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## **Anti-SLAPP Legislation and Non-Justiciable Issues: A Consideration of *Hansman v Neufeld* and *Todsen v Morse***

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**Cases Commented On:** *Hansman v Neufeld*, [2021 BCCA 222 \(CanLII\)](#); *Todsen v Morse*, [2022 BCSC 1341 \(CanLII\)](#)

Earlier this year, the [Supreme Court granted leave to appeal](#) in the decision *Hansman v Neufeld*, 2021 BCCA 222 (CanLII) (*Neufeld*). The case concerns an application under the *Protection of Public Participation Act*, [SBC 2019, c 3 \(PPPA\)](#) to dismiss a defamation action as a “SLAPP”: a “Strategic Lawsuit against Public Participation”. Later this year, the British Columbia Supreme Court considered another application under the *PPPA*, likewise to dismiss a defamation action, in *Todsen v Morse*, 2022 BCSC 1341 (CanLII) (*Todsen*).

This post compares and contrasts the two decisions in order to shed light on recent developments and outstanding disagreements in British Columbia anti-SLAPP law, and to inform law reform initiatives in Alberta.

I begin by situating *Neufeld* and *Todsen* within the broader trend in defamation law towards the use of SLAPP suits, before summarizing the facts of each case. I then contrast the approach each court took to the final weighing of the public interest required under the *PPPA* anti-SLAPP test. I conclude with a policy proposal for bringing anti-SLAPP legislation to Alberta, arguing that such legislation should clearly require any proceeding that escapes the anti-SLAPP filter to raise a serious justiciable issue.

### **SLAPP Suits in Social Context**

A SLAPP is civil litigation that targets an activist defendant with the intention of either preventing that defendant from pursuing their agenda or punishing that defendant for having done so (Penelope Canan & George W Pring, “[Strategic Lawsuits Against Public Participation](#)” (1988) 35:5 *Social Problems* 506 at 506; Daniella Marchand and Nafisa Abdul Razak, “[Is Now the Time to Consider Anti-SLAPP Legislation in Alberta? A Reflection on \*Pointes Protection\*](#)” (15 April 2020), online: ABlawg at 1).

The litigation is an end in itself. The plaintiff’s goal is not necessarily to win the lawsuit; rather, it is to drain the defendant’s resources through a costly and time-consuming court battle (Byron Sheldrick, *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression* (Waterloo, ON: Wilfrid Laurier University Press, 2014) at 2).

As such, the general trend is for the plaintiff(s) in a SLAPP suit to be a well-resourced entity with substantially more financial and legal resources than the defendant(s). This is reflected in the four traditional indicators of a SLAPP suit, namely, that SLAPPs:

- 1) most commonly assert defamation or tortious interference in an economic interest;
- 2) claim damages far in excess of a defendant's ability to pay, or seek injunctive relief;
- 3) impose significant legal costs on the defendant; and
- 4) are frivolous, in that defendants overwhelmingly tend to prevail in those circumstances where a SLAPP suit receives a judicial decision (Thomas A Waldman, "SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation" (1992) 39 UCLA L Rev 979 at 984).

Because so much of what makes a suit a SLAPP is the resource disparity between the plaintiff and defendant, plaintiffs tend to represent capitalist economic interests over and against more progressive causes.

The history of SLAPP litigation in Canada bears this observation out.

The 1980s and 1990s saw a number of SLAPPs in which British Columbia logging companies sued environmental activists (see, e.g., *MacMillan Bloedel v Galiano Island Trust Committee*, 63 BCAC 81 (CA), [1995 CanLII 4585 \(BC CA\)](#)). More recent SLAPP litigation has seen a salmon-farming company suing a local activist (*Mainstream Canada v Staniford*, [2013 BCCA 341 \(CanLII\)](#)), developers suing disaffected local residents (Concerned Residents of Hillside, resolved out of court), and mining corporations suing the authors and publishers of an academic text critical of their operations in central Africa (*Barrick Gold and Banro v Éditions Ecosociété*, settled out-of-court). The leading, albeit non-comprehensive, analysis of these and related historical SLAPPs remains Sheldrick, *Blocking Public Participation* at 39-62.

*Todsen v Morse* is a SLAPP suit of this first sort.

There is, however, another category of SLAPP suit into which the case of *Hansman v Neufeld* falls, namely, that of a public official using the legal system to stifle expression critical of that official's actions while in office. In 2011, for example, Edmonton mayor Stephen Mandel sued blogger Nathan Black for defamation because Black had alleged Mandel's vote to close a downtown airport was tarnished by a financial conflict of interest. In 2008, Nanaimo mayor Gary Korpan claimed defamation against two local citizens who, respectively, allegedly produced and displayed a bumper sticker accusing the mayor of corruption (Sheldrick, *Blocking Public Participation* at 51-52). Neither case resulted in judgments, with the latter being settled out-of-court and no information available about the resolution of the former. These cases further indicate the degree to which SLAPP suits are ends in themselves designed to control expressive discourse without regard for the suit's ultimate outcome.

In this second category of SLAPP suits, the purpose also is to preserve conservative, capitalist power as they are premised on a restrictive understanding of what expression citizens may use to criticize public officials. As Sheldrick notes, such cases are particularly concerning when they take place within the context of an election campaign, as did both the Mandel and Korpan cases,

because “[e]lections are fraught with political conflict and with allegations and assertions about the character of candidates....Allegations of defamation within this context have the potential for undermining democratic debate and the functioning of electoral processes as mechanisms of political accountability” (Sheldrick, *Blocking Political Participation* at 53).

As we will see, although not taking place within the context of an election campaign, this, too, is the potential of the *Hansman v Neufeld* decision.

### **The *Protection of Public Participation Act*, SBC 2019, c 3**

The *PPPA* affords a party two grounds for bringing an application to dismiss a SLAPP, namely, that:

- (a) the proceeding arises from an expression made by the applicant, and
- (b) the expression relates to a matter of public interest (*PPPA*, s 4(1)).

Provided the party bringing the application is able to satisfy these two conditions, the burden then shifts to the other party to establish that the original proceeding “has substantial merit;” the defendant in that proceeding “has no valid defence;” and, finally, “the harm likely to have been or to be suffered by the respondent [to the *PPPA* application] 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” (*PPPA*, s 4(2)).

### ***Hansman v Neufeld*, 2021 BCCA 222**

“Sexual Orientation and Gender Identity 123” (or “SOGI 123”) is a British Columbia educational curriculum designed to teach students about sexual orientation and gender identity. The plaintiff/appellant, a public school trustee, published a Facebook post criticizing the curriculum, in particular, what he perceived as the lack of public debate around its content. The defendant/respondent, then the head of the BC Teachers’ Federation, criticized the appellant in various news outlets for, among other things, uttering hate speech and creating a “discriminatory and hateful” environment for students and teachers (*Neufeld* at para 13(1)).

The appellant brought an action in defamation against the respondent. The respondent in turn brought an application under the *PPPA* to dismiss the appellant’s action.

The chambers judge sustained the respondent’s application primarily on the grounds that the respondent likely had a valid defense of fair comment pursuant to *WIC Radio Ltd v Simpson*, [2008 SCC 40 \(CanLII\)](#) (*WIC*).

The appellant appealed that decision to the BC Court of Appeal.

### ***Todsen v Morse*, 2022 BCSC 1341**

The plaintiffs, Richard and Linda Todsen, are co-owners of a building company, Todsen Design & Construction Ltd, and together wish to develop a property in Qualicum Beach, British Columbia.

The defendants are an individual, Ezra Morse, and the Qualicum Nature Preservation Society (QNPS), which Morse and two others founded under the *Societies Act*, [SBC 2015, c 18](#). Morse and the QNPS campaigned against the Todsens' proposed development, in particular, via social media.

The Todsens brought an action in defamation alleging that Morse and the QNPS made 24 defamatory statements in the course of their campaign. Those statements are divisible into four categories, namely, those alleging that:

- (1) the Todsens used bribery to further their development proposal;
- (2) the majority of Qualicum Beach residents oppose the development proposal;
- (3) the Todsens propose to rezone protected land;
- (4) the Todsens verbally and physically assaulted Morse during a public information meeting about the development proposal.

Morse and the QNPS responded by bringing an application under the *PPPA* to dismiss the Todsens' defamation action.

## **Two Approaches to Weighing the Public Interest**

The courts in *Neufeld* and *Todsen* most sharply diverge in their application of the final stage of the *PPPA* test for a SLAPP, whether the likely harm to the respondent due to the applicant's expression is "serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression" (s 4(2)).

In *Neufeld*, the BC Court of Appeal (in reasons written by Justice Lauri Ann Fenlon, with Peter M. Willcock and Peter G. Voith JJ concurring) understands this stage to be a final weighing of the public interest in protecting the appellant's versus the respondent's expression (at para 63). Justice Fenlon reasons here that the lower-court judge erred because he:

did not consider the potential chilling effect on future expression by others who might wish to engage in debates on [SOGI 123] or other highly charged matters of public interest—that is, the risk that people would withdraw or not engage in public debate for fear of being inveighed with negative labels and accusations of hate speech with no opportunity to protect their rights. (at para 65)

This risk is strongest for those who hold controversial or "inflammatory" opinions (at para 69). Being accused of disseminating hate speech is one way in which reputational damage can occur (at para 68). And those who hold controversial opinions should be able to engage in public debate without having to fear the loss of their reputation (at para 63).

According to the Court of Appeal, the lower-court judge's error was to overlook the chilling effect on free speech of permitting the *PPPA* application and thereby preventing the respondent from defending himself at trial from such an accusation (at para 68). If the allegedly defamatory statements are, indeed, defamatory, there is a public interest stake in vindicating the respondent's

meritorious claim (at para 63, citing *1704604 Ontario Ltd v Pointes Protection Association*, [2020 SCC 22 \(CanLII\)](#) at para 63 (*Pointes*)).

For this and other reasons set out in its judgment, the Court allows the appeal, sets aside the dismissal order, dismisses the application under s 4 of the *PPPA*, and reinstates the respondent’s defamation action.

In *Todsen*, by comparison, Justice Jan Brongers of the BC Supreme Court follows Justice Suzanne Côté’s lead in *Pointes* at para 81 and treats the final stage of the *PPPA* analysis as an opportunity to scrutinize “what is really going on” in the case at bar (*Todsen* at para 32). Quoting *Neufeld* at para 5, Justice Brongers accepts that in performing this analysis, a *PPPA* anti-SLAPP application can screen out “an otherwise valid cause of action...so long as the public interest in protecting the defendant’s expression outweighs the public interest in allowing the plaintiff to proceed” (*Todsen* at para 33).

The Court believes it is not required to perform the final-stage analysis in this case because the *Todsens* did not succeed in demonstrating both that (1) their claim has substantial merit and (2) the defendants have no valid defense for any of the 24 allegedly defamatory statements. For the purposes of completeness, however, Justice Brongers conducts a public-interest weighing nonetheless.

His approach to this final-stage analysis is illuminating in that only those statements pertaining to the alleged assault would have warranted public interest protection. That is because “what is really going on” in relation to the other three sets of allegedly defamatory statements is “a request for judicial consideration of whether [Morse and the QNPS] should be permitted to engage in” the sort of public discourse those statements represent (at para 109). For example, the so-called “Community Opposition” statements are public assertions about the extent of Qualicum residents’ opposition to the proposed development; the *Todsens* are free to dispute those assertions, but it is inappropriate for them to do so in court (at para 134).

By comparison, the so-called “Assault Statements” require determination of whether the allegedly defamatory allegations themselves are justified “as opposed to what are the appropriate boundaries for public discussion” (at para 190).

In short, the BC Supreme Court in *Todsen* uses the final stage of the anti-SLAPP test to ask whether the defamation suit in question raises a justiciable issue. By contrast, in *Neufeld*, the Court of Appeal uses the same stage to ask whether the allegedly defamatory statements are appropriate contributions to public debate—in effect, taking the opposite approach.

### **Free Expression Isn’t a Right to Litigate Your Side’s Position**

Anti-SLAPP legislation limits access to the courts in order to prevent a well-documented misuse of judicial resources for the purposes of restricting free speech.

A good parallel at common law is the test for public interest standing, which serves a similar purpose and, I suggest, provides a model both for evaluating *Neufeld* and *Todsen* as well as for extending anti-SLAPP protections to Alberta.

“It would be intolerable,” the Supreme Court noted in *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607, [1986 CanLII 6 \(SCC\)](#) at 631:

if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere ‘busybody’ litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government.

The *PPPA* performs a similar function in that it is designed to ensure that only those who have suffered serious damage as a result of an allegedly defamatory expression are entitled to press their suit in the courts; and, further, that they are only able to do so if their action raises a question that the courts are fit to answer. These are important limitations, but as the Court of Appeal’s reasoning in *Neufeld* illustrates, they are, at present, too readily open to misinterpretation.

The Court correctly reasons, in *Neufeld*, that falsely accusing someone of disseminating hate speech is substantively defamatory. Such an accusation may “inflict serious reputational harm,” the Court found (at para 68), and I quite agree. It makes sense, therefore, that the public interest in protecting the respondent’s specific accusations of hate speech would be less than for expressions that do not make those accusations: the harm caused is at least potentially significant, and the public interest favours allowing the appellant to litigate his potentially meritorious defamation claim.

This is not the case, however, for the respondent’s attribution of negative labels to the appellant in *Neufeld*.

The Court places significant emphasis on a person’s right to defend themselves against such labels. And, to be sure, if a person is accused of, say, transphobia, they have every right to rebut that accusation. Much as in *Todsen*, the plaintiffs have every right to rebut the assertion that a majority of Qualicum Beach residents oppose the development proposal. The real question, however, is whether this right to defend oneself translates into a right to litigate one’s subject position in a public debate in court.

In my opinion, the answer is “no.”

The common law of justiciability is relevant here.

It is well established in Canadian law that not every question is appropriately answered by the courts. Specifically, the Supreme Court has found that questions which are purely political in nature or which take the court beyond “its area of expertise: the interpretation of law” are non-justiciable (see *Reference re Secession of Quebec*, [1998] 2 SCR 217, [1998 CanLII 793 \(SCC\)](#) at para 26, citing *Reference re Canada Assistance Plan (Canada)*, [1991] 2 SCR 525, [1991 CanLII](#)

[74 \(SCC\)](#) at 545). Questions which draw a court into political controversies are, in other words, inappropriate for the judiciary to answer because they go beyond the ambit of the court's jurisdiction. Where a litigant poses a non-justiciable question to the courts, the judiciary may decline to answer it (in the case of reference questions) or decline to afford the litigant standing to press their suit (in the case of claims premised on public interest standing) (for the latter, see especially the test laid out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012 SCC 45 \(CanLII\)](#) at para 2 (SWUAV)).

As the BC Supreme Court correctly recognized in *Todsen*, anti-SLAPP legislation affords the judiciary a further opportunity to dismiss non-justiciable questions.

The reason for this is obvious.

Nearly any argument or accusation made in the context of a public debate could have the effect of discouraging those of a contrary opinion from expressing their views publicly. If this was the standard for bringing a defamation action, I doubt any anti-SLAPP dismissal application could succeed.

There is a clear public interest, in *Neufeld*, in the appellant defending himself from the negative labels attached to him, as well as in vindicating his side's position in the public eye. This does not, however, translate into an automatic right to mount that defense through an *offensive* defamation suit against his rhetorical opponent, as the Court of Appeal fails to recognize.

Better the approach taken in *Todsen*, where the Court correctly finds that there is a public interest in allowing a defamation action to proceed if and only if that action asks the judiciary to consider whether the plaintiff is entitled to a legal remedy; and that there is no public interest in allowing that action to proceed if it asks the judiciary to determine what is and is not an appropriate contribution to public discourse.

The Supreme Court has an opportunity, in taking up *Neufeld*, to side with Justice Brongers' approach in *Todsen* and clarify that a proceeding ought to have "substantial merit" in the sense of raising "a serious justiciable issue" (to borrow wording from the test for public interest standing: SWUAV at para 2) in order to escape an anti-SLAPP dismissal application. With that minor clarification, the Supreme Court can ensure the judiciary does not open the floodgates to litigants who, contrary to the purpose of anti-SLAPP legislation, wish to use the courts to vindicate positions that are better argued in the public square.

Alberta would do well to enact anti-SLAPP legislation of its own, modelled on British Columbia's, to prevent exactly the sort of litigation discussed in this post. And, if the province does, it would do well to write into its own statute the requirement that a proceeding raise a serious justiciable issue in order to be allowed to proceed.

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