

CANADA / JUDGMENT

## Lang v. Neufeld

2022 BCSC 130

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Supreme Court of British Columbia

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2022 BCSC 130 Lang v. Neufeld

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lang v. Neufeld,

2022 BCSC 130

Date: 20220127

Docket: S211614

Registry: Vancouver

Between:

Peter Marshall Lang

Petitioner

And

Barry Neufeld

Respondent

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

Counsel for the Petitioner:

N.M.G. Chantler

A.S. Smith

Counsel for the Respondent:

P.E. Jaffe

Place and Date of Hearing:

Vancouver, B.C.

June 25, July 2 and

October 8, 2021

Written Submissions of the Petitioner:

August 19 and September 13, 2021

Written Submissions of the Respondent:

September 2, 2021

Place and Date of Judgment:

Vancouver, B.C.

January 27, 2022

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- [1] The Petition in this matter seeks an order declaring the office of the respondent Mr. Neufeld as a trustee of the Board of Education of School District No. 33 (Chilliwack) (the "Board") to be vacant as a result of an alleged contravention by Mr. Neufeld of the conflict of interest provisions of the School Act, R.S.B.C. 1996, c. 412.
- [2] Mr. Neufeld has brought a preliminary application seeking an order dismissing the Petition pursuant to s. 4 of the Protection of Public Participation Act, S.B.C. 2019, c. 3 [PPPA]. Mr. Neufeld denies that he was in a conflict of interest, and asserts that the Petition was brought in an attempt to silence him and punish him for speaking out on matters of public interest.

## **Factual Background**

- [3] The Board is a board of education established under the School Act. It is comprised of seven trustees who are elected for four-year terms. It is responsible for approximately 30 schools in the Chilliwack area attended by approximately 14,000 students and serviced by approximately 1,800 teachers and support staff. Many of its unionized employees, which include both support staff and teachers, are members of either the Canadian Union of Public Employees, Local 411 ("CUPE") or the British Columbia Teachers Federation ("BCTF").
- [4] Mr. Neufeld is a retired corrections officer. He is also a trustee on the Board. He was first elected to the Board in 1993 and, apart from a three-year hiatus from 2008 to 2011, has been a trustee ever since.

- [5] In about 2016 or 2017, a new anti-bullying, tolerance and inclusiveness resource known as "SOGI 1 2 3" was adopted for use in Chilliwack schools. Both CUPE and the BCTF were strong supporters of SOGI 1 2 3. Mr. Neufeld was opposed to this resource, believing that it is harmful to children and that it displaces the role of parents.
- [6] In October 2017, Mr. Neufeld published a comment on his Facebook page criticizing the resource, and thereafter spoke at a public meeting about his concerns. The views he expressed were controversial and objectionable to a number of people, including some of his fellow trustees as well as the leadership of both CUPE and the BCTF. They also attracted critical comment from provincial government officials.
- [7] The appropriateness of Mr. Neufeld's comments is not in issue on this application; however, they are an important part of the context of the matters that are in issue.

### CUPE Complaint

- [8] On January 15, 2018, CUPE filed a complaint (the "Complaint") with the British Columbia Human Rights Tribunal ("BCHRT"). The Complaint named two respondents: Mr. Neufeld and the Board. With respect to both respondents, the Complaint identified:
- a) The "Area of Discrimination" as "Employment"; and
  - b) The "Grounds of Discrimination" as "Gender Identity or Expression".
- [9] The Complaint alleged a violation of s. 13(1)(b) of the Human Rights Code, R.S.B.C. 1996, c. 210 [HRC], which provides that:
- (1) A person must not
  - (b) discriminate against a person regarding employment or any term or condition of employment

because of the Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

- [10] The alleged discrimination was particularized in an attached form which asserted that:
- a) Mr. Neufeld "made and published homophobic and transphobic statements pertaining to the work environments and working conditions of members of [CUPE]"; and
  - b) The Board had failed "to take adequate measures to protect its employees from this discrimination", and had "failed to provide a work environment free of discrimination".

[11] The Complaint went on to assert, as its legal foundation, that "an employer is responsible for ensuring a discrimination and harassment-free work environment", and that "[d]irectors or officers of an organization are subject to s. 13 of the [HRC]". It asserted that Mr. Neufeld:

is a trustee of the Board that operates and is responsible for the workplace of CUPE members; he stands in a position of authority over members of CUPE in the context of their employment.

[12] With respect to "Remedy Sought", the Complaint stated:

36. The Complainant seeks a declaratory order that the Respondents have breached the Code.

37. The Complainant seeks an order that the Respondent Board require trustees and senior management to complete training on LGBTQ equality rights, and on protecting LGBTQ students in schools.

38. Further the Complainant seeks an order directing the Board to enforce Board Policy 402 by adopting a motion of censure.

39. The Complainant seeks an order for compensation to injury to dignity, feelings, and self-respect in the amount of \$50,000 to be paid on behalf of the affected employees to a non-profit organization that advocates for LGBTQ youth.

[13] CUPE issued a media release on January 15, 2018, announcing the filing of the Complaint.

[14] On January 18, 2018, the Board convened an emergency in-camera meeting and voted to request Mr. Neufeld's resignation as a trustee. Mr. Neufeld refused to resign. He was then removed from all school liaison work. The next day, the Board issued its own media release, announcing the steps it took at the January 18, 2018 meeting.

[15] On January 29, 2018, the BCTF filed its own complaint with the BCHRT in terms very similar to the Complaint that had been filed by CUPE.

### School Protection Program

[16] The School Protection Program ("SPP") provides insurance-type coverage for boards of education, including "Employment Practices Liability". It provides for the payment of all defence costs in respect of claims that are accepted as falling within the scope of coverage. It also provides that the program will pay any loss that a covered entity becomes legally obligated to pay as a result of a claim for which coverage is provided. The SPP maintains the right to select and appoint legal counsel.

[17] On April 26, 2018, the program wrote to Mr. Neufeld acknowledging the Complaint and advising:

This letter will confirm Employment Practices Liability Program (EPLP) coverage for the above-noted matter.

Guild Yule LLP has been retained as your legal counsel.

[18] The letter confirmed coverage for the Complaint without any limitation or reservation of rights. A nearly identical letter to Mr. Neufeld confirmed coverage for the BCTF complaint.

[19] The SPP appointed separate counsel for the Board in respect of each of the two complaints.

#### 2018 Election

[20] School board elections occurred on October 20, 2018. Mr. Neufeld's controversial positions were prominent in the election campaign.

[21] Mr. Neufeld was re-elected to the Board. The Board that was elected in October 2018 was deeply divided, with a majority of four trustees strongly opposed to Mr. Neufeld and his views and two other trustees who often voted with Mr. Neufeld on controversial matters.

[22] Ms. Willow Reichelt was elected as a trustee in the 2018 election. Two years later, on October 30, 2020, she became Chair of the Board. Although not a party to this proceeding, she has provided most of the substantive evidence in support of the Petition, and in opposition to Mr. Neufeld's application to dismiss the Petition.

#### School Board Meeting

[23] In the fall of 2020, the Board through its counsel negotiated a proposed settlement of the CUPE Complaint, which included:

- a) The reading of a statement by the Board;
- b) Mandatory training for the Board's trustees and senior management; and
- c) A donation of \$5,000 to a local, non-profit organization that advocates for LGBTQ youth.

[24] Arrangements were made for members of the Board to get together by videoconference, on an in-camera basis, to discuss the potential settlement. A decision was made not to notify Mr. Neufeld of the videoconference. Although Ms. Reichelt says in her affidavit that this decision was made by "the Board", it does not appear that the Board met as a group to determine who should be given notice. Presumably, that decision was made either by the Board Chair or by senior staff. In any event, Mr. Neufeld heard about the meeting and, through counsel, insisted on his right to be present. He ultimately attended.

[25] The evidence indicated that a preliminary objection was made to the meeting proceeding, given the lack of proper notice. By majority vote, the Board determined to go ahead.

[26] The lawyer who had represented the Board in respect of the Complaint, Mr. Mitchell, attended the meeting to advise the Board of the proposed settlement. Mr. Mitchell advised Mr. Neufeld that, in his view, Mr. Neufeld was in a conflict of interest and should not participate. Mr. Neufeld disagreed; his evidence was that Mr. Mitchell:

sought to persuade me to recuse myself. He claimed I was in a conflict of interest for reasons that made no sense to me. I refused to be excluded from that Zoom discussion.

- [27] Mr. Neufeld vocalized his opposition to the proposed settlement. One of his concerns was the appropriateness of using Board funds to make a donation to an organization not involved in public schools. He was advised by Mr. Mitchell that the payment would be funded by the SPP.
- [28] Although Mr. Neufeld participated in the discussion of the proposed settlement, he did not vote on it.
- [29] The Board held its regular in-camera meeting in advance of its regular public meeting on October 20, 2020. According to Ms. Reichelt, Mr. Neufeld voiced his opposition to the CUPE settlement again during that meeting. It appears from the evidence that his comments that day were in the context of the Board's discussion of Mr. Neufeld's conduct.
- [30] There was one factual dispute between the parties with respect to the discussions by Board members about the settlement. Ms. Reichelt in her affidavit deposed that at the October 20, 2020 meeting, Mr. Neufeld commented that the Board's settlement of the Complaint would "cost him \$50,000". Her evidence was that this concern related to the fact that he would be the sole remaining respondent to the Complaint.
- [31] Both Mr. Neufeld and Heather Maahs, another Board member who filed an affidavit in this proceeding, deposed that Mr. Neufeld said no such thing. Mr. Neufeld and Ms. Maahs both asserted that all those present were aware that Mr. Neufeld was being covered by the SPP, so would have no personal financial exposure in any event.
- [32] The only documentary evidence in the application record with respect to the October 20, 2020 in-camera meeting was a "meeting summary" contained in the minutes of the Board's November 3, 2020 meeting, which recorded the following meeting topics but no other details:
1. BCPSEA Report
  2. Racism & Cultural Sensitivity Training
  3. Legal Fees
  4. Trustee Conduct
- [33] The other dispute between the parties was whether the October 5, 2020 discussion was, in fact, a meeting. Mr. Neufeld points out that there was no formal notice of meeting, no agenda, and no minutes taken, and that the decision not to give him notice was intentional and not inadvertent.
- [34] For the reasons set out below, I do not need to resolve either of those conflicts in order to deal with the present application.

[35] At the regular Board meeting on October 20, 2020, Mr. Neufeld made a statement during the "Trustee Reports" portion of the meeting. He expressed concern over what he saw as a disrespectful attitude of some trustees to those with a "creationist perspective", and commented that:

This recently was an issue because this Board has just voted to authorize a major donation of thousands of dollars to a private organization that advocates

At this point, Mr. Neufeld was cut off by the raising of a point of order on grounds that the confidentiality of in-camera discussions had been breached. The meeting chair did not accept the point of order, concluding that "there has been no breach of confidentiality". Mr. Neufeld then continued on with the more general aspects of his statement, saying nothing further about a donation.

[36] On October 21, 2020, Mr. Neufeld made a Facebook posting referencing a "pay out of thousands of dollars to a gay advocacy group".

[37] The minutes of the Board's November 3, 2020 meeting include the following "joint public statement" which was read out by the Chair, Ms. Reichelt:

Both the [Board] and [CUPE] believe that all schools and workplaces must be safe and welcoming for all, students and staff alike, regardless of sexual orientation, gender identity, race, religion or background. The Board and [CUPE] do not condone any conduct that is racist, sexist, transphobic or homophobic, or that discriminates on any other human right ground.

The Board has taken initiatives to improve the safe learning and working environment for LGBTQ individuals, including painting a rainbow crosswalk in the School District #33 parking lot, censuring discriminatory conduct from a trustee, and committing to provide education workshops for trustees on gender identity, sexual orientation, human rights and anti-discrimination. [CUPE] recognizes these initiatives by the Board and is committed to working with the Board going forward to ensure everyone feels included and respected in a safe learning and working environment while being fully and completely themselves.

The Board and [CUPE] are pleased that, following good faith discussions between them, they have come to a mutually satisfactory resolution of a human rights complaint against the Board by [CUPE], arising from one trustee's personal comments, and that that complaint against the Board will not be proceeding further.

[38] The minutes of the Board's November 24, 2020 meeting include the following:

During the in-camera meeting that took place earlier today, the Chilliwack Board of Education made the decision to exclude Trustee Barry Neufeld from the remaining in camera meetings during the 2020-2021 school year. This action was taken due to two serious incidents:

1. Trustee Neufeld publicly disclosed confidential information that had been discussed at an in-camera meeting.

2. Trustee Neufeld refused to recuse himself from an Board in-camera meeting where an issue was discussed that he had a pecuniary interest in.

These incidents were violations of Section 58 of the School Act, Section 3 of the Board Policy 212: In-Camera Meetings and Section 8 of Board Policy 205: Code of Ethics for Trustees.

## The Petition

- [39] This proceeding was commenced on February 19, 2021, through the filing of a Petition. It seeks declarations that Mr. Neufeld, in his capacity as a trustee of the Board, knowingly contravened s. 58 of the School Act, that his office is vacant, and that he is disqualified from running for a position as trustee of the Board.
- [40] As noted below, the School Act does not provide a statutory remedy by which boards of education can enforce provisions like s. 58 directly. Rather, the remedy provided under s. 63 of the School Act is made available to any "resident elector".
- [41] The petitioner, Mr. Lang, had no direct involvement in or knowledge of the events described above other than through reading about them in the media. He is a parent of a child who attends school in Chilliwack and ran unsuccessfully for a position on the Board in 2018. No issue was raised, however, as to his status as a resident elector.
- [42] The Petition was supported by two affidavits. The first was from Mr. Lang, which given his lack of direct knowledge, consisted primarily of newspaper articles and a recording of the October 20, 2020 public meeting. The second was from Ms. Reichelt, who provided copies of meeting minutes and her own direct evidence as to events at the October 5, 2020 videoconference. The minutes attached to Ms. Reichelt's affidavit did not include any minutes of in-camera meetings.
- [43] On the day the Petition was filed, counsel for the petitioner issued a media release to various news organizations, advising them of the commencement of this proceeding and noting that:

The litigation is funded by Affiliates of the BC Federation of Labour, who are amplifying the call of union workers, concerned parents, and those demanding equity in schools in Chilliwack.

The evidence indicates that both CUPE and the BCTF are affiliates of the BC Federation of Labour.

- [44] On March 11, 2021, the Board's trustees, including Mr. Neufeld, attended the two-hour training session contemplated by the settlement with CUPE.
- [45] At the time of the hearing before me, I was advised that the Complaint remained outstanding but that no hearing of the Complaint by the BCHRT had been scheduled.

## PPPA Application

- [46] The Petition and supporting affidavits were emailed to Mr. Neufeld on March 2, 2021, and formally served on him on March 10, 2021. On March 30, 2021, Mr. Neufeld filed an application under the PPPA seeking an order that the Petition be dismissed. The application also sought an order striking out the claim pursuant to R. 9-5 of the Supreme Court Civil Rules [Rules]. Those materials were, unfortunately, not served on counsel for the petitioner until April 9, 2021.
- [47] There followed various correspondence between counsel as to whether one or two days would be required for the hearing. Given difficulties in obtaining a two-day hearing, only one day was reserved for June 25, 2021.
- [48] Although Mr. Lang filed an Application Response on April 23, 2021, setting out his opposition to Mr. Neufeld's application, his responsive affidavits (which ultimately came from Ms. Reichelt and a legal assistant) were unfortunately not served on Mr. Neufeld's lawyer until the evening of June 16, 2021.
- [49] Mr. Neufeld's reply affidavits were sworn on Monday, June 21, 2021 - just four days before the June 25, 2021 hearing.
- [50] At the hearing on June 25, 2021, Mr. Neufeld's counsel suggested that given the lack of available time, the Court should focus initially on the application to strike out the Petition pursuant to R. 9-5 of the Rules. However, s. 5(1) of the PPPA provides that:
- Subject to subsection (2), if an applicant serves on a respondent an application for a dismissal order under section 4, no party may take further steps in the proceeding until the application, including any appeals, has been finally resolved.
- [51] In light of that provision, and given the likelihood that a R. 9-5 application would constitute a "further step", I directed the parties to focus on the PPPA application and arranged for a second hearing day on July 2, 2021 to ensure the parties had time to make their submissions on the PPPA issues.
- [52] On July 6, 2021, having heard two days of submissions and reviewed the materials, I issued a memorandum to the parties, noting in part that:

It appears to me that the parties on this matter only truly joined issue as to key matters on the application in the affidavits exchanged in the days leading up to the hearing (i.e. on June 16 and 21, 2021). It was in the context of those affidavits that the alleged conflict was set out in detail by Ms. Reichelt and Mr. Neufeld's position in respect of insurance coverage became clear.

That has left the court with both an unsatisfactory factual basis on which to determine the issue and without submissions of either party directed at what seem to be key issues: whether Mr. Neufeld was covered by insurance in respect of the Human Rights Tribunal Claim, and if so whether he continued to have a pecuniary interest in such claim regardless of the insurance coverage.

[53] With respect thereto, I note that:

- a) The only details of the alleged conflict in the affidavits filed in support of the Petition in February, 2021, was Ms. Reichelt's assertion that Mr. Neufeld was, at the October 5, 2020 videoconference:

advised that he was in a conflict of interest and that he would contravene the School Act and Chilliwack School Board policy by participating in the in camera meeting while the CUPE 411 Complaint was discussed.

- b) Mr. Neufeld responded to this assertion in his affidavit sworn March 29, 2021, by asserting that:

I have never had a pecuniary interest in the outcome of any "settlement" of CUPE's BCHRT complaint, either for legal costs or prospective penalties. Even if that complaint was not patently absurd and had a chance of success, I would have no exposure to such costs.

- c) Ms. Reichelt's affidavit sworn June 16, 2021, then particularized the alleged conflict of interest as follows:

Mr. Neufeld had an obvious pecuniary interest in the Board's settlement of the CUPE 411 Complaint, as it would leave him as the sole remaining respondent to the Complaint. Accordingly, he would be liable for any damages award made by the BC Human Rights Tribunal at the conclusion of the complaint process. His private interest in avoiding that outcome was in direct conflict with his public duty as a trustee on the Board.

- d) Mr. Neufeld responded to this assertion in his affidavit sworn June 21, 2021, stating that:

she refers to "an obvious pecuniary interest" but mentions nothing about the Schools Protection Program". This insurance plan covers all potential loss (including legal fees and any penalties) related to our activities as school board trustees. Upon BCTF and CUPE instigating their BCHRT complaints, the SPP appointed the law firm of Guild Yule for me and Harris and Company (Keith Mitchell) for the Board. Ms. Reichelt is certainly aware that neither the Board nor myself are exposed to any financial loss in these proceedings.

- e) The affidavit of Ms. Maahs, also sworn June 21, 2021, confirmed her understanding that "BCHRT complaints are covered by our SPP insurance plan".

[54] On July 23, 2021 the parties took part in a judicial management conference, and made submissions on the need for document production and additions to the evidentiary record. I issued brief reasons for judgment on July 28, 2021 [indexed as 2021 BCSC 1468]. In these

reasons for judgment, I directed that certain additional documents be produced and put in evidence, including the SPP insurance policy and any correspondence between Mr. Neufeld and the SPP with respect to their acceptance of coverage in respect of the CUPE complaint. The parties were given the opportunity to file written submission in respect of that additional evidence.

[55] Finally, on October 8, 2021, the parties appeared before me to make further submissions limited to the issue of whether Mr. Neufeld had a pecuniary interest in the CUPE complaint given the existence of the SPP and the coverage position taken by the SPP.

## Issues

[56] The issues on this application flow from the test set out in s. 4 of the PPPA:

- (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.

[57] The issues on this application are thus as follows:

- a) Whether the Petition arises from an expression on a matter of public interest [s. 4(1)];
- b) The merits of the claims made in the Petition and of any defences raised [s. 4(2)(a)]; and
- c) The balancing of the public interest with reference to the harm allegedly suffered by the petitioner [s. 4(2)(b)].

## Legal Framework

### PPPA

[58] As noted by Fenlon J.A. in *Neufeld v. Hansman*, 2021 BCCA 222 [Hansman] at para. 3:

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

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

- [59] Justice Fenlon went on to comment at para. 5:

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

- [60] Section 4 sets out the test to be applied under the PPPA. The leading case on the application of s. 4 is *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, which dealt with nearly identical provisions of the Ontario Courts of Justice Act, R.S.O. 1990, c. C.43 (in particular, s. 137.1 of that statute).

#### Stage One - Expression on a Matter of Public Interest

- [61] To repeat, s. 4(1) provides that:

- (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.

- [62] The term "expression" is defined in s. 1 of the PPPA as follows:

"expression" means any communication, whether it is made verbally or non-verbally, publicly or privately, and whether it is directed or not directed at a person or entity;

- [63] The test applied under s. 4(1) was reviewed by Côté J. in *Pointes Protection*. At para. 21, she noted that:

- [21] Fundamentally, this is a two-part analysis. The burden is on the moving party to show that (i) the proceeding arises from an expression made by the moving party and that (ii) the expression relates to a matter of public interest. This is a threshold burden, which means that it is necessary for the moving party to meet this burden in order to even proceed to [the Ontario equivalent of s. 4(2)] for the ultimate determination of whether the proceeding should be dismissed.
- [64] Justice Côté confirmed at para. 23 that the word "satisfies" requires the moving party (here, Mr. Neufeld) to meet his burden on the balance of probabilities.

#### Arises from an Expression

- [65] Dealing with the words "arises from", Côté J. commented at para. 24:
- [24] By definition, "arises from" implies an element of causality. In other words, if a proceeding "arises from" an expression, this must mean that the expression is somehow causally related to the proceeding.[1] What is crucial is that many different types of proceedings can arise from an expression, and the legislative background of s. 137.1 indicates that a broad and liberal interpretation is warranted at the s. 137.1(3) stage of the framework. This means that proceedings arising from an expression are not limited to those directly concerned with expression, such as defamation suits.
- [66] The footnote referenced in this paragraph states:
- [1] I do not believe that a precise level of causation needs to be identified, as courts have consistently been able to grapple with and apply the "arising from" standard (*Allstate Insurance Co. of Canada v. Aftab*, 2015 ONCA 349, 335 O.A.C. 172; *Sheppard v. Co-operators General Insurance Co.* (1997), 1997 CanLII 2230 (ON CA), 33 O.R. (3d) 362 (C.A.); *New Brunswick v. O'Leary*, 1995 CanLII 109 (SCC), [1995] 2 S.C.R. 967; *Bracklow v. Bracklow*, 1999 CanLII 715 (SCC), [1999] 1 S.C.R. 420).
- [67] This question of causal connection was considered in the context of a negligence claim in *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation*, 2021 ONCA 25 at paras. 41 and 45, in which Trent University provided food testing services for purposes of an investigative news story:
- [41] The negligence claim here arises from an expression, in the sense described both by this court and by the Supreme Court in *Pointes*. The expression is causally connected to the claim; there is a nexus between them; the expression grounds the claim; and the claim targets the expression. The expression or communication of or about the test results is integral to all aspects of Subway's negligence claim: the existence of a duty of care, whether the duty was breached, and damages.
- [45] Although in important ways the negligence action is concerned with the quality of Trent's testing, in equally important and fundamental ways it is concerned with Trent's knowledge that it was doing the testing to provide information to be broadcast; it is concerned with

what Trent communicated about its tests; and it is concerned with the harm that resulted from the communication of, about, and based on, its test results. That is sufficient to satisfy the initial threshold of being a claim that arises out of an expression. A claim in an action that complains about these matters falls within the category of litigation that could unduly limit such expression.

#### Relates to a Matter of Public Interest

- [68] The proper approach to this phrase was explained by Côté J. in *Pointes Protection* at paras. 26-31:
- [26] These words should be given a broad and liberal interpretation, consistent with the legislative purpose of s. 137.1(3). Indeed, the APR clearly stated that a "broader test will ensure that the full scope of legitimate participation in public matters is made subject to the special procedure" (at para. 31) and that therefore a "broad scope of protection" is preferable (para. 29).
- [27] In *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, this Court considered the question of how public interest in a matter is to be established. While that case concerned the defence of responsible communication to a defamation action, it also involved determining what constitutes a "matter of public interest". The same principles apply in the present context. The expression should be assessed "as a whole", and it must be asked whether "some segment of the community would have a genuine interest in receiving information on the subject" (paras. 101-2). While there is "no single 'test'", "[t]he public has a genuine stake in knowing about many matters" ranging across a variety of topics (paras. 103 and 106). This Court rejected the "narrow" interpretation of public interest adopted by courts in Australia, New Zealand, and the United States; instead, in Canada, "[t]he democratic interest in such wide-ranging public debate must be reflected in the jurisprudence" (para. 106).
- [28] The statutory language used in s. 137.1(3) confirms that "public interest" ought to be given a broad interpretation. Indeed, "public interest" is preceded by the modifier "a matter of". This is important, as it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest -- there is no qualitative assessment of the expression at this stage. The question is only whether the expression pertains to any matter of public interest, defined broadly. The legislative background confirms that this burden is purposefully not an onerous one.
- [29] Nonetheless, expression that relates to a matter of public interest must be distinguished from expression that simply makes reference to something of public interest, or to a matter about which the public is merely curious. Neither of the latter two forms of expression will be sufficient for the moving party to meet its burden under s. 137.1(3) (see *Torstar*, at para. 102).

[30] Ultimately, the inquiry is a contextual one that is fundamentally asking what the expression is really about. The animating purpose of s. 137.1 should not be forgotten: s. 137.1 was enacted to circumscribe proceedings that adversely affect expression made in relation to matters of public interest, in order to protect that expression and safeguard the fundamental value that is public participation in democracy. If the bar is set too high at s. 137.1(3), the motion judge will never reach the crux of the inquiry that lies in the weighing exercise at s. 137.1(4)(b). Thus, in light of the legislative purpose and background of s. 137.1, it is important to interpret an "expression" that "relates to a matter of public interest" in a generous and expansive fashion.

[31] In conclusion, s. 137.1(3) places a threshold burden on the moving party to show on a balance of probabilities (i) that the underlying proceeding does, in fact, arise from its expression, regardless of the nature of the proceeding, and (ii) that such expression relates to a matter of public interest, defined broadly. To the extent that this burden is met by the moving party, then s. 137.1(4) will be triggered and the burden will shift to the responding party to show that its underlying proceeding should not be dismissed. I proceed to analyze that provision below.

[Emphasis in original.]

[69] In para. 29, Côté J. highlighted a distinction between expression that "relates to" a matter of public interest and expression that "simply makes reference to" something of public interest. That distinction was taken up by MacNaughton J. in *Cheema v. Young*, 2021 BCSC 461 at paras. 85-90. In that case, the defendant's tweets included comments on the transition to a municipal police force in Surrey, as well as comments implicating Mr. Cheema in improper influence, bullying, abuse of power and financial malfeasance. MacNaughton J. commented that those tweets:

make reference to a matter of public interest in a veiled effort to target Mr. Cheema, a private individual. In the result, Mr. Young has not established that his comments about Mr. Cheema are with respect to a matter of public interest, even given the expansive and generous interpretation of that term in *Pointes Protection*.

However, given that the tweets also referenced matters of public interest, she continued on to the second stage of the PPPA analysis.

#### Stage Two - Merits and Balancing the Public Interest

[70] To repeat, s. 4(2) of the PPPA provides that:

- (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.

[71] The effect of this provision was summarized in *Pointes Protection* at para. 33:

[33] As the text of this provision makes explicit, the burden is on the responding party (i.e. the plaintiff in the underlying proceeding) to satisfy the motion judge of both (a) and (b). Therefore, if either (a) or (b) is not met, then this will be fatal to the plaintiff discharging its burden and, as a consequence, the underlying proceeding will be dismissed. However, if the plaintiff can show that both (a) and (b) are met, then the proceeding will be allowed to continue. While (a) directs a judge's specific attention to the merit of the proceeding and the existence of a valid defence, (b) is open-endedly concerned with what is at the heart of the legislation at issue and anti-SLAPP legislation generally: the weighing of the public interest in vindicating legitimate claims through the courts against the resulting potential for quelling expression that has already been determined under s. 137.1(3) to be related to a matter of public interest.

[Emphasis in original.]

### Assessment of the Merits

[72] Section 4(2)(a) requires the court to consider whether there are "grounds to believe" that the proceeding has substantial merit and there is no valid defence. The meaning of the words "grounds to believe" was discussed in *Pointes Protection* at paras. 36-39:

[36] The words "grounds to believe" plainly refer to the existence of a basis or source (i.e. "grounds") for reaching a belief or conclusion that the legislated criteria have been met. In the context of a s. 137.1 motion, that basis or source must be anchored in the nature of the procedure and record contemplated by the legislative scheme. It must be borne in mind that a s. 137.1 motion can be brought at "any time" after a proceeding has commenced (see s. 137.2(1)).

[37] Accordingly, in determining whether there exist grounds to believe at the s. 137.1(4)(a) stage, courts must be acutely aware of the limited record, the timing of the motion in the litigation process, and the potentiality of future evidence arising. Introducing too high a standard of proof into what is a preliminary assessment under s. 137.1(4)(a) might suggest that the outcome has been adjudicated, rather than the likelihood of an outcome. To be sure, s. 137.1(4)(a) is not a determinative adjudication of the merits of the underlying claim or a conclusive determination of the existence of a defence.

- [38] Section 137.1(4)(a) may therefore be interpreted by distinguishing a motion made under s. 137.1 from a motion to strike and a motion for summary judgment, both of which are tools that remain available to parties notwithstanding the existence of s. 137.1. The very fact that the legislature created s. 137.1 as a mechanism indicates that a s. 137.1 motion was meant to fulfil a different purpose than these other motions. While a summary judgment motion allows parties to file a more extensive record and a motion to strike is adjudicated solely on the pleadings, s. 137.1 contemplates that the parties will file evidence and permits limited cross-examination. This suggests that the parties are expected to put forward a record, commensurate with the stage of the proceeding at which the motion is brought, that lends itself to the inquiry mandated under s. 137.1(4)(a). Thus, although the limited record at this stage does not allow for the ultimate adjudication of the issues, it necessarily entails an inquiry that goes beyond the parties' pleadings to consider the contents of the record (the extent of such consideration will be explored further in the next section).
- [39] Accordingly, I conclude that "grounds to believe" requires that there be a basis in the record and the law -- taking into account the stage of litigation at which a s. 137.1 motion is brought -- for finding that the underlying proceeding has substantial merit and that there is no valid defence.
- [Emphasis in original.]
- [73] The phrase "substantial merit" was discussed in *Pointes Protection* at paras. 44-54. As noted at paras. 48-49:
- [48] 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.
- [49] Therefore, I conclude from the foregoing exercise of statutory interpretation that for an underlying proceeding to have "substantial merit", it must have a real prospect of success -- in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. In context with "grounds to believe", this means that the motion judge needs to be satisfied that there is a basis in the record and the law -- taking into account the stage of the proceeding -- for drawing such a conclusion. This requires that the claim be legally tenable and supported by evidence that is reasonably capable of belief.
- [74] At paras. 52-54, *Côté J.* distinguished an application under the PPPA from a summary judgment motion:
- [52] It is therefore important to recognize how s. 137.1 motions differ from summary judgment motions, as briefly touched on in the preceding section. Section 137.1 motions are made at an earlier stage in the litigation process, with much more limited evidence and corresponding procedural limitations (see s. 137.2). As a result, a motion judge deciding a s.

137.1 motion should engage in only limited weighing of the evidence and should defer ultimate assessments of credibility and other questions requiring a deep dive into the evidence to a later stage, where judicial powers of inquiry are broader and pleadings more fully developed. This is not to say that the motion judge should take the motion evidence at face value or that bald allegations are sufficient; again, the judge should engage in limited weighing and assessment of the evidence adduced. This might also include a preliminary assessment of credibility -- indeed, the legislative scheme allows limited cross-examination of affiants, which suggests that the legislature contemplated the potential for conflicts in the evidence that would have to be resolved by the motion judge. However, s. 137.1(4)(a)(i) is not an adjudication of the merits of the underlying proceeding; the motion judge should be acutely conscious of the stage in the litigation process at which a s. 137.1 motion is brought and, in assessing the motion, should be wary of turning his or her assessment into a de facto summary judgment motion, which would be insurmountable at this stage of the proceedings.

- [53] Finally, in determining the ambit of "substantial merit", the statutory context of s. 137.1 must be borne in mind: even if a lawsuit clears the merits-based hurdle at s. 137.1(4)(a), it remains vulnerable to summary dismissal as a result of the public interest weighing exercise under s. 137.1(4)(b), which provides courts with a robust backstop to protect freedom of expression.
- [54] In summary, in light of the foregoing analysis, to discharge its burden under s. 137.1(4)(a)(i), the plaintiff must satisfy the motion judge that there are grounds to believe that its underlying claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success.
- [75] With respect to s. 4(2)(a)(ii), Côté J. noted at para. 56 that it is up to the defendant to the main proceeding (in this case Mr. Neufeld) to "put in play" defences that he intends to present, but that once that has happened the onus is on the plaintiff to demonstrate that there are grounds to believe that there is "no valid defence".

### Balancing the Public Interest

- [76] At paras. 61-62, Côté J. described the public interest balancing mandated by s. 4(2)(b) as being the "crux of the analysis" and the "core of [s. 4]". She noted at para. 77 that the weighing exercise under this provision may be informed by jurisprudence under s. 2(b) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter] and that such inquiries might:

look to the core values underlying freedom of expression, such as the search for truth, participation in political decision making, and diversity in forms of self-fulfilment and human flourishing.

- [77] At para. 80, she set out additional factors that may also prove useful, including:

- [80] the importance of the expression, the history of litigation between the parties, broader or collateral effects on other expressions on matters of public interest, the potential chilling effect on future expression either by a party or by others, the defendant's history of activism or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the Charter or human rights legislation. I reiterate that the relevance of the foregoing factors must be tethered to the text of s. 137.1(4)(b) and the considerations explicitly contemplated by the legislature to conduct the weighing exercise.
- [78] She concluded at paras. 81-82 that:
- [81] Fundamentally, the open-ended nature of s. 137.1(4)(b) provides courts with the ability to scrutinize what is really going on in the particular case before them: s. 137.1(4)(b) effectively allows motion judges to assess how allowing individuals or organizations to vindicate their rights through a lawsuit -- a fundamental value in its own right in a democracy -- affects, in turn, freedom of expression and its corresponding influence on public discourse and participation in a pluralistic democracy.
- [82] In conclusion, under s. 137.1(4)(b), the burden is on the plaintiff -- i.e. the responding party -- to show on a balance of probabilities that it likely has suffered or will suffer harm, that such harm is a result of the expression established under s. 137.1(3), and that the corresponding public interest in allowing the underlying proceeding to continue outweighs the deleterious effects on expression and public participation. This weighing exercise is the crux or core of the s. 137.1 analysis, as it captures the overarching concern of the legislation, as evidenced by the legislative history. It accordingly should be given due importance by the motion judge in assessing a s. 137.1 motion.

## School Act Provisions

- [79] A consideration of the merits of the claims made and defences raised requires a consideration of the relevant provisions of the School Act, Part 5 of which deals with conflicts of interest on the part of trustees.
- [80] Section 58 of the School Act sets out the basic rule, while s. 59 provides certain exceptions:

### Duty of trustee

58 (1) If a trustee has any pecuniary interest in any matter and is present at a meeting of the board at which the matter is considered, the trustee

- (a) must at the meeting disclose his or her pecuniary interest and the general nature of the pecuniary interest,
- (b) must not take part in the discussion of or vote on any question in respect of the matter, and

- (c) must not attempt in any way, whether before, during or after the meeting, to influence the voting on any question in respect of the matter.
- (2) If the meeting referred to in subsection (1) is not open to the public, in addition to complying with the requirements of that subsection the trustee must immediately leave the meeting or the part of the meeting during which the matter is under consideration.
- (3) If the pecuniary interest of a trustee is not disclosed as required by subsection (1) by reason of the trustee's absence from the meeting, the trustee must disclose the pecuniary interest and otherwise comply with the requirements of that subsection at the first meeting of the board attended by the trustee after the meeting referred to in that subsection.

#### Exceptions

59. Section 58 does not apply to a pecuniary interest in any matter that a trustee may have
- (a) by reason of the trustee having a pecuniary interest in the matter which is a pecuniary interest in common with electors generally,
  - (b) by reason of the trustee being entitled to receive any indemnity, expenses or remuneration payable to one or more trustees in respect of the matter,
  - (c) by reason only that the trustee is a member of an association incorporated under the Cooperative Association Act or a credit union having dealings or contracts in respect of the matter with the board of the school district of which he or she is a trustee, or
  - (d) by reason only of a pecuniary interest of the trustee that is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the trustee.

[81] The words "pecuniary interest" are defined in s. 55(1):

"pecuniary interest" means, with respect to a trustee, an interest in a matter that could monetarily affect the trustee and includes an indirect pecuniary interest referred to in section 56;

[82] With respect to the words "indirect pecuniary interest", s. 56 provides that:

#### Indirect pecuniary interest

56. For the purposes of this Part, a trustee has an indirect pecuniary interest in any matter in which the board is concerned if
- (a) the trustee or the trustee's nominee
    - (i) is a shareholder in or a director or senior officer of a corporation that does not offer its securities to the public, or
    - (ii) has a controlling interest in or is a director or senior officer of a corporation that offers its securities to the public,
- and the corporation has a pecuniary interest in the matter, or

- (b) the trustee is a partner of a person, is a member of a firm or is in the employment of a person or firm that has a pecuniary interest in the matter.

[83] The remedy for the breach by a trustee of the prohibition in s. 58 is found in ss. 62 and 63:

### Application to court

62 (1) Subject to subsection (3) an elector may, within 6 weeks after the fact comes to the elector's knowledge that a trustee may have contravened section 58, apply to the court for a determination of the question of whether the trustee has contravened section 58.

- (2) The elector in the application must state the grounds for alleging a contravention of section 58 by the trustee.
- (3) No application may be brought under subsection (1) after the expiration of 4 years from the time at which the contravention is alleged to have occurred.

### Remedy

63 (1) Subject to subsection (2), if the court determines that a person, while holding the office of trustee, has knowingly contravened section 58, the court

- (a) must, in the case of a person currently holding office as a trustee, declare the office of the trustee vacant, and
  - (b) may, if the contravention has resulted in financial gain, require the person to make restitution to the party suffering the loss or, if that party is not readily ascertainable, to the board of which the person is a trustee or former trustee.
- (2) If the court determines that a person who is currently holding an office of trustee contravened section 58 and finds that the contravention was committed through inadvertence or because of an error in judgment made in good faith, the person is not subject to having his or her office declared vacant under subsection (1).
- (3) An office declared vacant under subsection (1) must remain vacant if the decision is appealed, and no election to fill the office may be held until the final determination of the matter or until the next general school election, whichever is earlier.

[84] Thus, on an application brought pursuant to s. 62, the key issues will be (a) whether the trustee has a "pecuniary interest", either direct or indirect (ss. 58(1), 55), that is not "so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the trustee" (s. 59(d)), and (b) whether the trustee acted knowingly (s. 63(1)).

[85] A trustee may, on such an application, defend the application on the basis that "the contravention was committed through inadvertence or because of an error in judgment made in good faith" (s. 63(2)).

- [86] If the court finds that s. 58 has been breached, and no available defence is found to apply, then the court "must" declare the office of trustee vacant.
- [87] Similar provisions in the Alberta School Act, R.S.A. 2000, c. S-3, were considered in *Calgary Roman Catholic Separate School District No. 1 v. O'Malley*, 2007 ABQB 574. At para. 74, Clark J. adopted a summary of the applicable principles:
- [74] Counsel for the Board aptly summarized the rationale and principles upon which the pecuniary interest prohibitions are based as follows:
- (a) The provisions prescribe the standard of conduct expected of an elected official and are intended to maintain integrity in the discharge of public duty;
  - (b) There is no need to find corruption or actual loss on the part of the elected official. The issue is whether the member failed to honour the standard of conduct prescribed by the statute;
  - (c) The conflict-of-interest rules are based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters;
  - (d) Public office is a trust. The principle of law which underlies these provisions is that an official must not put himself in a position where his private interest might be opposed to the unbiased performance of his official duty;
  - (e) The principle should be applied with unabated rigour and there should be no erosion of the principles, if confidence is to be maintained in the electoral process;
  - (f) Integrity in the discharge of public duties is, and remains, of paramount importance, and when the question of private interest arises, the Court will not weigh its extent nor the amount in determining the issue - the breach does not change its character merely because it is of small extent;
  - (g) Whether a person has a pecuniary interest in a matter is evaluated on an objective, reasonable standard, not the trustee's personal view; and
  - (h) The outcome of the vote is not relevant, nor is the effect or the operation of the resolution if passed.
- [88] The focus of the rules governing pecuniary conflicts of interest on the problem of divided loyalties is reflected in the comments of Donald J.A., dealing with provisions of the Community Charter, S.B.C. 2003, c. 26, in *Schlenker v. Torgrimson*, 2013 BCCA 9 at paras. 38-40:
- [38] The purpose of such legislation was eloquently described by Robins J. (later J.A.) speaking for the Ontario Divisional Court in *Re Moll and Fisher* (1979), 96 D.L.R. (3d) 506 at 509:

This enactment, like all conflict-of-interest rules, is based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired when their personal financial

interests are affected. Public office is a trust conferred by public authority for public purpose. And the Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less.

Legislation of this nature must, it is clear, be construed broadly and in a manner consistent with its purpose.

[Emphasis added.]

[39] In *The Queen v. Wheeler*, [1979] 2 S.C.R. 650, the Court referred to the New Brunswick equivalent of s. 8 of our Interpretation Act, quoted earlier, in adopting at 659 a broad approach to the interpretation of the conflict provision involved in that case.

[40] In *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, Sopinka J. commented generally on conflict of interest legislation for local government at 1196-97:

I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. It is apparent from the facts of this case, for example, that some degree of pre-judgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest. See *Re Blustein and Borough of North York*, [1967] 1 O.R. 604 (H.C.); *Re Moll and Fisher* (1979), 23 O.R. (2d) 609 (Div. Ct.); *Committee for Justice and Liberty v. National Energy Board*, [[1978] 1 S.C.R. 369]; and *Valente v. The Queen*, [1985] 2 S.C.R. 673.

Statutory provisions in various provincial Municipal Acts tend to parallel the common law but typically provide a definition of the kind of interest which will give rise to a conflict of interest. See *Blustein and Moll*, *supra*.

[Emphasis added.]

[Emphasis that of Donald J.A.]

[89] Schlenker considered whether two elected trustees of the Salt Spring Island Local Trust Area were in a "direct or indirect pecuniary interest" in respect of a resolution to award two service contracts to societies of which they were directors. The question was governed by s. 100 of the Community Charter, the wording of which was in many ways similar to that in the School Act. In allowing the appeal, Donald J.A. noted at paras. 33-34 that:

- [33] By limiting the interest to personal financial gain, the chambers judge's interpretation missed an indirect interest, pecuniary in nature, in the fulfillment of the respondents' fiduciary duty as directors. The result of applying that narrow interpretation to the facts was to defeat the purpose and object of the conflict of interest legislation.
- [34] The object of the legislation is to prevent elected officials from having divided loyalties in deciding how to spend the public's money. One's own financial advantage can be a powerful motive for putting the public interest second but the same could also be said for the advancement of the cause of the non-profit entity, especially by committed believers in the cause, like the respondents, who as directors were under a legal obligation to put the entity first.
- [90] Justice Donald further stated that:
- [50] As directors of the Societies, the respondents were under a fiduciary duty to put the Society's interests first. Directors of societies, by virtue of their position, have an indirect interest in any contract a society is awarded. When the respondents moved and voted in favour of resolutions that benefitted their Societies through the granting of contracts, arguably contracts the Societies might not have been awarded had the councillors not also been directors, their duties as directors to put the Society's interests first were in direct conflict with their duties as councillors to put the public's interests first. These circumstances encompass the mischief the legislation was aimed at, namely, a conflict of interest in deciding money resolutions. The public is disadvantaged by the conflict, whether the respondents derived any personal gain or not, because the public did not have the undivided loyalty of their elected officials.
- [91] Justice Donald noted two prior judgments of the Court of Appeal in which it had concluded that the circumstances did not give rise to a direct or indirect pecuniary conflict:
- a) *Fairbrass v. Hansma*, 2010 BCCA 319, in which the Mayor of Spallumcheen had voted on a bylaw to amend the Official Community Plan in a way that was allegedly to the potential benefit of his two sons, and
  - b) *King v. Nanaimo (City)*, 2001 BCCA 610, in which a city councillor voted in favour of matters benefitting his largest campaign contributor.
- [92] In distinguishing those prior judgments, Donald J.A. commented at para. 55:
- [55] In the present case, however, proof of a pecuniary conflict does not depend on a remote and tenuous connection as in *King* or on speculation like *Fairbrass*, but on the solid footing of a fiduciary duty as discussed.
- [93] Two other cases were referenced by Mr. Lang in argument. In *Wynja v. Halsey-Brandt* (1993), 78 B.C.L.R. (2d) 72, 1993 CanLII593 (C.A.), two trustees on the Richmond School Board were elementary school teachers employed by the Vancouver School Board. They were found to have a pecuniary interest in a vote confirming a collective agreement between

the Richmond School Board and the Richmond Teachers Association, on the basis that what happened during the collective bargaining process involving one local teachers' union had a direct and significant bearing on negotiations for the other local teachers' union. Justice Wood did not accept an argument that the conflict provisions were limited to cases involving an "ascertainable" financial interest, noting at para. 17 that:

The effect of this argument is to limit the pecuniary interest defined in s. 75 to an "ascertainable" pecuniary interest, in the sense that such interest is quantifiable. Again, I see no reason to give the plain language of that definition such a restricted meaning. I think the trial judge's approach to the construction of the s. 75 definition of pecuniary interest was right. A pecuniary interest is any interest that could monetarily affect the trustee.

[94] In *Godfrey et al v. Bird and District of North Saanich*, 2005 BCSC 626, the Court found an "indirect pecuniary interest" in circumstances in which a councillor voted on resolutions affecting property owned by a party with whom that councillor had a longstanding business relationship. Justice Burnyeat commented at para. 103 that the cases he reviewed:

indicate a trend towards a broader interpretation of the words "direct or indirect pecuniary interest" as electors and Legislatures insist upon higher standards of objectivity for elected representatives in order to promote disinterested consideration of the questions that councillors are called upon to decide.

### **Impact of Confirmation of Insurance Coverage without Reservation**

[95] *Parlee v. Pembridge Insurance Co.*, 2005 NBCA 49, outlined the well-established principle that a liability insurer cannot resile from an acceptance of coverage in respect of a claim except in very limited circumstances. The general principle was stated as follows:

[12] It is a well established principle of insurance law that when an insurer, "with full knowledge of grounds for denial of coverage to its insured enters an appearance to the action brought against the insured and carries on the defence, it is by so doing estopped from later denying liability under the policy either to the insured or to the third party judgment creditor". Put another way, an insurer cannot engage in such conduct "without waiving its rights under the policy as between it and the insured".

[96] In *The Commonwell Mutual Assurance Group v. Campbell*, 2018 ONSC 5899, aff'd 2019 ONCA 668, an insurer had appointed counsel who represented Mr. Campbell through discoveries before taking the position that it had made a mistake in defending Mr. Campbell. The Court held that by defending without a non-waiver agreement or reservation of rights, the insurer had waived any policy breach or exclusion, commenting at paras. 30-33:

[30] It should be noted that an insurer may elect to disregard a policy breach or it may waive reliance on an exclusion. Where a breach has been waived, the insurer cannot later resile from such waiver. Accordingly, there is a duty on the insurer to be clear about its position and not to leave an insured with a false belief that its interests are protected.

- [31] Where a claim clearly falls outside the scope of an insurance policy or falls within an exclusion or exception, the insurer should deny coverage clearly and unequivocally. In cases where there is doubt about a duty to defend or where there may be a duty to defend but there may not be a duty to indemnify, the insurer must take steps to bring the possibility the claim will be denied to the attention of the insured. Non-waiver agreements or reservation of rights letters are important tools to ensure an insured clearly understands she or he may be without coverage.
- [32] If there is some doubt about coverage and the insurer requires time to investigate, the general practice is to obtain a non-waiver agreement or to reserve rights. This is precisely what Guarantee did before ultimately denying coverage. An insurer that proceeds to defend an action, or even an insurer which unequivocally states that it will defend an action, may be taken to have waived reliance on the exclusion or it may be estopped from later denying coverage.
- [33] As long ago as 1921, the Supreme Court of Canada held that having elected to defend an insured rather than contesting coverage, the insurer could not avoid paying the judgment after it took the matter to trial and obtained an unfavourable result: *Western Canada Accident & Guarantee Insurance Co. v. Parrott*, [1921] 61 S.C.R. 595. In the circumstances of that case, the insurer was found to have made an election not to rely on a condition in the policy.
- [97] In *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47, the Supreme Court of Canada reaffirmed these legal principles, while confirming that they have no application when new facts come to the attention of the insurer that demonstrate a policy breach.

## Positions of the Parties

### Position of Mr. Neufeld

- [98] Mr. Neufeld alleges that this proceeding arises from an expression by him on a matter of public interest. He argues, in a general sense, that the Petition is part of a campaign by various groups, including CUPE, to silence any criticism of the SOGI 1 2 3 resource and those who would raise concerns about its appropriateness for use in schools. In a more specific sense, he says that the Petition seeks to impose legal consequences on him as a result of the statements made by him during the course of a videoconference on October 5, 2021, in respect of the proposed settlement by the Board of the CUPE Complaint. He argues that in both these general and specific senses, the Petition arises from his expressions on matters of public interest. He says that expressions made by elected public representatives during deliberations of a board of education are a matter of public interest, regardless of whether the expressions are made in a public setting, an in-camera meeting or an informal videoconference.

- [99] Dealing with the merits, Mr. Neufeld's fundamental assertion is that he never had a pecuniary interest in the Complaint, much less in the settlement of the Complaint as against the Board. He argues he did not have a pecuniary interest because the Complaint was fully covered by an insurer, with that insurer having accepted the claim for coverage without reservation.
- [100] He asserts as well that the videoconference on October 5, 2020, was not a properly constituted meeting of the Board in any event and so his participation in it could not be a violation of s. 58 of the School Act.
- [101] Mr. Neufeld further asserts that he could not be held to have acted knowingly given that he has been clear throughout that he believes he has no financial exposure in respect of the CUPE Complaint.
- [102] With respect to questions about whether his public statements giving rise to the Complaint were within the scope of his role as trustee, Mr. Neufeld relies on the claims as set out in the Complaint. He is named as a respondent based on an allegation of "employment discrimination" in breach of s. 13 of the HRC, and he is alleged to be subject to that claim solely because of his status as a trustee.
- [103] He argues that the various suggestions made by Mr. Lang as to the prospect of the SPP withdrawing its coverage of the claim are speculative and without merit, and that the Court can and should rely on the absence of any reservation of rights on behalf of the insurer.
- [104] He asserts that the Court should consider "what is really going on" in the Petition - he asserts that the petitioner Mr. Lang is acting on behalf of a group of unions who are trying to use the litigation process to shut down any expression of contrary views, and to "de-platform" him by having him removed from the Board on spurious grounds. He says there is a strong public interest in allowing freedom of expression on matters of public controversy and that strong public interest militates in support of granting his application.
- [105] Finally, Mr. Neufeld argues that there is significant harm in allowing this proceeding to continue, as its goal is to prevent a democratically elected representative from speaking on matters of public interest in light of his election to represent citizens on matters of public education in the Chilliwack area.

### Position of Mr. Lang

- [106] Mr. Lang argues that the PPPA could not have been intended to protect unlawful expression expressly prohibited under the School Act, however much that expression relates to a matter of public interest. He argues that this application is an improper use of the PPPA.

[107] He argues that the proceeding does not "arise from" expression in the general sense alleged by Mr. Neufeld - that is, it does not arise from his advocacy in opposition to the SOGI 1 2 3 resource at large. Rather, he argues that the expression in issue must be looked at in its specific sense - that is, Mr. Neufeld's participation in the in-camera meeting by vocalizing his opposition to the proposed settlement and thereby attempting to influence the vote.

[108] Mr. Lang argues that the expression made at that meeting was not on a matter of public interest. He submits:

Were the [Board's] deliberations over the proposed settlement a matter of public interest? They most certainly were not. The public may be curious about the deliberations, but the public has no right to inquire into those deliberations. The deliberations occurred in camera. They concerned a highly sensitive subject matter and were likely subject to legal privileges.

[109] With respect to the merits, Mr. Lang argues that the Petition is meritorious, and accuses Mr. Neufeld of using this application simply to delay his inevitable removal from the Board. Mr. Lang says that Mr. Neufeld, as a respondent to the human rights complaint, had a pecuniary interest in a settlement of that complaint by the only other respondent - given that he would then be the sole remaining respondent. He highlights the word "could" in the definition of "pecuniary interest" in s. 55, and argues that at the time of the October 5 meeting "there were numerous avenues by which [Mr. Neufeld] could have ultimately been found to be personally liable".

[110] Mr. Lang argues that the impact of the insurance policy is a defence to the Petition, and that Mr. Neufeld did not "put it in play" until shortly before the hearing. As a result, he says that it was not properly pleaded and the defence should be rejected. He also says that Mr. Neufeld failed to properly prove the existence of insurance coverage for the claim, and that in any event the existence of insurance coverage does not eliminate Mr. Neufeld's pecuniary interest in the outcome of the complaint.

[111] Mr. Lang also argues that there is a possibility that the insurance coverage might be withdrawn. He argues that the insurance coverage should be deemed to be limited by provisions of the School Act that limit the ability of boards of education to pass bylaws to indemnify trustees. Mr. Lang argues that the statements made by Mr. Neufeld were made to his personal Facebook page and at a public meeting that he attended in his personal capacity, and that as a result the statements did not arise from the performance by Mr. Neufeld of his duties as trustee. He argues that the fact coverage has been accepted without reservation does not mean that an ultimate determination of coverage has been made. He suggests that the confirmation of coverage does not alter the terms of the SPP, and that the SPP could withdraw coverage based on an argument that Mr. Neufeld's public statements were not approved by the Chilliwack School Board. He also suggests that the SPP might withdraw coverage on the basis that Mr. Neufeld's actions were "fraudulent", "criminal", "malicious" or "intentionally dishonest". He argues that:

It is not necessary for the SPP to have expressly "reserved rights" in correspondence in order for it to deny coverage or seek indemnity from [Mr. Neufeld]. The terms of the SPP include numerous potential avenues by which the SPP might deny coverage or seek indemnity.

[112] Finally, he argues that there is a possibility that the Board might seek indemnity against Mr. Neufeld on the basis that his public statements constituted "gross negligence", relying on s. 95(3) of the School Act.

[113] More generally, Mr. Lang argues that "a public official cannot ignore a conflict of interest on the basis that he is insured". He argues that:

Public officials are invariably covered by some type of insurance plan or indemnity policy. This insurance cannot inoculate them from the prohibition against acting in a conflict of interest. The legislation provides no exception for the occasion when an insurance policy is, or might, take effect. Insurance is not an excuse to conduct oneself in a matter otherwise impermissible but for coverage.

[114] Mr. Lang argues that the fact that the Board has passed a motion finding Mr. Neufeld to be in a conflict of interest is a strong indicator that the Petition has substantial merit.

[115] Mr. Lang argues that no defence has been raised by Mr. Neufeld with any precision or clarity.

[116] With respect to the public interest balancing, Mr. Lang argues that there is a strong public interest in holding public officials to account for breaches of conflict of interest rules and that in light of that strong public interest, the Petition should be allowed to proceed. He argues that Part 5 of the School Act is intended to protect the public, and there would be harm in permitting an elected official to ignore the conflict rules.

[117] Finally, he notes that:

The relief sought in this proceeding will not "silence" Mr. Neufeld; he will remain free to espouse his views on SOGI 123, albeit removed from his pulpit as a school trustee.

## Analysis

### Arises from Expression on a Matter of Public Interest

[118] It may seem at first blush that a petition brought under Part 5 of the School Act is not the sort of proceeding that the PPPA was aimed at. However, cases such as *Pointes Protection* and *Subway* make it clear that whether the PPPA applies is determined on the basis of the statutory language - not on preconceived notions about the sorts of cases the PPPA would normally apply to.

- [119] Specifically, the statutory test requires consideration of the factors set out in s. 4(1). With respect to s. 4(1)(a), the words "arises from" require the court to consider carefully the causal relationship between any expression and the proceeding. In this case, the proceeding is founded on Mr. Neufeld's expression at the October 5, 2020 meeting, in which he advocated in opposition to the proposed settlement. The causal relationship between that expression and the claims made in the Petition is clear.
- [120] Mr. Neufeld's argument that the proceeding arises from his expression in opposition to the SOGI 1 2 3 resource more generally would require the Court to go beyond the facts asserted and positions taken in the Petition, and instead to consider the motivation not only of Mr. Lang but also of those funding the litigation. That sort of inquiry goes far beyond what is contemplated by s. 4(1)(a) and the approach set out in *Pointes Protection* at para. 24.
- [121] I would thus accept Mr. Lang's submission that the causation test prescribed by s. 4(1)(a) requires me to limit the s. 4(1) analysis to the specific statements made by Mr. Neufeld to his fellow Board members in the discussion on October 5, 2020. It is only those statements that have sufficient causal connection to the relief sought in the Petition to bring the PPPA into play.
- [122] I turn to the question of whether those expressions by Mr. Neufeld relate to a matter of public interest. As noted in *Pointes Protection* at paras. 26-27, the phrase should be given a broad and liberal interpretation focused on protecting participation in public matters, considering questions like whether "some segment of the community would have a genuine interest in receiving information on the subject", and "a genuine stake in knowing" about the subject matter of the expression. There is, at this point, no qualitative assessment of the expression: *Pointes Protection* at para. 28.
- [123] A key difference between the parties is whether the fact that the key expression occurred at an in-camera meeting, as to which the public was neither invited nor entitled to detailed information, affects the characterization of the expression that occurred there for purposes of the PPPA. In my view, it is the character of the expression and not the available scope of dissemination of that expression that should govern. Public bodies like a board of education meet in-camera from time to time on matters in which the public interest in protecting the information to be shared from public dissemination outweighs the public interest in transparent operation of a public body. However, that does not affect the character of the matters discussed at that meeting or make them any less matters of public interest.
- [124] In my view, the participation of all trustees in the in-camera discussion on October 5, 2020, consisted of expressions on matters of public interest notwithstanding that the meeting was not held in public.
- [125] I conclude that Mr. Neufeld has met the onus on him to establish that the Petition arises from expression by Mr. Neufeld on a matter of public interest.

## Merits of the Claim and Defences

- [126] It is clear from a review of both *Bent v. Platnick*, 2020 SCC 23 and *Hansman* that the consideration of the merits of the claims and defences required by s. 4(2)(a) is to be substantive, subject to the court being "acutely aware of the limited record, the timing of the motion in the litigation process and the potentiality of future evidence arising" (*Pointes Protection* at para. 37), and deferring "ultimate assessments of credibility and other questions requiring a deep dive into the evidence to a later stage" (*Pointes Protection* at para. 52).
- [127] In this case, each party tendered multiple affidavits from key players and neither party sought orders for cross-examination of witnesses. That reflects the fact that there is little in the way of factual disputes on key issues in the case. Critical documents such as the CUPE Complaint, the SPP policy document and the coverage correspondence are before me, with the main dispute between the parties relating to their legal significance. The key underlying allegation - that Mr. Neufeld participated in the video discussion on October 5, 2020, and made known his opposition to the proposed settlement - is similarly not in dispute.
- [128] While there does not appear to be a significant dispute that Mr. Neufeld made comments related to the settlement at the in-camera meeting on October 20, 2020, the evidence indicates it was in the context of a discussion of Mr. Neufeld's conduct. Nothing in the evidence suggests that the settlement was itself brought back for reconsideration at that meeting, and there was no theory advanced that would prohibit a trustee from responding to a discussion about that trustee's own conduct. In any event, it is not suggested that anything Mr. Neufeld said at the October 20, 2020 meeting, went beyond what he said on October 5, 2020.
- [129] As noted above, there are limited conflicts in the evidence - specifically:
- a) Whether the video discussion on October 5, 2020, was in fact a meeting of the Board; and
  - b) Whether Mr. Neufeld made a comment on October 20, 2020, that the Board's settlement of the Complaint would "cost him \$50,000".
- [130] As will be set out below, neither of these factual issues make any difference to my conclusions as to the merits.

## Grounds to Believe a Valid Claim

- [131] The parties put forward different views as to what were elements of the claims in the Petition and what were elements of potential defences. In particular, Mr. Lang argued that any issue arising from the insurance coverage was a defence to the claim, while Mr. Neufeld argued that the legal effect of the insurance coverage was that no pecuniary interest ever arose. Specifically, Mr. Neufeld argued that because of the insurance coverage and the insurer's acceptance of coverage without reservation, Mr. Neufeld had no pecuniary interest in the Complaint to begin with (or at least from the time of confirmation of

coverage). As such, it goes to the very existence of the pecuniary interest that is a fundamental and necessary element of Mr. Lang's claim. I agree that this is the correct approach to the analysis, and as a result, the insurance policy issue is properly considered as part of the analysis of Mr. Lang's claim rather than as a defence.

[132] Similarly, I see the provisions of s. 59(d), which prevent the application of s. 58 where the alleged pecuniary interest is "so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the trustee", as going to the character of the pecuniary interest underlying the claim. As such, it is an element to be considered in the analysis of the claim, rather than separately as a defence.

[133] The Petition asserts that Mr. Neufeld knowingly breached s. 58 of the School Act by participating in a meeting of the Board on October 5, 2020, at which the settlement of the Complaint was discussed. Mr. Lang argues that Mr. Neufeld had a pecuniary interest in the settlement of the Complaint by the Board. This assertion requires consideration of the claims made in the Complaint. They are set out in paras. 36-39 of the Complaint, which are quoted above at para. 12. Two of them (paras. 37 and 38) seek relief only against the Board. The relief sought against Mr. Neufeld is limited to:

- a) a declaratory order that Mr. Neufeld has breached the HRC (para. 36), and
- b) an order (para. 39) for:

compensation to injury to dignity, feelings, and self-respect in the amount of \$50,000 to be paid on behalf of the affected employees to a non-profit organization that advocates for LGBTQ youth.

[134] On its face, the settlement of the Complaint by the Board does not directly affect Mr. Neufeld. However, setting aside for the moment any consideration of the insurance coverage, I accept that there is a potential for Mr. Neufeld to be made liable to a greater portion of any award for the compensation sought in the claim as a result of that settlement. I note in that regard that the Board's settlement provided only \$5,000 that could be characterized as "compensation" within para. 39 of the Complaint, while the amount claimed is \$50,000. The settlement would prevent the Board being required to pay anything beyond that \$5,000, and thus could well have the effect of increasing the proportion of any compensation award to be payable by Mr. Neufeld. For that reason, in the absence of insurance coverage, I would conclude that there are grounds to believe that Mr. Neufeld would have had an interest in the settlement that could monetarily affect him. I would also accept that there are grounds to believe that that interest might not be so "remote or insignificant" as to fall within s. 59(d).

[135] With respect to Mr. Neufeld's argument that he did not act "knowingly" (as required by s. 63(1) of the School Act), there appears to be no doubt on the evidence that Mr. Neufeld consistently asserted that he was not in a conflict. However, the evidence also appears to be undisputed that he was advised by Mr. Mitchell that he was in a conflict. It is not clear whether Mr. Neufeld had his own legal advice on this question. I note as well Ms. Reichelt's

disputed evidence that Mr. Neufeld made a comment on October 20 that the Board's settlement would cost him \$50,000, which if accepted would suggest awareness of a pecuniary conflict. As noted in O'Malley, the existence of a pecuniary interest is evaluated on an objective, reasonableness standard and not based on the trustee's subjective personal view. In my view, again absent the insurance coverage issue, I would find that given the early stage of the proceedings and the lack of any cross-examination on these key issues, there are sufficient "grounds to believe" that a valid claim might be made out to satisfy the test in s. 4(2)(a) of the PPPA.

- [136] I note in passing that one of the results of the statutory scheme - which provides for an "elector" rather than the Board to advance this Petition - is that neither the court nor the petitioner has the benefit of the Board's position as to why Mr. Mitchell advised Mr. Neufeld that he had a conflict of interest. We do not know whether Mr. Mitchell had developed a considered opinion as to the existence of a conflict prior to the October 5 meeting, and if so whether he had identified and considered the impact of the insurance coverage. It is possible that Mr. Mitchell had simply identified a concern and made a common sense recommendation that Mr. Neufeld not participate in the discussion in order to be safe rather than sorry.
- [137] In any event, I am satisfied that the School Act contemplates that it is the Court that determines whether a trustee was in a pecuniary conflict. The Court can not be bound by the opinions of either a lawyer retained by a board of education or by the majority vote of a board of education. The judgment in *Redmond v. Wiebe*, 2021 BCSC 1405, in which the Court declined to consider the report of an "investigator" who prepared a report that drew conclusions as to the existence of a conflict, is helpful in confirming the role of the Court in such cases.
- [138] I turn now to the insurance issue. In my view, the existence of insurance coverage and the insurer's acceptance of coverage in respect of the Complaint without reservation has the effect of negating any pecuniary conflict of interest in the circumstances.
- [139] In particular, I conclude that the SPP, through its acceptance of the claim, agreed to pay all legal costs of defending that claim and to pay any amount that Mr. Neufeld might be ordered to pay in respect of that claim. The legal effect of cases such as *Parlee* and *Commonwell Mutual Assurance* is that the SPP would not be in a position to withdraw its acceptance of coverage in the absence of some undisclosed fact going to the conditions of the policy. In this case, there is no suggestion in the evidence that there is any fact that was not broadly known about the matters giving rise to the claim. Rather, the evidence indicates that Mr. Neufeld has been anything but subtle in making known his opposition to the SOGI 1 2 3 resource.
- [140] I note here that the claims made against Mr. Neufeld in the Complaint are claims that arise only as a result of his status as a trustee of the Board. He is alleged to have violated s. 13 of the HRC as a result of statements said to create a discriminatory workplace. While the

actions of Mr. Neufeld giving rise to this allegation may well have taken place outside of the context of Board meetings or formal trustee activities, there is no nexus between Mr. Neufeld and a claim of employment discrimination under s. 13 of the HRC absent his office as a trustee.

- [141] A key purpose of insurance coverage for directors and officers of organizations - both public and private - is to ensure that individuals are willing to take on those offices and to mitigate concerns about being drawn into litigation arising from their status as directors and officers. It should be noted that a trustee of a board of education is in a very similar role to a director of a non-profit organization or other sort of public board.
- [142] I have considered the various arguments raised by Mr. Lang as to the ways in which the SPP might withdraw coverage in respect of the Complaint. Fundamentally, the arguments made by Mr. Lang are all premised on the SPP changing its mind about the Complaint. I note that it is nearly four years since the SPP accepted the Complaint for coverage and it has given no sign of withdrawing coverage. There is no suggestion on the evidence of any undisclosed fact that might cause the SPP to do so. Further, under the law as set out above, the SPP simply would not have the right to do so. The suggestion that something might come up that would allow the SPP to withdraw coverage has no evidentiary foundation whatsoever. Similarly, the suggestion that the Board might sue Mr. Lang for indemnity is speculative and highly unlikely, given that both the Board and Mr. Lang were covered by the SPP and the existing settlement was funded by the SPP rather than the Board.
- [143] I turn now to Mr. Lang's argument that Mr. Neufeld continued to have a pecuniary interest in the claim notwithstanding the insurance coverage on the basis that "insurance cannot inoculate [a public official] from the prohibition against acting in a conflict of interest". This argument is superficially attractive. However, it ignores the fact that the insurance coverage goes to the very existence of the pecuniary interest that underlies the conflict of interest.
- [144] Fundamental to conflict of interest law in British Columbia is the concern of divided loyalties. As noted in Schlenker at para. 45, it is based on the moral principle that no person can serve two masters, and that a person's judgment may be impaired when their personal financial interests are affected. In a case where:
- a) insurance coverage exists that fully covers both defence costs and indemnity for any liability,
  - b) there is no deductible or self-insured retention,
  - c) coverage has been accepted by the insurer without reservation, and
  - d) there is no evidence suggesting that there is some undisclosed fact that would allow the insurer to withdraw its coverage,

it simply cannot be said that the insured person's financial interests are affected, or that there could be any objective, reasonable concern that the person's judgment is affected by having to "serve two masters".

- [145] In any event, it would seem to me that even if there was some residual concern that "something might come up" that would negate insurance coverage, that would in the circumstances of this case fall within the language of s. 59(d) of the School Act - that is, that risk would be "so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the trustee".
- [146] As a result, I conclude that Mr. Lang has not established that there are grounds to believe that the underlying claim in the Petition has substantial merit.
- [147] The two matters of dispute on the evidence - whether the October 5 video conference was in fact a meeting of the Board, and whether Mr. Neufeld in fact made a comment on October 20 about the settlement costing him \$50,000 - would have no impact on this conclusion.
- [148] Before moving on, I want to comment briefly on concerns raised by Mr. Lang as to the fairness of the procedure followed on this application. At the original hearing of the application, the Court had before it uncontradicted evidence of Mr. Neufeld that the Complaint was fully covered by insurance. Mr. Neufeld had not been cross-examined on that evidence. While Mr. Lang argued that the Court should simply ignore that evidence, no realistic basis was put forward for it to do so.
- [149] The orders made by the Court for the production of additional evidence were made after hearing from both parties. They were aimed at uncovering any potential factual basis that might question the existence of the insurance coverage. Those orders could well have benefited Mr. Lang, although as it turned out they did not. Once more complete evidence was before the court, both parties were given full opportunity to make submissions both in writing and in person on the insurance issue.
- [150] The Rules are aimed at securing the just, speedy and inexpensive determination of every proceeding on its merits. The orders made were aimed at ensuring this matter was decided on the merits with full opportunity of each party to obtain and place before the court necessary evidence and make full submissions.

### **Grounds to Believe no meritorious defence**

- [151] In this case, there were suggestions that Mr. Neufeld may raise a defence based on s. 63(2) of the School Act that any contravention arose "through inadvertence or because of an error in judgment made in good faith". In particular, there was some suggestion that Mr. Neufeld's lawyer was involved in securing an invitation for Mr. Neufeld to attend the October 5, 2020 meeting, which might lead to an inference that Mr. Neufeld had legal advice with respect to whether he was in a conflict of interest.

- [152] In this case, the PPPA application was launched before any petition response was filed. Thus, there is no pleading setting out Mr. Neufeld's position on such issues. In addition, there is no evidence from Mr. Neufeld that directly addresses this issue in a way that would provide an evidentiary foundation for an assertion of good faith error of judgment.
- [153] I agree with Mr. Lang that any such defence was not "put in play" by Mr. Neufeld. As a result, I do not need to consider it for purposes of analysis under s. 4(2)(a)(ii) of the PPPA.

### Balancing the Public Interest

- [154] It is not strictly necessary to consider the balancing of the public interest under s. 4(2)(b). Section 4(2) makes it clear that Mr. Lang has the onus to satisfy the court of the matters set out in all three of ss. 4(2)(a)(i) (substantial merit), 4(2)(a)(ii) (no defence), and 4(2)(b) (public interest in continuing the proceeding), and Mr. Lang has been unsuccessful on the first of these elements. However, I will record my conclusions briefly as they may be relevant in the event of an appeal.
- [155] I agree that there is a strong public interest in allowing elected public representatives to speak freely and openly on matters of public interest. They are elected to fulfil that role in the course of the leadership positions they take on.
- [156] However, in a democratic society, there are a limited number of restrictions on the ability of elected officials to speak freely on matters of public interest that come before them. One such restriction relates to participation in a decision-making process when in a pecuniary conflict of interest. When an elected official acts in breach of that restriction, there is a strong public interest in holding that official to account. Holding officials to account protects the public and ensures the strength and legitimacy of our democratically elected government structures.
- [157] For these reasons, if I had concluded that there were grounds to believe the Petition in this matter had substantial merit, I would have concluded that the public interest in allowing the Petition to proceed to a determination on the merits outweighed the public interest in protecting Mr. Neufeld's expression.

### Conclusion

- [158] As I noted above, the merits and the appropriateness of Mr. Neufeld's comments in respect of the SOGI 1 2 3 resource are not at issue on this application. The decision made rests solely on the law governing conflicts of interest under the School Act, principles of insurance law, and the statutory tests in the PPPA.
- [159] For the reasons set out above, I order that the Petition in this matter be dismissed pursuant to s. 4 of the PPPA.

[160] Mr. Neufeld has provided no evidence of damages and I would dismiss the application for damages (as distinct from legal costs) pursuant to s. 8 of the PPPA.

[161] Mr. Neufeld sought costs pursuant to s. 7 of the PPPA. As noted in *Hobbs v. Warner*, 2021 BCCA 290 at paras. 97-104, s. 7 provides a starting point for the decision as to costs but that is subject to an overriding judicial discretion to ultimately impose the order that is appropriate in all the circumstances. In my view, the parties should be given the opportunity to make submissions with respect to costs in light of my findings in this judgment.

[162] I would direct that Mr. Neufeld provide his submissions as to costs not later than February 21, 2022, with Mr. Lang's submissions to be provided not later than March 18, 2022, and any reply submission to be provided by March 28, 2022.

"Veenstra J."

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