Hansman v. Neufeld – SCC decision confirms that certain “counter-speech” is deserving of protection

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The Supreme Court of Canada recently considered the statutory test to dismiss strategic lawsuits against public participation (SLAPPs) under British Columbia’s *Protection of Public Participation Act*, S.B.C. 2019, c. 3 (PPPA).

On May 19, 2023, the Court released its long-anticipated decision in *Hansman v Neufeld*, 2023 SCC 14. In a 6–1 decision, the SCC granted Mr. Hansman’s appeal and dismissed a defamation lawsuit brought in 2018 by a school board trustee against a former teachers’ union president, who described comments made by the trustee as bigoted, transphobic, and hateful. The SCC provided further guidance on the interpretation of the anti-SLAPP framework in British Columbia and Ontario.

Key takeaway

To successfully resist an anti-SLAPP application a plaintiff must provide evidence that enables the court to draw an inference that he or she suffered harm of a magnitude sufficient to outweigh the public interest in protecting the defendant’s expression.

Background

On Oct. 23, 2017, Barry Neufeld, a public school board trustee in British Columbia, made online posts criticizing the way British Columbia schools were implementing a curriculum to teach children about sexual orientation and gender identity. In his posts, Mr. Neufeld described the curriculum as a “weapon of propaganda” that teaches the “biologically absurd theory” that “gender is not biologically determined, but is a social construct". Over the next year, Glenn Hansman, the President of the British Columbia Teacher’s Union, was quoted in a number of publications and media interviews describing Mr. Neufeld’s statements as anti-2SLGBTQ+, hateful, and discriminatory. Mr. Neufeld continued to publicly express his opinions, and Mr. Hansman continued to respond, expressing that Mr. Neufeld’s comments were “hateful” and created an unsafe school environment. Mr. Neufeld sued for defamation. Mr. Hansman then applied to have Mr. Neufeld’s defamation action dismissed as a SLAPP under the PPPA.

The PPPA creates a pre-trial procedure that allows a defendant to apply to the court for an order dismissing an action arising out of an expression of public interest. The PPPA was enacted in 2019. It is a legislative response to lawsuits brought for an improper purpose, namely to silence expression and financially punish one's critics. Ontario and Québec have enacted similar laws, commonly known as anti-SLAPP laws.

A dismissal application under the PPPA first requires the defendant to prove that the proceeding arises from expression that relates to a matter of public interest. If the defendant does so, the onus shifts to the plaintiff to satisfy the court there are grounds to believe that: (1) the proceeding has substantial merit, and (2) the defences raised by the defendant have no real prospect of success. If the court is not satisfied the plaintiff has met their onus as to one or both criteria, it must dismiss the proceeding.

If the plaintiff meets their burden, the court must conduct a public interest weighing exercise in which the plaintiff must satisfy the court that the harm they are likely to have suffered outweighs the public interest in protecting that expression.

The decision on appeal

In the British Columbia Supreme Court, the chambers judge found that Mr. Hansman had a valid fair comment defence to Mr. Neufeld's action, and that the public interest in protecting Mr. Hansman's expression outweighed the public interest in allowing Mr. Neufeld's action to continue. The chambers judge accordingly dismissed Mr. Neufeld's lawsuit. On appeal, the British Columbia Court of Appeal (BCCA) disagreed on both accounts and overturned the chambers judge's decision. The BCCA notably held that the chambers judge erred in his characterization of Mr. Hansman's expressions as comments under the fair comment defence and erred at the public interest weighing stage by failing to consider the presumption of damages in defamation actions and the potential "chilling effect" that dismissing Mr. Neufeld's lawsuit would have on future public debate.

The Supreme Court of Canada decision

Writing for the majority, Justice Karakatsanis departed from the traditional approach of the anti-SLAPP analysis and dealt with the public interest weighing stage before considering the validity of Mr. Hansman's defences (which was criticized by Côté J. in her dissent).

Weighing of the public interest

The primary issue the Supreme Court of Canada considered was the public interest weighing exercise.

The Majority of the Court held that a plaintiff must provide evidence that enables the court "to draw an inference of likelihood" that the plaintiff suffered harm of a magnitude sufficient to outweigh the public interest in protecting the defendant's expression, and there must be evidence that enables the judge to infer a causal link between the expression and the harm suffered. The relevant harm is harm to the plaintiff caused by the defendant's statements, not by the plaintiff's inability to sue. The PPPA calls only for

the weighing of the harm likely to have been suffered by the plaintiff. There is no reference in the anti-SLAPP legislation to any harm that the plaintiff or others might suffer from losing their ability to express themselves in the future if the action were dismissed or to sue in defamation. Any chilling effect that Mr. Neufeld might suffer from dismissal of his lawsuit did not constitute "harm" for the purposes of the public interest weighing stage. The Court scrutinized the evidentiary record and determined that Mr. Neufeld suffered limited harm as a result of Mr. Hansman's statements: Mr. Neufeld continued to express the same contentious views despite the public reaction and won re-election a year later.

In considering the other side of the weighing exercise, the Court recognized that not all expression is created equal, noting that jurisprudence under s. 2(b) of the *Canadian Charter of Rights and Freedoms* explains that the nature of the expression dictates the level of protection afforded to it. Similarly, the values and principles underlying equality rights under the *Charter* may factor into the weighing analysis in a proper case. The level of protection afforded to any particular expression will 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 section 2(b) of the *Charter*, the greater the public interest in protecting it. While the Court recognized that the value of Mr. Neufeld's expression was not the issue before the Court, the statements made by Mr. Neufeld, to which Mr. Hansman was responding, provided critical context in characterizing and assessing the value of Mr. Hansman's statements.

The Court focused strongly on the content of Mr. Hansman's expressions and imported the concept of "counter-speech" into the analysis. Counter-speech that aims to protect a "vulnerable or marginalized group" engages the values at the "core" of s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The Court placed a high value on the public interest in protecting the particular expression at issue before it in this case due to its content (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). Given Mr. Neufeld's failure to establish harm serious enough to outweigh that substantial public interest, the Court held that the weighing exercise required a dismissal of the action.

Validity of the fair comment defence

Consistent with the Ontario Superior Court of Justice's decision in *Volpe v Wong-Tam*, 2022 ONSC 3106 argued by BLG, the SCC confirmed that the fair comment defence did not require Mr. Hansman to demonstrate that Mr. Neufeld was bigoted, transphobic, promoted hatred, or created an unsafe environment for students, only that there was a factual basis for his expression. Similarly, the SCC confirmed prior Ontario jurisprudence that has held that labels such as homophobic, transphobic, bigoted, racist, or sexist are properly characterized as comment, not fact.

Dissent of Justice Côté

In dissent, Côté J. departed from the Majority's decision on the weighing exercise as well as the fair comment defence. To Côté J., the issue before the court was not

whether it agreed with either party's expression, but whether the court should dismiss Mr. Neufeld's action at an early stage.

As a preliminary matter Côté J. criticized the structure of the Majority's analysis. The plaintiff in the proceeding must first overcome a merits-based hurdle, and only once this is shown does the court have to engage the weighing exercise. 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.

On the fair comment defence, Côté J. was of the view that there were grounds to believe that Mr. Hansman's statements implying that Mr. Neufeld engaged in hate speech were statements of fact and therefore could not be shielded under the fair comment defence. At the public interest weighing stage, Côté J. was of the view that the magnitude of the harm could be inferred from the gravity of the impugned statements, and allegations of hate speech rank high on the scale of seriousness. Côté J. also took the view that the equality values of s. 15(1) of the Charter were not a relevant consideration under existing anti-SLAPP legislation, and cautioned that not all counter-speech is of equal value. Côté J. would have upheld the BCCA's view that the potential chilling effect on public debate was a relevant consideration at the public interest weighing stage. She would have allowed the lawsuit to continue.

Conclusions

The Supreme Court of Canada recently analyzed nearly identical Ontario anti-SLAPP legislation in two decisions released concurrently: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, and *Platnick v. Bent*, 2020 SCC 23. In *Neufeld*, the Court confirmed that, given the substantial similarity between the Ontario and British Columbia laws, *Pointes* and *Bent* apply with equal force to the PPPA. *Neufeld* provides further guidance on the interpretation of both the Ontario and British Columbia anti-SLAPP laws.

The SCC's decision in *Hansman v Neufeld* is a strong pronouncement that anti-SLAPP legislation in British Columbia and Ontario is alive and well.

This decision is the first in Canada to import the notion of protecting "counter-speech" as a relevant consideration under the anti-SLAPP framework. Even forceful "counter-speech" containing accusations of hate speech may be protected from a defamation lawsuit where the speech is aimed at the protection a group of persons the court finds to be marginalized or vulnerable.

BLG has a robust appellate practice and has acted for plaintiffs and defendants involved in anti-SLAPP applications in British Columbia and Ontario. For more information, please reach out to any of the key contacts listed below.

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