noted that Mr. Neufeld had alleged examples of reputational harm and argued that harm could be inferred based on circumstantial factors (paras. 57-58). Second, the chambers judge erred by assuming causation would be difficult to establish because others had made similar statements about Mr. Neufeld (paras. 51-59). I disagree.

[67] Although general damages are presumed in defamation law, s. 4(2)(b) prescribes a weighing exercise which requires that the harm to the plaintiff be serious enough to outweigh the public interest in protecting the defendant's expression. While the presumption of damages can establish the *existence* of harm, it cannot establish that the harm is "serious" (see, e.g., *Lachaux v. Independent Print Ltd.*, [2019] UKSC 27, [2020] A.C. 612, at para. 13; see also *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128, 23 C.E.L.R. (4th) 11, at para. 22; *Levant v. DeMelle*, 2022 ONCA 79, 79 C.P.C. (8th) 437, at para. 68). To hold otherwise would be to presumptively tip the scales in favour of the plaintiff in defamation cases and effectively gut the weighing exercise. Rather, to succeed on the weighing exercise, a plaintiff must provide evidence that enables the judge "to draw an inference of likelihood" of harm of a magnitude sufficient to outweigh the public interest in protecting the defendant's expression (*Pointes*, at para. 71; *Bent*, at para. 154). Presumed general damages are insufficient for this purpose, as are bare assertions of harm.

[68] Even where the extent of harm suffered by the plaintiff is serious, however, the legislation also requires some evidence that enables the judge to infer a causal link between the defendant's expression and the harm suffered (*Pointes*, at para. 71). Where the defendant is not the only one speaking out against the plaintiff, inferring a causal link between the defendant's expression and the harm suffered by the plaintiff becomes both more important (para. 72), and more difficult.

[69] The chambers judge's reasons on this issue are more summary because he had already concluded that Mr. Neufeld did not discharge his burden regarding the fair comment defence, and he considered the public interest weighing exercise as an alternative argument. Thus, he did not specifically deal with the relevant circumstantial arguments that Mr. Neufeld made in support of the extent of the harm he suffered. Still, the judge's ultimate conclusion on the record is clear. Even considering the circumstantial factors that Mr. Neufeld alleged, there is no basis to disturb the judge's assessment of the harm to Mr. Neufeld. And as the judge recognized, other circumstantial factors clearly pointed to a conclusion that Mr. Neufeld had suffered limited reputational harm: Mr. Neufeld continued to express the same contentious views despite the public reaction and won re-election a year later.

[70] Nor do I agree with the Court of Appeal that the chambers judge found causation could not be established simply because Mr. Hansman was one of many speaking out against Mr. Neufeld. To link the few examples of harm he alleged to Mr. Hansman, Mr. Neufeld asserted only that the negative attention he received

“commenced” after Mr. Hansman’s statements (Chambers Judge’s Reasons, at para. 147). The chambers judge held this, too, was a bald assertion and one belied by the record before him. He found it was clear that other people and entities had independently reacted negatively to Mr. Neufeld’s views, and there was nothing to indicate their reactions were influenced or motivated by Mr. Hansman’s comments (para. 150).

[71] I would defer to the chambers judge’s conclusions. As noted, there was an immediate public outcry to Mr. Neufeld’s views, one which began the day he first posted on Facebook, even before Mr. Hansman’s first statement to the media. In the context of this case, I would not disturb the chambers judge’s finding that something more than a bare assertion that the harm commenced after Mr. Hansman’s statements was needed to prove a causal link.

[72] Given the dearth of evidence from Mr. Neufeld on harm, the chambers judge did not err in concluding that Mr. Neufeld had adduced “almost no evidence of damage suffered” as a result of Mr. Hansman’s statements. Absent extricable error, his findings are entitled to deference (*Bent*, at para. 77).

(b) *The Chilling Effect on the Plaintiff and Others Similarly Situated*

[73] The Court of Appeal also held that the chambers judge erred in not considering the “chilling effect” dismissing the proceeding would have on “others who might wish to engage in debates on . . . highly charged matters of public interest”

(para. 65). The court hypothesized that people may “withdraw or not engage in public debate for fear of being inveighed with negative labels and accusations of hate speech with no opportunity to protect their reputation” (para. 65). Given the “serious reputational harm” accusations of hate speech might inflict, the court determined that the chambers judge erred in overlooking the “collateral effect that preventing Mr. Neufeld from defending himself from such serious accusations could have on other individuals’ willingness to express themselves on issues of public interest in [the] future” (para. 68).

[74] This reasoning runs counter to precedent, and is not “tethered to the text of [the relevant provision]” (*Pointes*, at para. 80). To begin, s. 4(2)(b) defines “the public interest in continuing the proceeding” with reference to “the harm likely to have been or to be suffered by the respondent as a result of the applicant’s expression”. The harm relevant to the public interest weighing exercise is harm to Mr. Neufeld caused by Mr. Hansman’s statements, not by his inability to sue. The loss of a right to sue is a possible *outcome* of the public interest weighing exercise, not an input.

[75] The “chilling effect” identified by the Court of Appeal does not constitute a “harm” suffered by Mr. Neufeld for the purpose of the weighing exercise. The concept of a chilling effect has a clear meaning in Canadian freedom of expression law. A chilling effect occurs where uncertainty surrounding the scope or application of a law limiting or prohibiting expression creates a risk that people will not speak for fear of violating the relevant law (see, e.g., *Saskatchewan (Human Rights Commission) v.*

Whatcott, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 32; *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, at para. 79; *R. v. Vice Media Canada Inc.*, 2018 SCC 53, [2018] 3 S.C.R. 374, at para. 26; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 104; *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, at p. 133). As McLachlin J., dissenting, but not on this point, explained in *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 850:

A second characteristic peculiar to freedom of expression is that limitations on expression tend to have an effect on expression other than that which is their target. In the United States this is referred to as the chilling effect. Unless the limitation is drafted with great precision, there will always be doubt about whether a particular form of expression offends the prohibition. . . . The result of a failure to [define any limitation with precision] may be to deter not only the expression which the prohibition was aimed at, but legitimate expression. The law-abiding citizen who does not wish to run afoul of the law will decide not to take the chance in a doubtful case. Creativity and the beneficial exchange of ideas will be adversely affected.

[76] In the civil context, courts have taken care to circumscribe the tort of defamation to avoid causing a chilling effect on legitimate expression, in line with the goals of anti-SLAPP legislation (see *Bent*, at para. 165, per Côté J., and at para. 262, per Abella J.). As the intervener the Centre for Free Expression points out, since *Pointes* and *Bent* were released, the chilling effect on public debate has only been considered by courts under the weighing exercise to assess the concern that allowing the proceeding to *continue* will chill the expression of the defendant and others who might be sued in defamation (see, e.g., *Schwartz & Red Lake Outfitters v. Collette*, 2020 ONSC 6580, at para. 123 (CanLII); *Catalyst Capital Group Inc. v. West Face Capital*

Inc., 2021 ONSC 7957, at para. 463 (CanLII); *Smith v. Nagy*, 2021 ONSC 4265, 156 O.R. (3d) 770, at para. 91; *Galloway v. A.B.*, 2021 BCSC 2344, at para. 784 (CanLII); *Gill v. Maciver*, 2022 ONSC 1279, at para. 179 (CanLII); *Volpe v. Wong-Tam*, 2022 ONSC 3106, 512 C.R.R. (2d) 153, at paras. 402-3).

[77] The Court of Appeal’s consideration of a “chilling effect” flowing from a plaintiff’s inability to pursue a defamation claim turns the concept on its head. Our jurisprudence addresses the concern that the possible imposition of a legal penalty would cause speakers to refrain from commenting on matters of public interest. Instead, the Court of Appeal held that the inability to *inflict* a legal penalty on Mr. Hansman would chill Mr. Neufeld’s expression and those of others who wish to express unpopular views. Simply put, there is no chilling effect in barring potential plaintiffs from silencing their critics and collecting damages through a defamation suit. Just as our law protects Mr. Neufeld’s right to voice his opinions on matters of public interest, so it protects the right of others, like Mr. Hansman, to respond. As the Court of Appeal recognized, “freedom of expression is ‘the cornerstone of a pluralistic democracy’ and . . . there must be room for views to be forcefully and even intemperately presented in the public forum” (para. 70).

[78] Mr. Hansman undoubtedly used words with the potential to inflict serious reputational harm. But the consideration of the public interest in continuing the proceeding must be grounded in harm to Mr. Neufeld, reputational or otherwise, caused

by Mr. Hansman’s expression, and not in the consideration of a “chilling effect” on others if Mr. Neufeld could not proceed with his defamation suit.

(2) Public Interest in Protecting the Defendant’s Expression

[79] The other side of the weighing exercise evaluates the public interest in protecting the defendant’s expression. In making this assessment, s. 2(b) *Canadian Charter of Rights and Freedoms* jurisprudence “grounds the level of protection afforded to [the defendant’s] expression in the nature of the expression” (*Pointes*, at para. 77). Similarly, s. 15(1) considerations may factor into the weighing analysis in a proper case. In *Pointes*, at para. 80, Côté J. cited “the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the *Charter* or human rights legislation” as a relevant factor for courts to consider. As our Constitution recognizes, not all expression is created equal, and the level of protection to be afforded to any particular expression can vary widely according to the quality of the expression, its subject matter, the motivation behind it, or the form through which it was expressed (see *Pointes*, at paras. 74, 76 and 120). The closer the expression lies to the core values of s. 2(b), including truth-seeking, participation in political decision-making and diversity in the forms of self-fulfillment and human flourishing, “the greater the public interest in protecting it” (para. 77).

[80] Some speakers seek to contribute to public discourse by countering ignorant or harmful expression with an informed or compassionate response

(M. Lepoutre, “Can ‘More Speech’ Counter Ignorant Speech?” (2019), 16 *J. Ethics & Soc. Philos.* 155, at pp. 155-56; P. Horwitz, “Citizenship and Speech. A Review of Owen M. Fiss, *The Irony of Free Speech and Liberalism Divided*” (1998), 43 *McGill L.J.* 445, at pp. 464-65; C. F. Zwibel, “Reconciling Rights: The *Whitcott* Case as Missed Opportunity” (2013), 63 *S.C.L.R.* (2d) 313, at pp. 332-33). The theory is that dissenting voices can “out-compete more pernicious speech” in the marketplace of ideas (C. Forcese and K. Roach, “Criminalizing Terrorist Babble: Canada’s Dubious New Terrorist Speech Crime” (2015), 53 *Alta. L. Rev.* 35, at p. 47), showing that, “though some citizens may hold despicable ideas, the weight of public opinion runs against them” (Horwitz, at p. 464). In American First Amendment jurisprudence, this concept is called “counterspeech” (*Whitney v. California*, 274 U.S. 357 (1927), per Brandeis J., concurring; *United States v. Alvarez*, 567 U.S. 709 (2012), per Kennedy J. (plurality opinion)).

[81] In s. 2(b) jurisprudence, the idea of counter-speech inheres in the recognition that the open exchange of ideas is a precondition to unlocking the value of free expression. For example, in *Keegstra*, at p. 766, this Court noted that “it is partly through a clash with extreme and erroneous views that truth and the democratic vision remain vigorous and alive” (see also *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at pp. 173 and 175, per L’Heureux-Dubé J., concurring; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 49). While counter-speech is not necessarily a complete solution to harmful expression (see *Keegstra*, at

p. 763; *Whatcott*, at para. 104), its close proximity to the values at the core of s. 2(b) is beyond doubt.

[82] Counter-speech motivated by the defence of a vulnerable or marginalized group in society also engages the values at the core of s. 15(1); namely, the equal worth and dignity of every individual (*Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 138; see also *Pointes*, at para. 80). Targets of degrading expression belonging to a vulnerable group in society may lack the ability or authority to effectively combat the harmful speech themselves (Lepoutre, at p. 157). Discourse can then take on an uneven quality, making protective counter-speech by the group or individual's more powerful advocates all the more influential and important (Zwibel, at p. 333; see *Whatcott*, at para. 75 (recognizing the importance of maintaining a "path of reply by [a] group under attack"))).

[83] Mr. Hansman spoke out to counter expression he perceived to be untrue, prejudicial towards transgender and other 2SLGBTQ+ individuals, and potentially damaging to transgender youth.

[84] The transgender community is undeniably a marginalized group in Canadian society. The history of transgender individuals in our country has been marked by discrimination and disadvantage. Although being transgender "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities" (J. Drescher and E. Haller, *Position Statement on Discrimination Against Transgender and Gender Diverse Individuals*, 2018 (online)), transgender and other

gender non-conforming individuals were largely viewed with suspicion and prejudice until the latter half of the 20th century.

[85] Indeed, transgender people occupy a unique position of disadvantage in our society, given the long history in psychiatry “of conflating [transgender and other 2SLGBTQ+] identities with mental illness” and even resorting to harmful “conversion therapy” to “resolve” gender dysphoria, and “recondition” the individual to reduce “cross-gender behavior” (A. Veltman and G. Chaimowitz, “Mental Health Care for People Who Identify as Lesbian, Gay, Bisexual, Transgender, and (or) Queer” (2014), 59:11 *Can. J. Psychiatry* 1, at pp. 1-2; American Psychological Association, Task Force on Gender Identity and Gender Variance, *Report of the Task Force on Gender Identity and Gender Variance* (2009), at p. 27). As the British Columbia Human Rights Tribunal has recognized, “[u]nlike other groups . . . , transgender people often find their very existence the subject of public debate and condemnation” (*Oger v. Whatcott* (No. 7), 2019 BCHRT 58, 94 C.H.R.R. D/222, at para. 61). They are stereotyped as diseased or confused simply because they identify as transgender (*Nixon v. Vancouver Rape Relief Society* (No. 2), 2002 BCHRT 1, 42 C.H.R.R. D/20, at paras. 136-37).

[86] Transgender people have faced discrimination in many facets of Canadian society. Statistics Canada has concluded that they are at increased risk of violence, and report higher rates of poor mental health, suicidal ideation, and substance abuse as a means to cope with abuse or violence they have experienced (see *Experiences of violent victimization and unwanted sexual behaviours among gay, lesbian, bisexual and other*

sexual minority people, and the transgender population, in Canada, 2018 (September 2020)). Studies have concluded that they are disadvantaged relative to the general public in housing, employment, and healthcare (Department of Justice Canada, *A Qualitative Look at Serious Legal Problems: Trans, Two-Spirit, and Non-Binary People in Canada* (2022), at p. 10; *XY v. Ontario (Government and Consumer Services)* (No. 4), 2012 HRTO 726, 74 C.H.R.R. D/331, at paras. 164-66). And despite encountering a higher incidence of justiciable legal problems, studies have also found that transgender people have traditionally faced greater access to justice barriers than the broader population, in part due to a lack of explicit human rights protections (J. James et al., *Legal Problems Facing Trans People in Ontario*, TRANSforming JUSTICE Summary Report 1(1), September 6, 2018 (online); see also Department of Justice Canada, at p. 11).

[87] Significant legal advancements in transgender rights have only come in the last 35 years, with most change taking place in the last decade (S. Singer, “Trans Rights Are Not Just Human Rights: Legal Strategies for Trans Justice” (2020), 35 *C.J.L.S.* 293, at p. 298). Once forced to advance claims of discrimination on the ground of “physical disability” (B. Findlay et al., *Finding Our Place: Transgendered Law Reform Project* (1996), at pp. 20-21), gender identity and/or expression are now prohibited grounds of discrimination in human rights codes across the country and included within the prohibition against hate speech under the *Criminal Code*, R.S.C. 1985, c. C-46 (see *Alberta Bill of Rights*, R.S.A. 2000, c. A-14; *Human Rights Code*, R.S.N.B. 2011, c. 171; *Human Rights Act, 2010*, S.N.L. 2010, c. H-13.1; *Human Rights Act*, R.S.N.S.

1989, c. 214; *Human Rights Act*, S. Nu. 2003, c. 12; *Human Rights Act*, S.N.W.T. 2002, c. 18; *Human Rights Code*, R.S.O. 1990, c. H.19; *Human Rights Act*, R.S.P.E.I. 1988, c. H-12; *Charter of human rights and freedoms*, CQLR, c. C-12; *Human Rights Act*, R.S.Y. 2002, c. 116; *The Human Rights Code*, C.C.S.M., c. H175; *The Saskatchewan Human Rights Code, 2018*, S.S. 2018, c. S-24.2; *An Act to amend the Canadian Human Rights Act and the Criminal Code*, S.C. 2017, c. 13).

[88] In the wake of this legislative progress, judicial recognition of the plight of transgender individuals in Canada is growing (see *XY*, at para. 164; see also *Oger*, at para. 62; *Vanderputten v. Seydaco Packaging Corp. (No. 1)*, 2012 HRTO 1977, 75 C.H.R.R. D/317, at para. 61; *JY v. Mint Tanning Lounge*, 2018 BCHRT 282, at para. 32 (CanLII); *J.Y. v. Various Waxing Salons*, 2019 BCHRT 106, 94 C.H.R.R. D/11, at para. 33; *X v. Hot Mess Salon*, 2019 BCHRT 24, at para. 11 (CanLII); *T.A. v. Manitoba (Justice)*, 2019 MBHR 12, at para. 24 (CanLII); *A.B. v. Correctional Service Canada*, 2022 CHRT 15, at para. 41 (CanLII)). And in 2021, the Superior Court of Quebec held that “[g]ender identity is analogous to the grounds listed at s. 15(1) of the *Canadian Charter*” because “[g]ender identity is an immutable personal characteristic” (*Centre for Gender Advocacy v. Attorney General of Quebec*, 2021 QCCS 191, 481 C.R.R. (2d) 273, at paras. 104 and 106).

[89] Yet individual courts and tribunals have also recognized that, “despite some gains, transgender people remain among the most marginalized in our society” (*Oger*, at para. 62), and continue to live their lives facing “disadvantage, prejudice,

stereotyping, and vulnerability” (*C.F. v. Director of Vital Statistics (Alta.)*, 2014 ABQB 237, 587 A.R. 332, at para. 58).

[90] Mr. Neufeld’s right to express himself is not in doubt, nor is it for this Court to assess the value of his expression. But Mr. Neufeld’s statements are critical context in characterizing Mr. Hansman’s expression, which is at issue. Despite Mr. Neufeld’s submissions, it is evident that his expression went beyond a critique of a government program. For instance, in his original post, Mr. Neufeld criticized the fact that SOGI 123 materials instruct children “that gender is not biologically determined, but is a social construct” and stated that permitting children to “choose to change gender is nothing short of child abuse” (A.R., vol. III, at p. 16). In the same post, Mr. Neufeld expressed concern that children were “being taught that heterosexual marriage is no longer the norm” and that “[i]ncreasing numbers of children are growing up in homes with same sex parents” (p. 16). And in his speech at the Culture Guard event about a month following his original post, Mr. Neufeld claimed that SOGI 123 “enabl[es] dysfunctional behavior and thinking patterns” and “coddl[es] and encourag[es] what [he] regard[s] as the sexual addiction of gender confusion”. Mr. Hansman was responding to these and other statements.

[91] Mr. Hansman’s counter-speech fell close to the core of s. 2(b). His expression served a truth-seeking function, as he was contacted by the media to present an alternative perspective within a debate on a matter of public importance. In speaking out, he sought to counter expression that he and others perceived to undermine the

equal worth and dignity of marginalized groups. Finally, his speech commenting on the fitness of an electoral candidate was political expression, which is “the single most important and protected type of expression” (*Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 11, per McLachlin C.J. and Major J., dissenting in part, but not on this point; see also *Able Translations Ltd. v. Express International Translations Inc.*, 2018 ONCA 690, 428 D.L.R. (4th) 568, at paras. 41-44 (affording expression about a person’s suitability for elected office significant protection under s. 137.1 of the Ontario *Courts of Justice Act*)).

[92] Although one’s engagement in counter-speech does not amount to “open season” on reputation (*Grant*, at para. 58) and speakers must always choose their words carefully (*Pointes*, at para. 75), on the whole, Mr. Hansman’s words were not a disproportionate or gratuitous response to Mr. Neufeld’s statements. When confronted with views a person believes to be discriminatory, individuals often use words such as “bigoted”, “intolerant”, or even sometimes “hateful”. I note that Mr. Hansman’s expression generally focused on the views that Mr. Neufeld expressed, and not who he is as a person.

[93] I agree with the chambers judge that there is a great public interest in protecting Mr. Hansman’s freedom of speech on such matters. The subject matter of Mr. Hansman’s speech (commenting on the value of a government initiative, the need for safe and inclusive schools, and the fitness of a candidate for public office), the form in which it was expressed (solicited by the media to present a counter-perspective

within an ongoing debate), and the motivation behind it (to combat discriminatory and harmful expression and to protect transgender youth in schools) are all deserving of significant protection. Given Mr. Neufeld’s failure to establish harm serious enough to outweigh that substantial public interest, the chambers judge did not err in concluding that the weighing exercise under s. 4(2)(b) mandates dismissal of the underlying action.

C. *Issue 2: No Valid Defence*

[94] While the weighing exercise may be the core of the anti-SLAPP legislation, the chambers judge first grounded his dismissal of the action in the finding that Mr. Hansman had a valid fair comment defence. Section 4(2)(a)(ii) provides that a court must make a dismissal order unless the plaintiff satisfies the court that there are grounds to believe that the defendant has no valid defence in the proceeding. The defendant must first point to any defences they intend to raise at trial, after which the burden shifts to the plaintiff. “[G]rounds to believe” means “something more than mere suspicion, but less than . . . proof on the balance of probabilities” (*Pointes*, at para. 40, quoting *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 114). To satisfy this burden, a plaintiff must show the defences advanced by the defendant “are not legally tenable or supported by evidence that is reasonably capable of belief such that they can be said to have no real prospect of success” (*Pointes*, at para. 59).

(1) Fair Comment Defence

[95] In support of his s. 4 application, Mr. Hansman advanced the defence of fair comment. The right of fair comment is “a basic safeguard against irresponsible political power” (C. Sappideen and P. Vines, eds., *Fleming’s The Law of Torts* (10th ed. 2011), at p. 668). The fair comment defence is premised on the idea that citizens must be able to openly declare their real opinions on matters of public interest without fear of reprisal in the form of actions for defamation (*Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, at p. 1086, quoting *Slim v. Daily Telegraph Ltd.*, [1968] 1 All E.R. 497, at p. 503 (C.A.)). This democratic discourse is a defining feature of a free and open society. Thus, the defence aims to keep the equilibrium in defamation law between two competing values: the protection of individual reputation from unwarranted attack, on one side, and the free debate “that is said to be the ‘very life blood of our freedom and free institutions’” on the other (*WIC Radio*, at para. 1, quoting *Price v. Chicoutimi Pulp Co.* (1915), 51 S.C.R. 179, at p. 194). The task of courts in interpreting the defence is to reconcile these two values, not to prefer one over the other (*WIC Radio*, at para. 2).

[96] The fair comment defence has five elements. First, the “comment must be on a matter of public interest” (*Grant*, at para. 31). Second, it must be “based on fact” (para. 31). Third, “though it can include inferences of fact, [it] must be recognisable as comment” (para. 31). Fourth, it must satisfy an objective test: “could any person honestly express that opinion on the proved facts?” (para. 31). Finally, even if the above elements are met, “the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice” (para. 31). Consideration of the elements of the fair

comment defence requires an assessment of the defamatory words used in the full context surrounding their use (*WIC Radio*, at paras. 55-56). In this appeal, the only elements at issue are the second and third elements of the defence, along with the question of malice.

[97] When invoked at trial, the defendant must prove the elements of the fair comment defence before the onus switches to the plaintiff to defeat the defence by establishing malice by the defendant (para. 52). On a s. 4 application, however, the onus is on the plaintiff to show grounds to believe that the defendant cannot establish one or more of its elements and thus the defence has no real prospect of success.

[98] As I explain, the chambers judge also did not err in concluding that Mr. Neufeld failed to challenge the validity of the fair comment defence.

(a) *Was the Expression Based on Fact?*

[99] To constitute fair comment, a factual basis for the impugned statement must be explicitly or implicitly indicated, at least in general terms, within the publication itself or the facts must be “so notorious as to be already understood by the audience” (*WIC Radio*, at para. 34). The defence is unavailable if “the factual foundation is unstated or unknown, or turns out to be false” (para. 31).

[100] There is, however, no requirement that the facts *support* the comment, in the sense of confirming its truth (para. 31). The expression must relate to the facts on

which it is based, but the comment need not be a reasonable or proportionate response (paras. 39, 51 and 59). The purpose of this element is not to measure the fairness of expression, but to ensure the reader is aware of the basis for the comment to enable them “to make up their own minds” as to its merit (para. 31).

[101] Here, the chambers judge held that Mr. Neufeld had not shown grounds to believe that the challenged statements were not based in fact, pointing to Mr. Neufeld’s original Facebook post as a basis for the statements (para. 134). Mr. Neufeld argues, and the Court of Appeal agreed, that there were grounds to believe that Mr. Hansman would be unable to establish that certain of the statements were based in fact.

[102] I disagree. The relevant inquiry is not whether the underlying facts supported the truth of the statements. At trial, Mr. Hansman need not demonstrate that Mr. Neufeld is bigoted, transphobic, promoted hatred, or created an unsafe environment for students. The question is merely whether the statement can be tethered to an adequate factual basis so the reader can be an informed judge. I agree with the chambers judge that Mr. Neufeld’s original Facebook post could provide the requisite factual basis for most statements at issue. The post reads:

Okay, so I can no longer sit on my hands. I have to stand up and be counted. A few years ago, the Liberal minister of education instigated a new curriculum supposedly to combat bullying. But it quickly morphed into a weapon of propaganda to infuse every subject matter from K-12 with the latest fad: Gender theory. The Sexual Orientation and Gender Identity (SOGI) program instructs children that gender is not biologically determined, but is a social construct. At the risk of being labelled a bigoted homophobe, I have to say that I support traditional family values and I agree with the College of paediatricians that allowing little children [to]

choose to change gender is nothing short of child abuse. But now the BC Ministry of Education has embraced the LGBTQ lobby and is forcing this biologically absurd theory on children in our schools. Children are being taught that heterosexual marriage is no longer the norm. Teachers must not refer to “boys and girls” they are merely students. They cannot refer to mothers and fathers either. (Increasing numbers of children are growing up in homes with same sex parents) If this represents the values of Canadian society, count me out! I belong in a country like Russia, or Paraguay, which recently had the guts to stand up to these radical cultural nihilists. [A link to a news article entitled “Parents Defeat Gender Ideology in Paraguay”.]

(A.R., vol. III, at p. 16)

[103] All of the challenged publications either reproduced, linked to, quoted from, or otherwise described Mr. Neufeld’s original Facebook post, apart from one publication which does not refer to Mr. Neufeld, as I explain below. Most articles also describe Mr. Neufeld’s anti-SOGI 123 views and views on gender dysphoria, in general. Certain of them also referenced other statements made by Mr. Neufeld, including his statement that semen is a natural anti-depressant for women, factually grounding Mr. Hansman’s reference to Mr. Neufeld’s “other misogynist and problematic statements”. Other articles referred to Mr. Neufeld’s remarks at the Culture Guard event, in which he stated that SOGI 123 encourages and enables “dysfunctional behavior and thinking patterns”, namely “the sexual addiction of gender confusion”. Mr. Neufeld’s views were therefore available to readers within the four corners of the publications, either within the text itself or via hyperlinks to further articles and explanations. Those views grounded Mr. Hansman’s statements that Mr. Neufeld should resign; expressed views that are bigoted, intolerant, transphobic, misogynist, or hateful; “tip toed” into hate speech; spread or promoted hatred against 2SLGBTQ+ students; and created or contributed to an unsafe or discriminatory environment.

[104] As the chambers judge noted, Mr. Neufeld can hardly argue that his Facebook post did not provide a factual basis for Mr. Hansman’s statements when he himself wrote that he posted at the risk of “being labelled a bigoted homophobe”. For the few publications that do not go into detail in describing Mr. Neufeld’s statements, the journalists seem to have relied on the fact that those views had achieved a level of notoriety such that they would have been known to the reading audience. This was a high-profile local controversy that spanned over a year. Both men were public figures. Mr. Neufeld’s Facebook post was widely reported by major media outlets within hours of it being posted, and the media continued to report on the dispute as it evolved. In this context, it was reasonable to conclude that it was unnecessary to set out the background to the controversy in great detail for all 11 publications.

[105] But Mr. Neufeld says that the original Facebook post cannot ground Mr. Hansman’s statement to the *Huffington Post* that “trustees with faith-based views need to figure out how they’ll work in a secular public school system” or seek work elsewhere. Mr. Neufeld contends there was no basis for this statement as his original post did not refer to his religious views (those posts came later). I disagree. The publication references the fact that Mr. Neufeld is a church subdeacon and prison chaplain, providing a factual nexus for the challenged statement.

[106] Similarly, Mr. Neufeld contends the Facebook post is insufficient to ground Mr. Hansman’s comment to a local news outlet on September 16, 2018, that “[i]t is extremely problematic to have somebody who is running as a school trustee

continuing to spread hate about LGBTQ people . . . and also be out there, making vile comments about refugees and immigrants” (A.R., vol. II, at p. 34). There was some dispute in the courts below about whether this statement concerned Mr. Neufeld or, as Mr. Hansman contends, another trustee candidate, given that the publication does not name anyone in particular. I agree with the concession of Mr. Neufeld’s counsel before the chambers judge that the comment appears to have been made “in response to another school board trustee” (A.R., vol. V, at p. 86), and should therefore not be considered.

[107] In sum, Mr. Neufeld has not shown grounds to believe that Mr. Hansman’s statements lacked a factual basis. As in *WIC Radio*, the general facts giving rise to the dispute were likely known to the audience and referred to in the publications themselves (para. 34).

(b) *Was the Expression Recognizable as Comment, Rather Than an Imputation of Fact?*

[108] For expression to constitute fair comment, the statement must be one that would be understood by a reasonable reader as a comment rather than a statement of fact (*WIC Radio*, at para. 27). A comment includes a “deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof” (para. 26, quoting *Ross v. New Brunswick Teachers’ Association*, 2001 NBCA 62, 238 N.B.R. (2d) 112, at para. 56). This is a low threshold; “the notion of ‘comment’ is generously interpreted” (*WIC Radio*, at para. 30).

[109] The line between comment and fact can be difficult to draw, particularly “in an editorial context where loose, figurative or hyperbolic language is used . . . in the context of political debate, commentary, media campaigns and public discourse” (para. 26). Opinions are expressed as facts more often than as personal views, such that statements that may seem to convey fact might be more properly construed as comment (R. D. McConchie and D. A. Potts, *Canadian Libel and Slander Actions* (2004), at p. 342). Context is essential in distinguishing comment from fact.

[110] Mr. Neufeld relies on a handful of cases to argue that Mr. Hansman’s statements were not comments but imputations of fact. In *Lascharis v. B’nai Brith Canada*, 2019 ONCA 163, 144 O.R. (3d) 211, at para. 34, the court found that a reasonable trier might conclude that statements that the appellant supported terrorists were statements of fact, not opinion. In *Bondfield Construction Company Ltd. v. Globe and Mail Inc.*, 2019 ONCA 166, 144 O.R. (3d) 291, at para. 17, the court held that statements suggesting corruption and collusion in a bidding process could be viewed as factual assertions. And in *Pan v. Gao*, 2020 BCCA 58, 33 B.C.L.R. (6th) 211, at para. 104, the court concluded that a statement that someone was a “seasoned liar” was a statement of fact. But these cases do not help us to determine whether Mr. Hansman’s statements were recognizable as comment. In the context of those cases, the statements suggested concrete knowledge of past wrongdoings, which is distinguishable from the generalized critiques at issue in this case.

[111] More on point are the many cases in which Canadian courts have determined that “loose, figurative or hyperbolic” labels (*WIC Radio*, at para. 26), like homophobic, transphobic, bigoted, racist, or sexist are properly characterized as comment, not fact (see *Mondal v. Evans-Bitten*, 2022 ONSC 809, 82 C.C.L.T. (4th) 327, at paras. 3-7 and 34; see also *Awan v. Levant*, 2016 ONCA 970, 133 O.R. (3d) 401, at para. 84 (“[c]alling someone prejudiced will normally be a conclusion or opinion”); *Volpe*, at para. 232 (a statement that a person is “homophobic, transphobic, or anti-LGBTQ2S+” was a comment); *Bernier v. Kinsella*, 2021 ONSC 7451, 73 C.P.C. (8th) 280, at para. 50 (“A statement that a person is racist or a misogynist is a generalization or conclusion that is not itself either true or false.”)). I agree that an allegation of bias or prejudice is “a debatable assertion as to a state of mind” and will typically be classified as a comment (P. A. Downard, *The Law of Libel in Canada* (5th ed. 2022), at pp. 298-99).

[112] A few statements are arguably closer to the line between comment and fact. While not strictly necessary to decide, given my conclusion as to the public interest weighing exercise, I would agree with the chambers judge that, in the specific context of this case and given the supporting facts included in each publication, a reasonable reader would have interpreted the statements as expressions of Mr. Hansman’s opinion. For example, the statement that Mr. Neufeld violated his obligations as a school board trustee could arguably be taken as an imputation of fact, especially given that Mr. Hansman’s role as president of the BCTF might give readers the impression he is an authority figure on such matters. But an allegation that a politician has not lived up

to their obligations is generally understood to be a critique, not a declaration of fact. Mr. Neufeld has not shown grounds to believe that it would not be seen as a comment in the context of this case.

[113] Additionally, Mr. Neufeld contends that because the *Criminal Code* recognizes an offence of wilful promotion of hatred (see s. 319(2)), the allegation that he “tip toed . . . into hate speech” would be taken as imputing criminal liability. I do not agree that accusations of hate speech would necessarily be understood by ordinary readers as referring to a *Criminal Code* offence. Such allegations have permeated public discourse in a way that well exceeds their narrow meaning within the legal system. In any event, the reference to hate speech was published within an ongoing public debate in an editorial in which Mr. Hansman was being asked to comment on the human rights complaint he had recently filed. It is clear, when read in context, that the statement expressed Mr. Hansman’s belief that Mr. Neufeld had “tip toed . . . into hate speech”, based on his own interpretation of Mr. Neufeld’s statements. An assertion that might be taken as factual in one context may be properly construed as comment in another (*WIC Radio*, at para. 26; see *Awan*, at para. 76 (calling someone a “liar” can be fact or comment, depending on the context)).

[114] Considered as a whole, the chambers judge was entitled to find under s. 4(2)(a)(ii) that the “sting” of Mr. Hansman’s statements was “comment and it would have been understood as such” by readers (*WIC Radio*, at para. 27).

(c) *Was the Fair Comment Defence Defeated by Malice?*

[115] A showing of malice defeats a valid fair comment defence. This can be done by demonstrating the defendant made the statement knowing it was false, with reckless indifference as to its truth, to injure the plaintiff out of spite or animosity, or for some other improper purpose (*WIC Radio*, at paras. 100-101 and 104; see also *Bent*, at para. 136; *Smith v. Cross*, 2009 BCCA 529, 314 D.L.R. (4th) 457, at para. 34). Proof of malice “may be intrinsic or extrinsic: that is, it may be drawn from the language of the assertion itself or from the circumstances surrounding the publication of the comment” (*WIC Radio*, at para. 100). A finding of a subjective honest belief negates the possibility of finding malice (para. 53).

[116] Mr. Neufeld argued that Mr. Hansman acted with malice in making the challenged statements — an allegation that the chambers judge found was unsubstantiated. The Court of Appeal held the chambers judge erred in his malice assessment in two material ways: (1) by finding as a fact that Mr. Hansman’s affidavit “stated” an honest belief in the views he expressed, when it contained no such assertion; and (2) by holding that, once a defendant asserts a subjective belief in their comments, malice can be proved only by a full admission by the defendant on cross-examination (paras. 43-44). I disagree on both counts.

[117] In *WIC Radio*, this Court cautioned against analyzing the fair comment defence at a “troubling level of technicality” (para. 35). A finding of subjective honest belief can be based on the thrust of the defendant’s evidence, read as a whole. Ultimately, the chambers judge found that Mr. Hansman’s affidavit “ma[de] it clear”

that he honestly believed the views he espoused (at para. 141), and he was entitled to do so.

[118] I also do not agree with the Court of Appeal that the chambers judge held as a matter of law that once a defendant expresses an honest belief in their statements, malice can be proved only by an admission on cross-examination. The chambers judge noted that, while the *PPPA* provides for a right of cross-examination on affidavits, Mr. Neufeld declined to use this opportunity. The judge determined that, short of an admission of malice by Mr. Hansman on cross-examination, it was difficult to imagine how malice could be found on the “evidence before [him]” (para. 141). This simply amounted to a statement that Mr. Neufeld failed to meet his persuasive burden on this s. 4 application.

[119] I agree with the chambers judge that Mr. Neufeld failed to adequately challenge the fair comment defence. The defence was Mr. Neufeld’s to disprove, yet Mr. Neufeld adduced no “evidence . . . that would form the basis of an argument against the validity of the fair comment defence” (para. 126). The judge was therefore entitled to dismiss the proceeding on this basis.

(d) *Other Errors Found by the Court of Appeal*

[120] Besides impugning the chambers judge’s ultimate conclusion on the fair comment defence, the Court of Appeal also objected to the way he undertook his analysis. The court held that the chambers judge erred by (1) working from a summary

of the statements made by Mr. Hansman, and (2) placing undue reliance on *WIC Radio*. It is unnecessary for me to address these purported errors in detail, other than to say that the chambers judge's analysis was appropriate in the circumstances and responsive to the arguments of the parties. His reasons, read as a whole, do not suggest that he overlooked the defamatory meaning of any particular statement in context, or some essential aspect of the analysis. And unlike the Court of Appeal, I do not agree the chambers judge erred by relying on *WIC Radio*. *WIC Radio* is a seminal decision from this Court on the interpretation of the elements of the fair comment defence and is factually similar to this case. Both that case and this one involved defamation suits arising out of a public debate in the media over educational policies and practices about the 2SLGBTQ+ community. In each case, the plaintiff was a public figure who expressed views perceived by the defendant to be discriminatory, which invited harsh criticism by the defendant. I am of the view that *WIC Radio* was a relevant, if not controlling, precedent for the judge to have considered.

D. *Motion for Fresh Evidence*

[121] Mr. Hansman applied under s. 62(3) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, and r. 47 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, to adduce two affidavits as fresh evidence in this Court. While I have serious reservations that this proposed evidence meets the *Palmer* test for admission (*Palmer v. The Queen*, [1980] 1 S.C.R. 759), as affirmed in *Barendregt v. Grebliunas*, 2022

SCC 22, at paras. 29-34, the evidence is unnecessary to resolve the appeal and I need not deal with the motion.

V. Conclusion

[122] I would allow the appeal, set aside the order of the Court of Appeal for British Columbia, and restore the order of the chambers judge dismissing the defamation action. I would make an order for costs to the appellant assessed on a party and party basis in this Court and on an ordinary costs basis at the Court of Appeal, with costs in the Supreme Court of British Columbia to be awarded on a full indemnity basis pursuant to s. 7(1) of the *PPPA*.

The following are the reasons delivered by

CÔTÉ J. —

I. Overview

[123] In a famous concurring opinion, U.S. Supreme Court Justice Louis Brandeis posited that the remedy for objectionable speech “is more speech, not enforced silence” (*Whitney v. California*, 274 U.S. 357 (1927), at p. 377). The argument that counter-speech is to be preferred to the censorship or silencing of ideas perceived to be wrong or offensive is connected to the concept of a “marketplace of ideas” encouraging competition between conflicting viewpoints. However,

counter-speech does not enjoy absolute constitutional protection, nor is it inherently more valuable than the speech to which it responds.

[124] In fact, counter-speech can even hinder the values underpinning our country's commitment to free expression (C. F. Zwibel, "The Right to Protest and Counter-Protest: Complexities and Considerations", in E. Macfarlane, ed., *Dilemmas of Free Expression* (2022), 111, at pp. 111 and 120-25). For example, counter-speech aimed at completely removing the initial expression from the public sphere appears to be inconsistent with the search for truth. Silencing contrary and unpopular views seems antithetical to our liberal, pluralistic and democratic society, which is committed to the free exchange of ideas in the pursuit of truth.

[125] Indeed, the marketplace of ideas welcomes vigorous debates on divisive issues. Such confrontation helps shape, strengthen or even change people's perspectives. After all, he "who knows only his own side of the case knows little of that" (J. S. Mill, *On Liberty* (1859 (reprinted 1978)), at p. 35). Truth is therefore arrived at by community members through the exercise of their agency and autonomous judgment, notably in the process of public discussion (R. Moon, "The Social Character of Freedom of Expression" (2009), 2:1 *Amst. L. Forum* 43, at p. 46; on the ties between freedom of expression and human dignity and autonomy, see also *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, at para. 59; T. M. Scanlon, *The Difficulty of Tolerance — Essays in Political Philosophy* (2003), at pp. 14-16).

[126] In short, not all counter-speech is of equal value (*R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 760-61). This is an appeal about defamatory counter-speech and about whether a defamation action brought as a result should be dismissed before trial under s. 4 of the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 (“PPPA”).

[127] Public debates on contentious issues can lend themselves to the use of intemperate, offensive or harsh language aimed at discrediting one’s opponent (*Keegstra*, at p. 832, per McLachlin J. (as she then was), dissenting). Although freedom of expression protects such language, the protection it offers is not absolute. It is limited by, among other things, one’s right to the protection of one’s reputation (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at paras. 102-6; *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, at para. 17).

[128] As with freedom of expression, our law’s protection of reputation is anchored in the notion of human dignity that underlies the rights guaranteed by the *Canadian Charter of Rights and Freedoms* (*Hill*, at paras. 120-21; see also *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, 2004 SCC 53, [2004] 3 S.C.R. 95, at paras. 52-53). While not a freestanding right, respect for one’s reputation is essential to participation in society (*R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 48, per Cory J.). Thus, there is a strong societal interest in ensuring that individuals can protect their good reputation, as a “reputation tarnished by libel can seldom regain its former lustre” (*Hill*, at para. 108).

[129] Defamation lawsuits like the one in the present case call upon courts to cautiously strike the appropriate balance between freedom of expression and the protection of one's reputation (*Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 3; see also *Bou Malhab*, at para. 19). In determining whether Barry Neufeld's action in defamation against Glen Hansman should be dismissed at an early stage, our Court must remain mindful of this balance and take great care in not upsetting it (*Bent v. Platnick*, 2020 SCC 23, [2020] 2 S.C.R. 645, at para. 168). Unfortunately, and I say this with respect, by dismissing Mr. Neufeld's claim, my colleague fails to do so.

[130] In my view, my colleague ventures beyond the narrow confines of the court's role when disposing of an application made under the *PPPA*. The purpose of s. 4 of the *PPPA*, just like that of s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"), upon which it was modelled, is to act as a pre-trial screening mechanism (*1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, [2020] 2 S.C.R. 587, at para. 16). In *Pointes*, our Court cautioned against turning the analysis of a motion under s. 137.1 of the *CJA* into a *de facto* summary judgment motion, which would be "insurmountable at this stage of the proceedings" (*Pointes*, at para. 52; see also para. 38).

[131] The same caveat applies to s. 4 of the *PPPA* given the analogous procedural and evidentiary limitations contained in the statute. For example, an application for a dismissal order can be made any time after the commencement of a proceeding (*PPPA*,

s. 9(2)). Once the plaintiff in the proceeding has been served with an application for a dismissal order under s. 4 of the *PPPA*, generally speaking, neither party can take further steps in the proceeding until the application has been adjudicated (s. 5). Furthermore, unless the court allows it, the plaintiff cannot amend his or her pleadings in order to prevent or avoid a dismissal order (s. 6). Likewise, evidence is to be given by affidavit (s. 9(4)). The rationale for these constraints is that an application under s. 4 of the *PPPA* is not meant to entail a determinative adjudication of the merits of the underlying proceeding (*Pointes*, at paras. 50-52). Rather, it is intended to serve as an expedient, cost-efficient way to dismiss proceedings that unduly restrict free expression on matters of public interest.

[132] Therefore, the question in this appeal is not whether this Court agrees with Mr. Neufeld's expression, or with Mr. Hansman's counter-speech for that matter. The question is merely whether Mr. Neufeld's action should be dismissed at this early stage of the proceeding. Unlike my colleague, I conclude that it should not. In doing so, I am in no way prejudging the merits of Mr. Neufeld's action in defamation; I am strictly finding that he deserves to have his day in court.

II. Analysis

[133] As a preliminary matter, I part ways with my colleague regarding the structure of her analysis. Although my colleague accurately describes the applicable framework at para. 37 of her reasons, she does not apply it. Indeed, she begins with the public interest weighing exercise and then examines the validity of the fair comment

defence advanced by Mr. Hansman. Respectfully, that is not how the analysis must be conducted (*Pointes*, at paras. 18 and 61-63).

[134] In my opinion, the plaintiff in the proceeding (here, Mr. Neufeld) must first overcome a merits-based hurdle, by demonstrating that there are “grounds to believe” that the proceeding has substantial merit (*PPPA*, s. 4(2)(a)(i)) and that the applicant under the *PPPA* (here, Mr. Hansman) “has no valid defence in the proceeding” (*PPPA*, s. 4(2)(a)(ii)). Only once this is shown does the court have to determine whether the plaintiff has established that the harm likely to have been or to be suffered by him or her 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 (s. 4(2)(b)). Section 4(2)(b) of the *PPPA* is the final step of the analysis. If the plaintiff fails to show that the applicant has no valid defence, the underlying claim must be dismissed and there is no need to conduct the weighing exercise mandated by s. 4(2)(b) (*Pointes*, at para. 58).

[135] My colleague asserts without explanation (and without citing *any* supporting authorities) that the “order in which a judge chooses to address each of the elements under s. 4(2) is, of course, at the discretion of the court” (para. 53). In doing so, she is effectively ignoring our Court’s recent decision in *Pointes*.

[136] It is clear from *Pointes* that the merits-based hurdle must be overcome before the court analyzes the public interest hurdle. The need to conduct the analysis in this order influenced how our Court defined the “substantial merit” standard in *Pointes*.

Indeed, the Court concluded that the standard could not be so stringent as to prevent cases from getting to the public interest weighing exercise, which is the core of the analysis under s. 137.1(4) of the *CJA*:

However, while frivolous suits are clearly insufficient, “something more” cannot require a showing that a claim is likely to succeed either, as some parties have posited. Neither the plain meaning nor the legal definition of “substantial” comports with a “likely to succeed” standard. The legislative and statutory context does not support such a standard either. If “substantial merit” requires a showing of being likely to succeed, this could unduly prevent cases from proceeding to the crux of the inquiry that is the weighing exercise under s. 137.1(4)(b). Given the importance of the weighing exercise in the legislative history, this cannot possibly be what the legislature contemplated. Indeed, nothing in the legislative history . . . points to a “likely to succeed” standard as the threshold for the plaintiff to prevail at the merits-based hurdle of s. 137.1. While the plaintiff need not definitively demonstrate that its claim is more likely than not to succeed, the claim must nonetheless be sufficiently strong that terminating it at a preliminary stage would undermine the legislature’s objective of ensuring that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to vindicate that claim.

...

Statutory interpretation is a contextual exercise that requires reading a provision with and in light of other provisions: accordingly, if the bar is set too high at s. 137.1(4)(a)(i) or (ii), a motion judge will never reach s. 137.1(4)(b) — this cannot possibly be what the legislature contemplated given the legislative history and intent behind s. 137.1. The legislature repeatedly emphasized proportionality as the paramount consideration in determining whether a lawsuit should be dismissed. Weighing the public interest in freedom of expression and public participation against the public interest in vindicating a meritorious claim is a theme that runs through the entire legislative history, and this informs how s. 137.1 should be judicially understood. [Emphasis added; paras. 48 and 63.]

[137] One of the objectives behind s. 137.1 of the *CJA* and s. 4 of the *PPPA* alike is to ensure “that a plaintiff with a legitimate claim is not unduly deprived of the

opportunity to vindicate that claim” (*Pointes*, at para. 48 (emphasis added)); see also paras. 63-64). The legitimacy of a claim is assessed, first and foremost, at the merits-based hurdle stage, which concerns “the strength of the underlying proceeding” (para. 60). In my view, by concluding that the order of the analysis is irrelevant and merely a matter of judicial discretion, my colleague undermines that legislative objective.

[138] The analysis of the merits-based hurdle informs that of the public interest hurdle. One aspect of the public interest hurdle requires assessing the seriousness of the harm suffered by the respondent (the plaintiff in the underlying proceeding) as a result of the applicant’s expression, a task that is difficult if not impossible to perform without looking at the strength of the underlying proceeding. The following example illustrates this point. In a defamation action, harm is presumed (*Pointes*, at para. 71), but whether a claim has a real prospect of meeting the test for defamation must be determined at the merits-based hurdle stage (*Bent*, at paras. 91 et seq.).

[139] My colleague’s approach does one of two things: either it glosses over the harm analysis or it subsumes the merits-based hurdle under the public interest hurdle. Neither of these options is desirable. Indeed, the first tips the scales in favour of the applicant and upsets the balance that must be carefully maintained between freedom of expression and the protection of individual reputation. The latter effectively rewrites s. 137.1(4) of the *CJA* and s. 4 of the *PPPA*, which our Court is obviously not entitled to do.

[140] I have searched in vain for an explanation in my colleague’s reasons as to why she saw fit to reverse the order of the analysis, despite no party having asked the Court to do so. Not only did neither the appellant nor the respondent ask our Court to adopt a framework different from the one applied in *Pointes*, but they both presented their arguments by addressing the merits-based hurdle first and then the public interest hurdle, as they should. The chambers judge and the Court of Appeal also proceeded in this order, as *Pointes* instructed them to do. The fact that the parties and interveners dedicated most of their submissions to the public interest hurdle is hardly a principled or good reason to change the framework adopted in *Pointes*.

[141] While I recognize that the public interest weighing exercise mandated by s. 4(2)(b) of the *PPPA* is the “crux” or “core” of the analysis, it must first be established that the underlying claim arises from an expression made by the applicant on a matter of public interest and that it clears the merits-based hurdle (*Pointes*, at paras. 18 and 61-63; *Bent*, at para. 139). Ultimately, it is “the public interest in allowing meritorious lawsuits to proceed” that is weighed against “the public interest in protecting expression on matters of public interest” (*Pointes*, at para. 18 (emphasis added)).

[142] Lower court judges may wish to enable proper appellate review and make alternative findings through the public interest weighing exercise even if a claim fails to clear the merits-based hurdle. The proper way to proceed is to follow the approach adopted by our Court in *Pointes*: first determine whether the claim clears the merits-based hurdle and *then* address the public interest hurdle (*Pointes*, at

paras. 112-13; see also *Echelon Environmental Inc. v. Glassdoor Inc.*, 2022 ONCA 391, at para. 12 (CanLII). Furthermore, this approach is directly in line with the legislative intent behind s. 4 of the *PPPA*, and s. 4(2)(b) in particular.

[143] Consequently, I will first analyze whether the chambers judge erred in concluding that Mr. Hansman has a valid fair comment defence. Afterwards, I will address whether the chambers judge erred in his analysis of the public interest hurdle. As I explain below, I am of the view that the chambers judge committed reviewable errors both in his assessment of the fair comment defence and in his analysis of the public interest hurdle. Indeed, the chambers judge misconstrued the applicable test under s. 4(2)(a)(ii) and (b) of the *PPPA*. Further, he misconstrued the law on defamation and on the fair comment defence, and failed to direct his mind to the quality of the expression at issue when assessing the public interest in protecting it. Therefore, the applicable standard of review is correctness unless the chambers judge's findings are not affected by these errors (*Bent*, at para. 77, citing *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8 and 36).

A. *Fair Comment Defence*

- (1) There Are Grounds to Believe That Mr. Hansman Cannot Avail Himself of a Fair Comment Defence for at Least Some of His Statements

[144] Under s. 4(2)(a)(ii) of the *PPPA*, the plaintiff must demonstrate that “the applicant has no valid defence in the proceeding”. The standard is not a very demanding

one. It requires showing that there is a basis in law and in the record for finding that there is no valid defence, taking into account the stage of the proceeding at which the application is brought (*Pointes*, at paras. 37-39; *Bent*, at para. 103).

[145] To succeed, the plaintiff does not have to establish that the applicant has no valid defence for *every* impugned statement; it suffices that a valid defence is unavailable for some statements or even only one. This is because s. 4 of the *PPPA* contemplates the dismissal of a proceeding altogether (see s. 1 of the *PPPA*, which defines “dismissal order” as “an order under section 4 dismissing a proceeding”). It does not allow for partial dismissal of the proceeding or for striking out parts of the claim. This is entirely consistent with the *PPPA*’s purpose, which is to screen out *lawsuits* in order to prevent defendants from being unduly pulled into the litigation process (*Pointes*, at paras. 16 and 62).

[146] For this reason, it is important to examine the defamatory sting and the context of each of the impugned statements in order to assess the availability of a defence. Therefore, I agree with the Court of Appeal that the chambers judge erred by failing to examine each of the impugned statements contained in the 11 publications. This was particularly critical because a fair comment defence was being advanced by Mr. Hansman. Assessing the availability of such a defence requires a careful review of the impugned statement in the context of the publication in which it appeared to determine whether it is recognizable as a comment rather than as a statement of fact (*WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 28).

[147] There is indeed a difference between “comment or criticism and allegations of fact, such as that disgraceful acts have been committed” (*Davis v. Shepstone* (1886), 11 App. Cas. 187 (P.C.), at p. 190, cited in *WIC Radio*, at para. 70, per LeBel J., concurring). A defining feature of a comment is that it is generally incapable of being proven (*WIC Radio*, at para. 26, citing *Ross v. New Brunswick Teachers’ Association*, 2001 NBCA 62, 238 N.B.R. (2d) 112, at para. 56). Similarly, a comment must be clearly recognizable as such and not be “so entangled [with allegations of fact] that inferences cannot be distinguished from facts” (R. E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States* (2nd ed. (loose-leaf)) (“*Brown on Defamation*”), at § 15:5). Any ambiguity in this regard must benefit the plaintiff (R. E. Brown, *The Law of Defamation in Canada* (2nd ed. (loose-leaf)), at p. 15-27, cited in *Ager v. Canjex Publishing Ltd.*, 2005 BCCA 467, 259 D.L.R. (4th) 727, at para. 43). The inquiry is an objective one aimed at discerning the perception of the reasonable viewer or reader (*Brown on Defamation*, at § 15:4).

[148] The chambers judge cursorily examined this issue. He concluded that the impugned statements were very similar to those in *WIC Radio*, which were found to be comments. He ultimately found that “no reasonable trier of this case could distinguish the facts in this case from the facts in *WIC*” (2019 BCSC 2028, 59 C.C.E.L. (4th) 205, at para. 137; see also para. 178). In so doing, he erred.

[149] Characterizing speech as a comment or as a statement of fact involves a contextual analysis, the result of which is *at most* a finding of mixed law and fact. The

present case illustrates why merely transposing a finding of mixed law and fact to another case is a questionable practice that should be avoided. Unlike the defendant in *WIC Radio*, Mr. Hansman was not a well-known, controversial commentator when he made the impugned statements; he was speaking in his capacity as president of the British Columbia Teachers' Federation ("BCTF"), a union composed of 45,000 teachers (C.A. reasons, 2021 BCCA 222, 50 B.C.L.R. (6th) 217, at para. 35). Moreover, contrary to the facts of *WIC Radio*, Mr. Hansman's statements were not published in an editorial; they were reported in news articles. These are critical differences, as both the reputation of a defendant, such as Mr. Hansman, and the format of the publication matter in classifying expression as a comment or a statement of fact and in assessing the availability of the fair comment defence in general (*WIC Radio*, at paras. 27 and 48). More fundamentally, as the Court of Appeal aptly noted, the court's ruling in *WIC Radio* was the result of an adjudication on the merits at trial, unlike in the present case (para. 39).

[150] In my opinion, there are grounds to believe that the fair comment defence is not available for two of Mr. Hansman's statements because they were made as statements of fact.

[151] In January 2018, news articles regarding Mr. Neufeld were published in the *Fraser Valley News* and the *Agassiz Harrison Observer*. Both articles, available online, reproduced a press release from the Chilliwack Teachers' Association. The press release announced the passing of a motion of non-confidence in the Chilliwack

Board of Education due to its perceived inaction in connection with Mr. Neufeld's statements concerning the Sexual Orientation and Gender Identity 123 ("SOGI 123") initiative. Mr. Hansman was quoted as saying the following:

Sometimes our beliefs, values, and responsibilities as professional educators are challenged by those who promote hatred. This is often the case when it comes to sexual health curriculum in schools and our efforts to ensure safe, inclusive schools for all students — including LGBTQ students [Emphasis added; emphasis in original deleted.]

(A.R., vol. I, at p. 87)

[152] Read plainly and in the context of the press release, this statement implies that Mr. Neufeld promoted hatred against an identifiable group, i.e. LGBTQ students.

[153] Then, in April 2018, a news article was published on CityNews 1130's website. The article pertained to the human rights complaint filed against Mr. Neufeld by the BCTF. In the article, Mr. Hansman was quoted as saying that Mr. Neufeld had "tip toed quite far into hate speech" (A.R., vol. I, at p. 89 (emphasis deleted)). This statement is at the core of Mr. Neufeld's action in defamation (chambers judge's reasons, at para. 25).

[154] Both of these statements carry the defamatory sting that Mr. Neufeld engaged in hate speech. Our law requires an onerous and objective standard to be met for speech to constitute hate speech (*Keegstra*, at pp. 777-78, per Dickson C.J.; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 56). Understandably, allowing subjective sensibilities to play a role in the

analysis would endanger the constitutionality of anti-hate speech laws. Therefore, what is considered hate speech is not speech that evokes a wide range of emotions, but speech that elicits deep feelings of detestation and vilification (*Keegstra*, at p. 777; *R. v. Andrews* (1988), 65 O.R. (2d) 161 (C.A.), at p. 179, per Cory J.A., aff'd [1990] 3 S.C.R. 870). Such speech sits at a distance from offensive or hurtful expression that “does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects” (*Whatcott*, at para. 57; see also para. 46).

[155] In my respectful view, affirming that Mr. Neufeld engaged in hate speech is quite different from expressing a judgment or making a remark incapable of proof. Read in their context, the aforementioned hate speech allegations appear similar to allegations of fraud, theft or other criminal conduct that have been found to be statements of fact for which a fair comment defence is not available (see, e.g., *Nanda v. McEwan*, 2019 ONSC 3357, at para. 48 (CanLII) (regarding allegations of theft and corruption), aff'd 2020 ONCA 431, 450 D.L.R. (4th) 145; *Hall v. Kyburz*, 2006 ABQB 294, at para. 33 (CanLII) (regarding allegations of various criminal acts, such as fraud, kidnapping and extortion), aff'd 2007 ABCA 228). I view the present case as being similar to *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163, 144 O.R. (3d) 211, and *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166, 431 D.L.R. (4th) 501, in which the Court of Appeal for Ontario held that statements that a party “supported terrorists” (*Lascaris*, at para. 34) or was involved in corruption and collusion (*Bondfield*, at para. 17) could be viewed as statements of fact.

The present appeal also has similarities to *Pan v. Gao*, 2020 BCCA 58, 33 B.C.L.R. (6th) 211, in which the Court of Appeal for British Columbia held that calling someone a “seasoned liar” was a statement of fact (paras. 101-4).

[156] My colleague distinguishes *Lascharis*, *Bondfield* and *Pan* from the matter at hand because “[i]n the context of those cases, the statements suggested concrete knowledge of past wrongdoings, which is distinguishable from the generalized critiques at issue in this case” (para. 110). But to accuse a person of hate speech is not the same as making a “generalized critique”. On the contrary, it *is* to attribute precise wrongdoing to that person (para. 110).

[157] For this reason, I conclude that there are grounds to believe that the two impugned statements were made as statements of fact and not as comments and, consequently, that the fair comment defence is not available to Mr. Hansman. I turn now to the public interest hurdle.

B. *Public Interest Hurdle*

(1) The Harm Likely to Have Been or to Be Suffered by Mr. Neufeld Is Very Serious

[158] Mr. Neufeld claims damages for non-monetary harm. He seeks compensation for the stress, anxiety, humiliation, mental and emotional distress as well as reputational harm suffered as a result of Mr. Hansman’s statements (A.R., vol. I, at

pp. 97-98). The chambers judge noted that Mr. Neufeld presented no evidence, aside from one paragraph in his affidavit, showing that he had suffered any damage that could be linked to Mr. Hansman's statements. It is worth emphasizing that what was required of Mr. Neufeld at this preliminary stage was not to prove harm or causation but only to "provide evidence for the . . . judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link" (*Pointes*, at para. 71). In my opinion, and as I demonstrate below, the chambers judge erroneously ignored factors aggravating the harm likely to have been or to be suffered by Mr. Neufeld, despite the fact that they were specifically argued by him (para. 155).

[159] First, the chambers judge failed to consider that the seriousness of the harm can be inferred from the gravity of the impugned statements. Indeed, the "nature of the defamatory comment is the most important element in assessing the amount of damages" (*Brown on Defamation*, at § 25:19; see also P. A. Downard, *The Law of Libel in Canada* (5th ed. 2022), at §14.01[2][b]). For example, allegations of criminal conduct rank high on the scale of seriousness (*Grant*, at para. 111; see also *Lascaris*, at paras. 40-41, cited with approval in *Canadian Union of Postal Workers v. B'nai Brith Canada*, 2021 ONCA 529, 460 D.L.R. (4th) 245, at para. 39, per Jamal J.A. (as he then was); *Clark v. East Sooke Rural Association*, 2004 BCSC 1120, at para. 132 (CanLII); *Manno v. Henry*, 2008 BCSC 738, at para. 79 (CanLII); *Lalli v. Athwal*, 2017 BCSC 1931, at para. 141 (CanLII); *Mann v. International Association of Machinists and Aerospace Workers*, 2012 BCSC 181, at para. 73 (CanLII)).

[160] The same can be said of hate speech allegations. They refer to objectively and undeniably abhorrent conduct that can give rise to criminal prosecution (*Criminal Code*, R.S.C. 1985, c. C-46, s. 319(2)). Such speech exposes members of an identifiable group to extreme and deep-felt emotions of detestation and vilification (*Whatcott*, at para. 59; *Keegstra*, at pp. 777-78). It “lays the groundwork for later, broad attacks on vulnerable groups. These attacks can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide” (*Whatcott*, at para. 74). Regardless of whether such conduct is characterized as a criminal offence under the *Criminal Code* or as the subject matter of a human rights complaint, accusing a person of having “tip toed quite far into hate speech” or having promoted hatred against an identifiable group is extremely damaging to that person’s reputation. In my opinion, the Court of Appeal was right in noting that such an accusation “can inflict serious reputational harm” (para. 68).

[161] Second, the chambers judge did not consider the absence of an apology from Mr. Hansman, which is another aggravating factor increasing Mr. Neufeld’s harm (*Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), at para. 51).

[162] Third, the chambers judge did not take into account the stature of Mr. Hansman, who, at all relevant times, was acting as the president of the BCTF. This is likely to have magnified Mr. Neufeld’s harm. Indeed, the “greater the reputation of the defendant, the greater the impact the defamation can be expected to have on the plaintiff” (Downard, at §14.01[2][g]; *Bent*, at para. 161).

[163] Finally, the chambers judge failed to consider the context of the publication and the platform on which the impugned statements were published (Downard, at §14.01[2][c]). The statements accusing Mr. Neufeld of hate speech were published by news organizations in articles available on the Internet (A.R., vol. I, at pp. 87 and 89). The anonymity offered by the Internet, combined with increased accessibility and information sharing, can result in greater harm to a person's reputation (*Crookes v. Newton*, 2011 SCC 47, [2011] 3 S.C.R. 269, at para. 37; *Barrick Gold*, at paras. 31-34; *Pineau v. KMI Publishing and Events Ltd.*, 2022 BCCA 426, at para. 69 (CanLII)).

[164] All of these aggravating factors relate to Mr. Hansman's expression and increase the amount of general damages, which are presumed in defamation cases (*Bent*, at para. 144; C.A. reasons, at paras. 55 and 57). These factors were erroneously ignored by the chambers judge. The chambers judge also erred in discounting the part played by Mr. Hansman in Mr. Neufeld's harm because others had expressed similar criticism towards Mr. Neufeld (para. 150). While I acknowledge that Mr. Hansman was not alone in criticizing Mr. Neufeld, the Court of Appeal was right in pointing out that a definitive determination of Mr. Hansman's part in Mr. Neufeld's harm is not required at this stage of the proceeding (*Pointes*, at paras. 71-72; C.A. reasons, at para. 59). To conclude otherwise would impose too onerous a burden on Mr. Neufeld at such an early stage. Furthermore, as our Court noted in *Pointes*, causation is not an "all-or-nothing proposition" (para. 72).

[165] The fact that Mr. Neufeld was re-elected as trustee may be a mitigating factor, but it does not nullify his claim, nor does it render his harm minor. Even in cases where a defamatory statement is not believed, damages can be awarded to compensate the plaintiff for the injured feelings, psychological impact and inconvenience caused by the libel (*Bent*, at para. 149; Downard, at §14.01[2][f] and [h]). Likewise, the fact that Mr. Neufeld was not silenced by Mr. Hansman's statements does not negate any harm he suffered. Otherwise, public figures could claim only nominal damages for defamation unless they lost their platform as a result. That is not, nor has it ever been, the state of the law. Granted, the fact that a plaintiff has shied away from the public sphere as a consequence of defamatory remarks can certainly increase the damages awarded, but this is not the yardstick by which harm is measured.

[166] In my opinion, given the aggravating factors discussed above, the seriousness of Mr. Neufeld's harm should have been situated somewhere between the middle and the high end of the scale.

(2) The Public Interest in Allowing Mr. Neufeld's Claim to Proceed to Trial Outweighs the Public Interest in Protecting Mr. Hansman's Expression

[167] Because of the subsidiary nature of this issue, the chambers judge gave little consideration to the competing public interests. He briefly noted that Mr. Hansman's expression deserved "significant protection" because many of his statements pertained to the need for inclusive and safe schools or did not mention

Mr. Neufeld, and he suggested that public debate should be favoured in light of the limited damage suffered by Mr. Neufeld (paras. 160-61).

[168] The chambers judge failed to direct his mind to the *quality* of the expression (*Pointes*, at para. 74). This constitutes a reviewable error. In fairness, he did not have the benefit of our Court's decision in *Pointes*. However, such an inquiry is essential to determine "what is really going on" in the case, which is ultimately the exercise contemplated by s. 4(2)(b) of the *PPPA* (*Pointes*, at para. 81; *Bent*, at para. 172).

[169] The role of this Court is not and should not be to evaluate the soundness of Mr. Hansman's and Mr. Neufeld's respective positions on SOGI 123 (C.A. reasons, at para. 2; chambers judge's reasons, at para. 177). Freedom of expression is content-neutral, which is why its scope even encompasses expression that is "unpopular, distasteful or contrary to the mainstream" (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 968). This fundamental freedom would be seriously undermined if the outcome of the public interest weighing exercise under the *PPPA* depended on the alignment between the views expressed by the applicant and those held by the court.

[170] In my opinion, my colleague follows an improper path of reasoning when she justifies reinstating the chambers judge's dismissal order on the basis that Mr. Hansman's expression "promotes equality", which is also a "fundamental democratic value" (para. 9). Equality is not one of the competing values at play under

legislation designed to discourage strategic lawsuits against public participation (“SLAPPs”); “the protection of individual reputation and freedom of expression” are (para. 58).

[171] Moreover, the promotion of equality is not one of the core values underpinning freedom of expression (i.e., the search for truth, participation in social and political decision making, and diversity in forms of self-fulfillment and human flourishing) (*Keegstra*, at p. 728; *Irwin Toy*, at p. 976). Assigning any role to the promotion of equality in the assessment of the public interest in protecting expression goes against the doctrine of content neutrality embraced by this Court in its jurisprudence on s. 2(b) of the *Charter* (see, e.g., *Irwin Toy*, at p. 968; *Keegstra*, at p. 729; *R. v. Zundel*, [1992] 2 S.C.R. 731, at pp. 753-58). The more we evaluate the worthiness of expression in light of values unrelated to freedom of expression, the further we move from content neutrality. More importantly, the promotion of equality is in no way a factor tethered to the text of s. 4(2)(b) of the *PPPA* and, for this reason alone, is not a relevant factor in the public interest weighing exercise (*Pointes*, at para. 80).

[172] Ultimately, both Mr. Hansman and Mr. Neufeld had the right to express themselves on SOGI 123. It may be that Mr. Neufeld’s statements crossed the line and that he breached the *Human Rights Code*, R.S.B.C. 1996, c. 210, but that is for the British Columbia Human Rights Tribunal to decide following a hearing on the merits of the complaints filed against Mr. Neufeld.

[173] It is undeniable that Mr. Hansman's counter-speech concerned the importance of ensuring inclusive schools for LGBTQ students through the implementation of SOGI 123. But Mr. Hansman did not limit himself to criticizing Mr. Neufeld's views on SOGI 123 or to affirming his support for inclusive schools. He made personal attacks and serious hate speech accusations that were likely to cause or that did cause significant harm to Mr. Neufeld. This lowers the public interest in protecting his speech, as "defamatory statements and personal attacks are 'very tenuously' related to the core values which underlie s. 2(b) of the *Charter*" (*Thorman v. McGraw*, 2022 ONCA 851, 476 D.L.R. (4th) 577, at para. 15; see also *Hill*, at para. 106; *Pointes*, at paras. 74-75; *Bent*, at para. 163).

[174] What is really going on in the present case is not an attempt to suppress Mr. Hansman's expression. Rather, this is "a case in which one party is attempting to remedy seemingly legitimate harm suffered as a result of a defamatory communication" (*Bent*, at para. 172). In other words, the harm likely to have been or to be suffered by Mr. Neufeld strongly militates in favour of allowing the proceeding to continue (para. 159).

[175] Restricting the availability of tort actions for defamation can have a chilling effect. In *Globe and Mail Ltd. v. Boland*, [1960] S.C.R. 203, this Court refused to extend the defence of qualified privilege to defamatory statements related to the fitness of political candidates, in part because it would deter future candidates from seeking office (pp. 208-9; see also *Hill*, at para. 106). Likewise, in the context of defamatory

counter-speech, interpreting s. 4 of the *PPPA* so as to deprive defamed parties who have suffered serious harm of their day in court could very well be detrimental to public debate. It could prevent those who hold controversial or unpopular views from entering the public arena to share them. This conclusion does not turn the concept of chilling effect on its head, contrary to what my colleague contends (para. 77). My colleague asserts that our Court’s jurisprudence on this concept “addresses the concern that the possible imposition of a legal penalty would cause speakers to refrain from commenting on matters of public interest” (para. 77). However, the deprivation, through a court order, of a party’s right to vindicate a legitimate claim *also* imposes a legal penalty on that party.

[176] I therefore agree with the Court of Appeal that the chambers judge erred in failing to consider the chilling effect that the dismissal of Mr. Neufeld’s claim might have on future expression by others (*Pointes*, at para. 80; C.A. reasons, at para. 65).

[177] Anti-SLAPP legislation like the *PPPA* does not provide a licence to defame (*Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129, 478 D.L.R. (4th) 514, at para. 33). Being the subject of defamatory counter-speech is not the price that those who engage in public debate by expressing minority views on contentious topics must inevitably pay. This is not what is envisioned by s. 4 of the *PPPA*, which, like s. 137.1 of the *CJA*, aims to ensure “that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to vindicate that claim” (*Pointes*, at para. 48). In

my view, and with all due respect, my colleague is depriving Mr. Neufeld of that very opportunity.

[178] As for Mr. Hansman's motion to adduce fresh evidence, I am of the view that both of the affidavits he seeks to file are not relevant to the decisive issues on appeal and therefore do not meet the test for admitting fresh evidence set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. The purpose of the first affidavit is to contradict Mr. Neufeld's claim that dismissing his defamation action would have a chilling effect on him by demonstrating that he continued to speak out after the chambers judge dismissed his action. However, the live issue before this Court is not whether Mr. Neufeld's expression was stifled because of the chambers judge's dismissal order. Rather, it is whether other people's expression could be. The second affidavit sets out developments in the human rights complaint filed by the BCTF; it is not relevant to the disposition of this appeal.

[179] For these reasons, I would dismiss the appeal with party and party costs in this Court and ordinary costs in the Court of Appeal for British Columbia. Pursuant to s. 7(2) of the *PPPA*, I would make no order regarding the costs of the *PPPA* application in the Supreme Court of British Columbia.

Appeal allowed with costs, CÔTÉ J. dissenting.

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