**Retaliatory Defamation Lawsuits, Equality Principles, and Access to Justice: Commentary on *Hansman v Neufeld*, 2023 SCC 14**

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## Introduction

In November 2023, the Supreme Court of Canada released its decision in *Hansman v Neufeld*, 2023 SCC 14.[2]

This decision has a symbolic and meaningful effect on equality law in Canada: it recognized, for the first time, the historical marginalization of the transgender community in Canada and the importance of protecting transgender youth.

What remains unclear from this decision, however, and what I unpack in this article, is how this decision could impact the increasing number of retaliatory defamation lawsuits and the increasing access to justice issues raised when responding to these types of lawsuits.

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[2] *Hansman v Neufeld*, 2023 SCC 14 ["***Neufeld***"].

While the decision's acknowledgement of the importance of "counter speech" is significant, the normative and definitional murkiness surrounding this new category of speech, as well as practical concerns about how counter speech is to be examined under anti-SLAPP legislation, may increase the already-heavy burden on those responding to retaliatory defamation lawsuits.

For equality lawyers, the *Neufeld* decision is a huge step in the right direction. For defamation and freedom of expression lawyers, the *Neufeld* decision raises more questions than it answers.

In this article, I situate the *Neufeld* decision within Canada's anti-SLAPP legislation, describe the reasoning laid out in *Neufeld*, and highlight the main take-aways from the case. I then examine some gaps in the decision's analysis of counter speech, and how these gaps impact the law on defamation and access to justice. I end with some advice for counsel and the courts to ensure that our anti-SLAPP legislation operates as intended: as an efficient and economical way for individuals engaging in public debate to protect themselves from retaliatory lawsuits.

**Retaliatory Lawsuits and Anti-SLAPP Legislation**

To understand the *Neufeld* decision, we need to understand Canada's anti-SLAPP legislation.

SLAPP stands for "strategic litigation against public participation"—in other words, a lawsuit or multiple lawsuits brought strategically to silence or squash public discourse. By initiating an expensive and time-consuming legal process, the plaintiff sends a message to the defendant, and other possible critics, that their criticism of the plaintiff comes with a cost.

Quebec, Ontario, and British Columbia have all enacted legislation intended to protect its citizens from SLAPPs. Ontario's anti-SLAPP legislation is found at s. 137.1 of the *Courts of Justice Act*, RSO 1990, c C.43, and B.C.'s anti-SLAPP legislation is found in the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 (*PPPA*), primarily s. 4. This article will not be discussing Quebec's legislation.

The legislation in B.C. and Ontario both outline a near-identical test:

1. The moving party (the defendant in the defamation action) must satisfy the motion judge that the proceeding arises from an expression relating to a matter of public interest. This is known as the **threshold** question.[3]

   In determining whether an expression relates to a matter of public interest, the question is whether "some segment of the community would have a genuine interest in receiving information on the subject."[4] There is no single test for what is of public interest; "'[t]he public has a genuine stake in knowing about many matters ranging across a variety of topics."[5] No qualitative assessment of the expression should be made at this stage: "it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the

[3] *Protection of Public Participation Act*, SBC 2019, c 3 ["***PPPA***"], s. 4(1); *Courts of Justice Act*, RSO 1990, c C.43 ["***CJA***"] s. 137.1(3).
[4] 1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 ["***Pointes***"] at para 102.
[5] *Pointes*, supra at para 27.

public interest."[6] In other words, the courts will not assess the merits, manner, or motive of the expression at this stage.

2. The burden then shifts to the responding party (the plaintiff in the defamation action) to satisfy the motion judge that there are "grounds to believe" that:
    a. the defamation lawsuit has "substantial merit";
    b. the defendant has "no valid defence"; and
    c. the public interest in letting the defamation action continue outweighs the public interest in protecting the expression made.[7]

Prongs (a) and (b) will be referred to as the **merits** prong. Prong (c), the last prong, will be referred to as the **weighing** prong.

The merits prong requires an examination of the merits of the defamation action, including through any possible defences the defendant may have. It must be legally tenable and supported by evidence reasonably capable of belief ("grounds to believe") that the defamation action tends to weigh more in favour of the plaintiff ("substantial merit").[8] This is a more demanding standard than a motion to strike. It requires more than just "some chance" of success and more than just an "arguable case." It must have a *real* prospect of success.[9] Similarly, there must be a basis in the record and the law that any possible defences put in play by the defendant do not tend to weigh more in favour of the defendant. If there is *any* valid defence, this prong will not be met.[10]

The weighing prong is the crux and heart of anti-SLAPP legislation. Here, judges can dismiss what appears to be a technically meritorious claim if the public interest in protecting the expression outweighs any possible reputational harm to the plaintiff. In other words, *even if* the plaintiff's defamation action has substantial merit, and *even if* the defendant likely has no valid defence to the action, the action can still be dismissed if freedom of expression and the public interest demands it.[11]

In conducting the exercise under the weighing prong, the motions judge can consider the following factors:

- 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,

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[6] *Pointes*, supra at para 28.
[7] *PPPA*, supra at s. 4(2); *CJA*, supra at s. 137.1(4).
[8] *Pointes*, supra at para 49.
[9] *Pointes*, supra at para 50.
[10] *Pointes*, supra at paras 58-59.
[11] *Pointes*, supra at paras 53, 62.

- 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.[12]

At least initially, the legislative impetus behind anti-SLAPP laws was to deter suits where there was a clear power imbalance; an oil and gas company suing environmental protestors, for instance.[13] As noted by the Supreme Court:

> SLAPPs first emerged in the United States as a tendency of some powerful businesses to use the threat of litigation to frustrate public mobilization efforts against them. Because of these origins, the archetypal SLAPP is generally described as a powerful or wealthy plaintiff, who has suffered only nominal damage, using litigation against a comparatively under-resourced defendant to silence criticism.[14]

However, Canadian courts quickly realized that this "archetype" didn't always correctly define SLAPPs; in fact, the meritless action brought by a well-heeled plaintiff to silence a critic is "as easy to recognize as it is rare."[15] The more insidious, and more likely, retaliatory lawsuit did not necessarily need to be initiated by the rich and powerful to be a strategic lawsuit meant to quash public discourse. It could consist of intemperate behaviour between two strangers on social media,[16] or two vocal activists or activist groups litigating against one another.[17] The parties could be on equal financial footing. The plaintiff might not necessarily have a history of using litigation to silence critics.[18]

What SLAPPs did need was only one consistent feature: "that the proceeding acts to silence the defendant, and more broadly, to suppress debate on matters of public interest, rather than to remedy serious harm suffered by the plaintiff."[19] Where this feature was found, a judge could deny the plaintiff's day in court, even on a meritorious claim, if there was a "more compelling social goal."[20]

To work effectively, however, anti-SLAPP legislation needed to be efficient and economical. As noted by the Hon. Madeleine Meilleur (at the time, the Attorney General of Ontario) at the second reading of the bill that would become Ontario's anti-SLAPP legislation, it was intended to "allow courts to quickly identify and deal with strategic lawsuits, minimizing the emotional and financial strain on defendants, as well as the waste of court resources."[21]

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[12] *Pointes*, supra at para 80.
[13] See also, *MacMillan Bloedel v Galiano Island Trust Committee*, 1995 CanLII 4585 (BC CA), where a B.C. logging company sued environmental activists; *Mainstream Canada v Staniford*, 2013 BCCA 341, where a salmon-farming company sued a local activist.
[14] *Neufeld*, supra at para 47.
[15] *Mondal v Kirkconnell*, 2023 ONCA 523 ["***Mondal***"] at para 31.
[16] *Mondal*, supra at para 33.
[17] *Lascaris v B'nai Brith Canada*, 2019 ONCA 163.
[18] *Neufeld*, supra at para 48. See also *Simán v. Eisenbrandt*, 2024 BCCA 176 at para 32.
[19] *Neufeld*, supra at para 48.
[20] *Neufeld*, supra at para 51.
[21] Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 41A, 1st Sess., 41st Parl., (December 10, 2014) at p 1975.

As such, the legislation mandated that an anti-SLAPP motion must be heard no later than 60 days after notice of the motion is filed with the court, in Ontario,[22] or "as soon as practicable", in B.C.,[23] to ensure a speedy determination.

Further, the legislation created a statutory presumption that a moving party/defendant who was successful on an anti-SLAPP motion would be entitled to its costs on a full indemnity basis unless inappropriate in the circumstances.[24] This would serve as a strong deterrent against plaintiffs initiating SLAPPs and limit the chilling effect on a defendant who was forced to incur legal fees just to bring the anti-SLAPP motion.

Lastly, an anti-SLAPP motion needed to be resolved on the basis of limited evidence.[25] In this respect, "motions under s. 137.1 are situated between motions to strike, which are decided solely on the pleadings, and summary judgment motions, which involve a more extensive record and ultimate adjudication of the issues."[26] This would ensure that the motions would not be bogged down by weighty evidentiary records and thereby increase the time and cost needed to bring them.

**The *Hansman v Neufeld* Decision**

With this background, we can more properly appreciate the Supreme Court's latest pronouncement on anti-SLAPP legislation in *Neufeld*, and more clearly understand the significance of this decision on defamation law, free expression, and access to justice.

The plaintiff, Barry Neufeld, was a public-school board trustee who posted a number of online remarks about B.C.'s new SOGI (sexual orientation and gender identity) 123 curriculum, which was intended to guide educators in fostering inclusion for 2SLGBTQ+ students.[27]

On his Facebook, Neufeld said, "at the risk of being labeled a bigoted homophobe," he felt the new SOGI 123 curriculum was a weapon of propaganda, he supported traditional family values, and he belonged in a country like Russia or Paraguay who had the "guts to stand up to radical cultural nihilists."[28]

The post met with viral online criticism, and major media outlets began reporting on it.

The defendant, Glen Hansman, is a teacher and the former President of a significant B.C. Teacher's Union. Hansman was asked to comment on Neufeld's online remarks, and he did: Hansman said that Neufeld was bigoted and intolerant, had created an unsafe space for kids, and should step down, resign, or be removed.[29]

Neufeld doubled down on his criticisms, further stating that the new curriculum was "an institutionalization of codependency: encouraging and enabling dysfunctional behavior and thinking

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[22] *CJA*, supra at s. 137.2(2).
[23] *PPPA*, supra at s. 9(3).
[24] *PPPA*, supra at s. 7(1); *CJA*, supra at s. 137.1(7).
[25] *Pointes*, supra at para 52; *Neufeld*, supra at para 37.
[26] *Mondal*, supra at para 29; *Pointes*, supra at paras 50-52.
[27] *Neufeld*, supra at para 13.
[28] *Neufeld*, supra at para 14.
[29] *Neufeld*, supra at paras 17-19.

patterns" and amounted to "coddling and encouraging what I regard as the sexual addiction of gender confusion."[30]

Hansman continued to respond to Neufeld's comments, stating that Neufeld had "tip-toed quite far into hate speech" and was promoting "hatred."[31]

Neufeld sued Hansman for defamation.

Hansman brought an anti-SLAPP motion, arguing that Neufeld's defamation lawsuit should be dismissed because the value of Hansman's expressive activity weighed greater than any harm that activity may have to Neufeld's reputation.

The Supreme Court agreed with Hansman and dismissed Neufeld's defamation action in its entirety.

Justice Karakatsanis' Majority Decision

The majority decision, written by Justice Karakatsanis, framed the issue in the context of anti-SLAPP legislation, defining SLAPPs as "actions that disproportionately suppress free expression on matters of public interest."[32]

The majority held that Hansman had met the threshold burden under the legislation: the proceeding arose from expressions of his that related to a matter of public interest.

The burden then shifted to Neufeld on the merits and weighing prong. Note, for later, that the majority analysed the weighing prong first before turning to the merits prong, stating that "the order in which a judge chooses to address each of the elements under [the merits and weighing prongs] is, of course, at the discretion of the court."[33] This article will keep the order as reflected in the legislation, with the merits prong examined first followed by the weighing prong.

While Neufeld's defamation lawsuit had "substantial merit," he could not disprove that Hansman had valid defences—particularly the defence of fair comment. The defence of fair comment only applies to opinions or comments, not asserted facts. The majority held that Hansman's allegations of bigotry were debatable opinions, not facts capable of proof or disproof.[34] As such, the defence of fair comment applied to Hansman's expressions, and there were grounds to believe that each of its 5 factors could be made out.

Moreover, the majority was clear that any reputational harm remedied by letting Neufeld's defamation lawsuit continue did not outweigh the significant public interest in protecting Hansman's expressions.

On one side of the scales, Neufeld failed to identify serious harm to his reputation flowing from Hansman's statements. While there is a presumption of damages in defamation law, and this can establish the

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[30] *Neufeld*, supra at para 23.
[31] *Neufeld*, supra at para 25, 29.
[32] *Neufeld*, supra at para 2.
[33] *Neufeld*, supra at para 53.
[34] An example of a debatable opinion incapable of proof: "I like green apples." An example of a factual assertion capable of proof: "The apple is green." See, e.g., *Kielburger v. Canadaland Inc.*, 2024 ONSC 2622 ["***Kielburger***"] at para 62.

*existence* of harm, Neufeld needed to show a *magnitude* of harm sufficient to outweigh the public interest in the corresponding expressions. Neufeld did not do this. In fact, the evidence showed that the magnitude of harm was on the lesser end. Neufeld "continued to express the same contentious views despite the public reaction and won re-election a year later."[35] Further, he could not show that any harm to his reputation flowed from Hansman's statements. There was immediate public outcry against Neufeld's comments, which began even before Hansman provided comments to the media. There was a dearth of evidence supporting a causal link between Hansman's expressions, specifically, and any subsequent harm to Neufeld's reputation.

On the other side of the scales, the Court recognized that Hansman's statements were deserving of significant protection. Hansman's expressions were "counter-speech motivated by a desire to promote tolerance and respect for a marginalized group in society."[36] In a precedent-setting move, the Court held that this type of expression deserves significant protection.

The majority explained that not all expression is created equal. The closer the expression lies to the core values of s. 2(b)—the search for truth, participation in social and political decision-making, and diversity in the forms of self-fulfillment and human flourishing—the more we should protect it. The values underlying section 15 of the *Charter*—our equality guarantee—may also factor into how much protection should be given to certain expressions. The quality of the expression, its subject matter, the motivation behind it, the form in which it is expressed—these factors can further help determine how much protection to afford to any particular expression.

This is significant in two major respects.

First, for the first time, the Supreme Court of Canada recognized *counter speech*: speech that "contribute[s] to public discourse by countering ignorant or harmful expression with an informed or compassionate response."[37] Counter speech reflects the philosophy that harmful speech is best remedied not through censorship but through a compassionate but direct response that challenges or undermines it.[38] In other words, the cure for bad speech, so it goes, is more speech.[39] The majority does note, however, that counter speech does not amount to "open season" on reputation, and that it should not be a disproportionate or gratuitous response to the initial discourse.[40]

Second, the majority held that counter speech is a particularly valuable type of speech because it lies close to the values underlying both s. 2(b) and s. 15 of the *Charter*. Counter speech ties closely into the values of s. 2(b) because it is key to the open exchange of ideas, which, in turn is essential to the pursuit of truth and democracy.[41] It is also valuable because it is "motivated by the defence of a vulnerable or marginalized

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[35] *Neufeld*, supra at para 69.
[36] *Neufeld*, supra at para 62.
[37] *Neufeld*, supra at para 80.
[38] See, e.g., Dangerous Speech Project, "Counterspeech", accessed online: https://dangerousspeech.org/counterspeech/.
[39] *Neufeld*, supra at para 123.
[40] *Neufeld*, supra at para 92.
[41] *Neufeld*, supra at para 81.

group in society," which engages the values at the core of s. 15 of the *Charter*—the equal worth and dignity of every individual.[42]

Hansman's expressions fell within the category of counter speech. His expressions were clearly motivated by the defence of the transgender community, particularly transgender kids.

The majority then explained why the transgender community is a vulnerable and marginalized group in Canada. Gender identity has never been explicitly recognized as an analogous and protected ground under section 15 of the *Charter*. In fact, the Supreme Court of Canada has never before given judicial notice on the need for legal protections for the transgender community. In the course of its reasons, the majority in *Neufeld* provided official judicial acknowledgement of the following:

- The transgender community is "undeniably" a marginalized community in Canada.[43]
- Their history is marked by discrimination and disadvantage, and they continue to face prejudice, stereotyping, and vulnerability.[44]
- Transgender folks have been and continue to be stereotyped as diseased or confused.[45]
- The transgender community is at increased risk of violence, they are disadvantaged in terms of housing, employment, and healthcare, and they face greater access to justice barriers than others given their lack of explicit human rights protection.[46]
- Gender identity and/or expression are prohibited grounds of discrimination in human rights codes across the country. Further, one case from a lower court has already found gender identity to be an analogous ground under s. 15 of the *Charter* because gender identity is an immutable personal characteristic.[47]

While the majority doesn't come outright and say it, its decision all but acknowledges that gender identity can now be treated as an analogous ground under s. 15 of the *Charter*, and that trans individuals' equality and dignity interests should therefore be accorded constitutional protection. This is a huge step forward for transgender folks seeking protection from discriminatory state action.

With this underpinning, the majority found that Hansman's counter speech was directed at protecting a marginalized group. Hansman's counter speech was motivated by responding to expressions "he perceived to be untrue, prejudicial towards transgender and other 2SLGBTQ+ individuals, and potentially damaging to transgender youth."[48]

This, in part, meant that Hansman's counter speech fell close to the core values underlying s. 2(b):

> His expression served a truth-seeking function, as he was contacted by the media to present an alternative perspective within a debate on a matter of public importance. In speaking out, he

[42] *Neufeld*, supra at para 82.
[43] *Neufeld*, supra at para 84.
[44] *Neufeld*, supra at para 89.
[45] *Neufeld*, supra at para 85.
[46] *Neufeld*, supra at para 86.
[47] *Neufeld*, supra at paras 87-88.
[48] *Neufeld*, supra at para 83.

> sought to counter expression that he and others perceived to undermine the equal worth and dignity of marginalized groups. Finally, his speech commenting on the fitness of an electoral candidate was political expression, which is "the single most important and protected type of expression."[49]
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> …
>
> I agree with the chambers judge that there is a great public interest in protecting Mr. Hansman's freedom of speech on such matters. The subject matter of Mr. Hansman's speech (commenting on the value of a government initiative, the need for safe and inclusive schools, and the fitness of a candidate for public office), the form in which it was expressed (solicited by the media to present a counter-perspective within an ongoing debate), and the motivation behind it (to combat discriminatory and harmful expression and to protect transgender youth in schools) are all deserving of significant protection.[50]

The majority further held that Hansman's counter speech was not disproportionate or gratuitous, that individuals have the right to use words like bigoted, intolerant, or hateful when confronted with views that appear to be discriminatory, and that Hansman's counter speech "generally focused on the views that Neufeld expressed, and not who he is as a person."[51]

As a result, the scales weighed in favour of protecting Hansman's counter speech, with the Court dismissing Neufeld's defamation action against him.

Justice Côté's Sole Dissent

Justice Côté wrote the sole dissent. She took issue with a number of aspects of the majority's decision.

First, she took issue with the order in which the majority chose to conduct its analysis, wherein it examined the weighing prong first before turning to see whether Neufeld also met the merits-based hurdle. This, Justice Côté held, should not be done because the weighing prong requires weighing the public interest in allowing a meritorious lawsuit to proceed against the public interest in protecting the expression.[52] Without determining whether the lawsuit could be meritorious or not, the weighing prong cannot properly balance the scales.

Second, Justice Côté disagreed that Hansman could avail himself of the fair comment defence. She would have held that some of Hansman's expressions were not recognizable as comments, appearing instead to be imputations of fact—particularly, the expression that Neufeld "promoted hatred" against LGBTQ2S+ students. This particular expression, in Justice Côté's view, could be characterized as an allegation that Neufeld committed hate speech (a criminal offence in Canada), which would be a statement of fact capable of proof or disproof that cannot be protected by the defence of fair comment.[53]

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[49] *Neufeld*, supra at para 91.
[50] *Neufeld*, supra at para 93.
[51] *Neufeld*, supra at para 92.
[52] *Neufeld*, supra at para 141.
[53] *Neufeld*, supra at para 153.

Lastly, Justice Côté disagreed entirely with how the majority balanced the scales between harm to Neufeld's reputation and the public interest in Hansman's expressions.

On one side of the scales, a number of aggravating factors would have led her to hold that there was harm to Neufeld on the middle or high end of the scale: the grave nature of an allegation of hate speech, the absence of an apology, Hansman's stature and legitimacy in the community, and the scope and spread of Hansman's expressions online. Further, in her view, drawing a direct causal link between Hansman's comments and any harm to Neufeld was unnecessary at such an early stage of the proceedings.

On the other side of the scales, Justice Côté disagreed strongly with the majority's attempts to bring equality into the weighing analysis. Equality is not one of the competing values at play under anti-SLAPP legislation, nor is it one of the core values underpinning freedom of expression. By bringing equality in, Justice Côté held, the majority engaged in an "improper path of reasoning" that undermines freedom of expression and its emphasis on content-neutrality: "the more we evaluate the worthiness of expression in light of values unrelated to freedom of expression, the further we move from content neutrality."[54]

Justice Côté's view was that the majority based its decision on the outcome it wanted to reach because of the "alignment between the views expressed by [Hansman] and those held by the court."[55] By reaching this outcome, the majority deprived Neufeld of the opportunity to vindicate a legitimate claim, chilling future engagement in public debate by those "expressing minority views on contentious topics."[56]

**Impact on Defamation Law**

The *Neufeld* decision has recognized the historical marginalization of trans communities in Canada. Further, the Court has all but confirmed that gender identity is an analogous ground under s. 15. That's a huge win to have from our highest court and a great step forward in equality law.

But this decision's impact on defamation law is murky, and possibly problematic.

I start by outlining what practitioners can take away from the decision—and from recent lower court cases that have already cited to it—and apply to their own practice.

However, I go on to explain what remains unanswered, and what may pose problems for counsel, their clients, and the courts in the future. In particular, while the decision's acknowledgement of the importance of "counter speech" is significant, the majority fails to properly explain how counter speech relates to 2(b)'s core values, and further fails to define key terms related to this new category of speech. While I do not agree with Justice Côté's concerns about content neutrality, her concerns about bringing equality values into defamation law warrant further consideration. Specifically, the majority decision's failure to provide definitional clarity or a clear normative grounding for counter speech, combined with the incorporation of a mini equality analysis into our anti-SLAPP legislation, could raise serious access to justice concerns in an already over-burdened legislative scheme.

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[54] *Neufeld*, supra at para 171.
[55] *Neufeld*, supra at para 169.
[56] *Neufeld*, supra at para 177.

General Guidelines

There is plenty to learn from the decision in *Neufeld*, as well as from the burgeoning lower court case-law that has already cited to it.

First, *Neufeld* is clear that we need to adjust our stereotypical ideas of SLAPP suits: "SLAPPs do not always embody the hallmarks of the archetype."[57] Anti-SLAPP legislation is not just for the lawsuit brought against David by Goliath; it is for any litigation that will act to suppress debate on matters of public interest rather than to remedy serious harm suffered by the person bringing the proceeding.

Second, *Neufeld* has provided some glosses to defamation law's fair comment defence. Calling someone racist, homophobic, or otherwise prejudiced is a debatable assertion that will generally be classified as an opinion rather than a fact. This means that the defence of fair comment will apply, and the defendant/moving party does not need to rely on the defence of truth to "justify" the assertion. Further, for the defendant to avail herself of the fair comment defence, she does not need to show that her opinion was based on facts that actually support that opinion or confirm its fairness. All that is necessary is to identify the factual foundation on which the opinion is based, and let the reader or listener make up their own mind on whether they agree or disagree with it. When dealing with counter speech, the original expressions that the counter speech is responding to will make up the necessary factual foundation.

Third, *Neufeld* has clarified how harm is to be weighed under the weighing prong. Some evidence of actual harm will be required from the plaintiff to defeat an anti-SLAPP motion. The general presumption of harm in defamation law will show the existence of harm but may not be sufficient to show that the harm is *serious* enough to overcome any public interest in the expressions made. Subsequent lower court case-law has confirmed that specific evidence of distress, hurt, and humiliation may be sufficient;[58] bold, conclusory assertions of harm will not be.[59] Further, while definitive findings of causation are not needed, some evidence of a causal link between the defendant's expressions and the harms suffered will be required, particularly where the reputational harm might have been caused by other sources. However, as identified recently by the B.C. Court of Appeal, if it is impossible to "separate the salt from the soup," it may be sufficient to show that the impugned expression continued the harm that may have started from other sources.[60]

Fourth, *Neufeld* has expanded how the public interest in the expression can be considered under the weighing prong. The merits, manner, and motivation of the expression can be examined in light of the core values underlying both s. 2(b) and s. 15 of the *Charter*. The closer the defendant's expression lies to those core values, the greater the public interest in protecting it.

Lastly, as I expand on in the next section, we have a new category of protected speech: counter speech. If the motivation of the expression is to combat expression perceived to be discriminatory or harmful, this will weigh heavily in favour of protection. However, counter speech should not be disproportionate or

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[57] *Neufeld*, supra at para 48.
[58] See, e.g., *Kielburger*, supra at paras 80, 85-87.
[59] *Gill v Maciver*, 2024 ONCA 126 ["***Gill***"] at para 56.
[60] *Rooney v Galloway*, 2024 BCCA 8 ["***Galloway***"] at paras 441-443.

gratuitous. Words like bigoted, intolerant, or hateful are acceptable, but generally, the counter speech should focus on the views or ideas expressed and not the person behind them. When and how this category applies is examined in more detail below.

Counter Speech

Now, if someone is sued for defamation, they may be able to avail themselves of the category of counter speech if they were engaging in speech that "contribute[s] to public discourse by countering ignorant or harmful expression with an informed or compassionate response."[61]

Counter speech, more broadly, is the practice of responding to harmful or hateful speech through more speech, rather than censorship. The goals are usually to shift the original speaker's views or beliefs, or to shift the public discourse away from harmful speech for the audience's benefit.[62] Typical strategies associated with counter speech include warning the speaker of the consequences of their speech, shaming and labeling the speaker through labels like homophobic or transphobic, using empathy and affiliation either with the speaker or with the targeted group, using humour to soften or neutralize the offending speech, and using images to transcend cultural or linguistic boundaries.[63]

Hansman himself used many of these strategies. He warned Neufeld of the consequences of his speech, explaining that Neufeld was "tiptoeing" quite far into hate speech and "promoting" hatred. He shamed and labeled Neufeld as intolerant and transphobic. He empathized with members of the LGBTQ school community and explained his affiliation with them as a gay man.

Recognition of this type of speech is enormously helpful in the battle against hateful or harmful speech. Not all harmful speech will be banned by Canada's federal and provincial hate speech laws; indeed, the definition of hate speech—usually defined as expression exposing vulnerable groups to detestation and vilification—is a high bar that will not capture all types of possibly harmful speech.[64] Counter speech acts as an essential tool against harmful expressions that may not rise to the level of legislatively-prohibited hate speech.

However, the decision leaves much unanswered. Below, I unpack three main concerns with the majority's recognition of counter speech: a lack of normative grounding, a lack of definitional clarity, and a lack of practical direction. While I try to find some meaning in the post-*Neufeld* jurisprudence, the outstanding questions pose a problem for access to justice, as I explain in the next section.

*How is counter speech grounded in s. 2(b)?*

The decision in *Neufeld* **lacks normative grounding**.

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[61] *Neufeld*, supra at para 80.
[62] Susan Benesch, Derek Ruths, Kelly P Dillon, Haji Mohammad Saleem, and Lucas Wright, "Considerations for Successful Counterspeech" ["**Successful Counterspeech**"] at p 2, accessed online: https://dangerousspeech.org/wp-content/uploads/2016/10/Considerations-for-Successful-Counterspeech.pdf
[63] Successful Counterspeech, supra at pp 3-6.
[64] *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at paras 24, 40-41.

The majority tells us that counter speech should be protected because it lies close to the core values of s. 2(b). In particular, the majority says that counter speech is key to the open exchange of ideas, which, in turn is essential to the pursuit of truth and democracy.[65]

But every type of dialogue, conversation, or call and response is part of the open exchange of ideas, and can therefore support political participation, democracy, and truth-seeking. Counter speech is not unique in that regard and doesn't lie any closer to 2(b)'s core values than any other public discourse. What makes counter speech different from other dialogue is that it is in furtherance of equality principles, that it is specifically intended to counter ignorant or harmful expression. The majority doesn't explain how *that* specific component—furthering equality principles or countering harmful expression—ties into one of 2(b)'s core values such that counter speech should be protected any more than other types of speech.

So, what exactly is the Court doing here? Is it saying that s. 15's equality principles can be tied directly into section 2(b)'s core values?[66] It wouldn't be hard to tie equality principles into s. 2(b)'s underlying core values, which are fairly encompassing. These values have been outlined as follows:

(1) seeking and attaining truth is an inherently good activity;
(2) participation in social and political decision-making is to be fostered and encouraged; and,
(3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.[67]

It would not be hard to link the act of speaking out in defence of the human dignity of a group to which you or others belong with the values of self actualization through expression, or political participation. Moreover, we already have language from the Supreme Court in *Ward v Quebec*, 2021 SCC 43 that "freedom of expression flows from the concept of human dignity."[68]

However, linking s. 15 to s. 2(b)'s core values in this way could impact s. 2(b) jurisprudence. For instance, under s. 2(b), if the effect of a government action, rather than its purpose, restricts an expressive activity, s. 2(b) is not brought into play unless the claimant can demonstrate that the activity supports 2(b)'s core values rather than undermines them.[69] If 2(b)'s core values now extend to equality principles, claimants now have more room to support their expressive content, expanding the scope of 2(b).

Alternatively, the Court could be saying that the value of expression can be examined through both the underlying core values of s. 15 and the underlying core values of s. 2(b), separately.[70] If so, this begs the question: why just s. 15? As aptly noted by Stephen Fulford at TheCourt.ca,[71] does that mean the value of expression can be weighed in light of other *Charter* provisions as well? Should we value expression more

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[65] *Neufeld*, supra at para 81.
[66] See, e.g., *Neufeld*, supra at para 91.
[67] *R v Keegstra*, [1990] 3 SCR 697 ["***Keegstra***"] at p 728.
[68] *Neufeld*, supra at para 59.
[69] *Keegstra*, supra at pp 729-730.
[70] See, e.g., *Neufeld*, supra at paras 79, 82.
[71] Stephen Fulford, "*Hansman v Neufeld*: Speech Promoting Equality is More Equal" *TheCourt.ca* (25 October 2023), online: https://www.thecourt.ca/hansman-v-neufeld-speech-promoting-equality-is-more-equal/.

if it furthers freedom of religion or conscience? Should we value it less if it undermines the freedom to associate or assemble?

We don't know which door the Court has opened, because it has, perhaps intentionally, left its analysis unclear. What we are left with is a judgment that recognizes the importance of counter speech, and that explains its significance in relation to equality law principles, but doesn't actually tell us how we are to treat those equality law principles—separately, or as part of 2b's values.

This is clearly of concern to Justice Côté. She states that the majority's reasoning leads us away from content-neutrality: "the more we evaluate the worthiness of expression in light of values unrelated to freedom of expression, the further we move from content neutrality."[72] Content neutrality was supposed to be the fundamental tenet underpinning freedom of expression: that regardless of the tone or content of our expression, regardless of how distasteful or unpopular, the expression should still be protected within the generous and permissive scope of s. 2(b).

However, Justice Côté does not identify how a lack of content neutrality in the weighing prong under anti-SLAPP legislation is going to impact any content neutrality inherent in s. 2(b) of the *Charter*. The only impact I foresee, if we tie equality principles directly into 2(b)'s values, is to expand s. 2(b}'s scope slightly; it doesn't have an impact on content neutrality, however. If we are examining s. 15 separately from 2(b) under anti-SLAPP's weighing prong, then *Neufeld* applies only to anti-SLAPP cases, not all freedom of expression cases broadly. Our anti-SLAPP legislation, along with the Court's guidance in *Pointes*, specifically contemplates that merits, manner, and motive, while not relevant for the threshold question, will be relevant in the weighing prong: "the *quality* of the expression, and the *motivation* behind it, are relevant here."[73] Indeed, it was Justice Côté herself, in the *Pointes* decision, who flagged that one of the factors to consider under the weighing prong was 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.[74] In this sense, the weighing prong acts much like section 1 of the *Charter*, which is decidedly *not* content-neutral.

Regardless, Justice Côté's concerns do emphasize the puzzling gap in the majority's reasons. The majority ties counter speech to s. 2(b)'s values, but ignores what makes counter speech unique from other types of speech and fails to ground *that* unique feature into freedom of expression. It does not explain whether equality principles should be examined because equality principles tie into 2(b)'s core values, or because equality principles should be considered separately.

As such, a precise explanation of how counter speech—and its emphasis on countering discriminatory language—ties into freedom of expression will have to wait for another day.

*How is counter speech defined?*

The decision in *Neufeld* **lacks definitional clarity**.

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[72] *Neufeld*, supra at para 171.
[73] *Pointes*, supra at para 74.
[74] *Pointes*, supra at para 80.

What we know from *Neufeld* is that counter speech needs to be an informed or compassionate response motivated by countering ignorant or harmful expression against a vulnerable or marginalized group in society.

Much needs to be unpacked here.

First, we need to understand whether the original expression is "ignorant or harmful" and whether it was made against a "vulnerable or marginalized group in society."

In considering whether Neufeld's original expression was made against a "vulnerable or marginalized" group, the majority considered the historic marginalization of the transgender community. It reviewed external evidence, including statistics and social science evidence. Will this type of evidence always be necessary to show that the counter speech was to protect a truly "vulnerable or marginalized" group? If evidence is not required, how are we defining "vulnerable" or "marginalized" groups? Will it be defined in relation to a group protected under s. 15 of the *Charter*, either analogously or through its enumerated grounds? Will a history of discrimination and disadvantage be a pre-requisite? Or could counter speech in protection of any minority group be sufficient?

In explaining why Neufeld's comments were "ignorant or harmful," the majority outlined evidence on the historical conflation of transgender identities with mental illness and contrasted this with Neufeld's reliance on traditional stereotypes of transgender folks as "dysfunctional" and confused.[75] This gives the impression that some evidence of stereotyping will be necessary to show that the original expression at issue was "ignorant or harmful." Is evidence necessary? What else might show "ignorant" or "harmful" expression?

All of this bleeds into my additional concerns about how counter speech is to be applied in practice, discussed in the next section.

Second, we need to understand how the counter-speaker's "motivation" is to be assessed. Do we require an examination of the counter-speaker's subjective intent? Objective intent? Can it be defeated by malice? *Neufeld* provides no answers.

A recent post-*Neufeld* case does provide some assistance. In *Mondal v Kirkconnell*, 2023 ONCA 523, the plaintiff was the owner of a medical imaging clinic and a frequent user of Twitter (now X). The defendant, a gay woman, had accused the plaintiff of homophobia for posting a photo of himself with Premier Doug Ford and Minister of Education Stephen Lecce. She continued to engage with the plaintiff's Twitter account over the course of the next two years. In 2021, she tweeted that her and her wife had to seek medical imaging elsewhere because the clinic owner was "a homophobic and transphobic bully."[76] She screenshotted the plaintiff's photo of himself with conservative politicians, as well as the plaintiff's tweets referring to a drag performer as a "tranny," and tweets criticizing PM Justin Trudeau for waving a Pride flag. At the time of her response, the latter two tweets had been deleted, apparently as a result of the plaintiff feeling in retrospect that they were insensitive. The clinic owner sued in defamation for this tweet.

[75] *Neufeld*, supra at para 90.
[76] *Neufeld*, supra at para 3.

The defendant brought an anti-SLAPP motion and argued that her tweet was counter speech, intended to act as a public service announcement to other members of the LGBTQ2S+ community.

The Ontario Court of Appeal did not buy the defendant's characterization of her tweet as counter speech due, in large part, to its finding that her "motivations" were questionable. She had levelled personal invectives against the plaintiff "simply for posing with conservative politicians," starting a Twitter feud that lasted for years. Her most serious tweet, calling him a "homophobic and transphobic bully," was based on two tweets that had already been deleted and apparently walked back from.[77] The court indicated that this could constitute evidence of malice. This decision suggests that courts will look to the full context, not just the defendant's professed subjective motivation, in determining whether the defendant was actually motivated by countering ignorant or harmful expression. A finding of malice will almost certainly undermine such professed motivations.

More specifically, what we can gather from this case is that counter speech should ideally be a timely response to any harmful expressions, it should not seek to punish expressions that have already been retracted or apologized for, and it should avoid making accusations of prejudice based on one's choice of association.

This case provides some interim guidance for practitioners. However, the courts will clearly need to continue developing its definition and assessment of "motivation," with assistance from counsel.

Third, we need to know when counter speech will be considered "informed or compassionate," and when counter speech will cross the line to being disproportionate or gratuitous. We don't have any clear language from the SCC on how to define what constitutes an "informed" or compassionate" response. Further, the only language we have from *Neufeld* on when counter speech will cross the line to being disproportionate or gratuitous is the assurance that Hansman's expressions did not cross that line—a rather unhelpful assurance given that Hansman's expressions, on their face, did appear to level serious, personal accusations against Neufeld.

In *Mondal*, discussed above, the Ontario Court of Appeal held that publicly labelling a stranger as homophobic simply for posting a photo of themselves with conservative politicians, without prompting, amounted to a "gratuitous personal attack."[78]

We can assume that some weighing will need to be done between the original expression and the counter speech to determine whether the counter speech is "disproportionate." This may require looking at both content and form. As in *Mondal*, the accusations contained in the counter speech may be disproportionate if they aren't justified by the content of the original expression. In relation to form, we may want to develop guidance around whether the chosen language of the counter speech would tend to inflame, rather than further informed discussion.[79] Lastly, we can assume that unprompted accusations may be labelled as

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[77] *Neufeld*, supra at para 92.
[78] *Mondal*, supra at para 84.
[79] See, e.g., *Ortt v The Owners, Strata Plan NES 3039*, 2024 BCSC 323 at para 103, though not in the context of counter speech.

gratuitous; this can be contrasted with Hansman's expressions, which were specifically solicited by the media to present a counter-perspective within an ongoing debate.

This guidance is limited and speculative, however. Specific principles guiding this analysis will need to be developed in the jurisprudence.

*How is counter speech applied in practice?*

The decision in *Neufeld* **lacks practical direction**. In particular, it fails to identify the analysis needed to engage the category of counter speech, including any necessary evidentiary burdens.

*Neufeld* held that Hansman's counter speech was made to "counter expression that he and others perceived to undermine the equal worth and dignity of marginalized groups."[80] This finding required the SCC to consider the vulnerability of the transgender community in Canada with reference to external evidence.

In particular, it looked to social science evidence from the Canadian Journal of Psychiatry and the American Psychological Association about the historical stereotypes in the field of psychiatry that equated transgender identities with mental illness.[81] It looked to statistics from Statistics Canada about rates of violent and sexual victimization in the transgender community.[82] It looked to qualitative research from the Department of Justice on disadvantages the transgender community faces in housing, employment, healthcare, and access to justice.[83] The majority used this evidence to support its finding that the transgender community was a "vulnerable or marginalized group in society."

Further, in order to find that Hansman validly perceived Neufeld's expressions to be undermining the equal worth and dignity of transgender individuals, the court specifically looked at Neufeld's original expressions in light of this evidence, emphasizing Neufeld's reliance on traditional stereotypes of transgender folks as "dysfunctional" and confused.[84] The majority used this evidence to support its finding that Neufeld's original expressions could be perceived as "ignorant or harmful."

This borrows from much of the jurisprudence under section 15(1) of the *Charter*, which requires proof of disproportionate impact based on an enumerated or analogous ground. This proof must include evidence about the "full context of the claimant group's situation," in contrast to other groups or the general population. This may include statistics or "expert testimony, case studies, or other qualitative evidence."[85] The claimant must also show that the impact imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. This will require courts to examine the "historical or systemic disadvantage of the claimant group", such as economic exclusion or

[80] *Neufeld*, supra at para 91.
[81] *Neufeld*, supra at para 85.
[82] *Neufeld*, supra at para 86.
[83] *Neufeld*, supra at para 86.
[84] *Neufeld*, supra at para 90.
[85] *R v Sharma*, 2022 SCC 39 ["***Sharma***"] at para 49.

disadvantage, social exclusion, psychological harms, physical harms or political exclusion.[86] Both judicial notice and inferences supported by available evidence can be used.[87]

The decision in *Neufeld* replicated parts of this test for the purposes of examining Hansman's counter speech, both in terms of examining whether the targeted group is actually marginalized and in examining how the original expression could be harmful towards or ignorant of that marginalization.

A fundamental question arises: Is there now an expectation that evidence is required to rely on the category of counter speech? What types of evidence will suffice—extrinsic evidence, reference to section 15 jurisprudence, or judicial notice? And who bears the evidentiary burden? Anti-SLAPP legislation puts the evidentiary burden of the weighing prong on the plaintiff/responding party. If a defendant/moving party wants to avail themselves of the category of counter speech, will the burden shift back to them? The Court has not provided any guidance on whether extrinsic evidence is now required to avail oneself of counter speech categorization, and what this extrinsic evidence should consist of.

The recent case of *Rainbow Alliance*, 2023 ONSC 7050 lends some credence to this concern.[88] There, the plaintiffs were targeted with homophobic and transphobic speech from Mr. Webster, who alleged an association between the plaintiffs' participation in drag culture and child 'grooming'. The plaintiffs sued Webster, who promptly brought an anti-SLAPP motion and argued that his speech should be protected. The court rightfully held that this type of speech was not in the public interest, but in doing so, the court relied on expert evidence adduced by the plaintiff that showed "the contemporary usage and historical background of the "groomer" slur, and to establish that it is used to suggest that 2SLGBTQI individuals are associated with sexually predatory behaviour."[89] It relied on this evidence to find minimal public interest in Webster's expression under the weighing prong.[90] While this is a welcome decision, it is concerning that the plaintiffs had to go to the expense of filing expert evidence in order to justify the level of protection to be afforded (or, in this case, to not be afforded) to various types of expression. It would be even more concerning if this expense fell on a defendant like Hansman, or an even more vulnerable defendant who will already be facing the enormous costs of defending against a retaliatory proceeding.

Access to Justice

*Neufeld* is stingy on how counter speech is to be protected in practice, creating uncertainty for those seeking to benefit from its protection. As *Neufeld* itself notes, when there is "uncertainty surrounding the scope or application of a law," people may avoid engaging in *Charter*-protected activities "for fear of violating the relevant law."[91] A cautious person may avoid engaging in counter speech at all if they are confused about the scope or application of this new category of protected speech.

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[86] *Sharma*, supra at para 52.
[87] *Sharma*, supra at para 55.
[88] *Rainbow Alliance Dryden et al v Webster*, 2023 ONSC 7050 ["***Rainbow Alliance***"].
[89] *Rainbow Alliance*, supra at para 20.
[90] *Rainbow Alliance*, supra at para 65.
[91] *Neufeld*, supra at para 75.

It is not unusual for an impactful Supreme Court decision to open up new lines of questioning, which will slowly be answered through modifications and tweaks to jurisprudence by the lower courts.

The problem is that all of these questions now need to be answered *in the context* of responding to a retaliatory defamation lawsuit.

This increases an already untenable access to justice problem with our anti-SLAPP legislation. In the last half decade since anti-SLAPP legislation was enacted in various provinces across Canada, the legislation has become increasingly unwieldly, bloated, and resource intensive. These motions can cost hundreds of thousands of dollars,[92] and take years to conclude.[93] They have lost their grasp on being an "efficient and economical" screening procedure.

This is, in large part, due to the nature of the legislation. The opportunity to dismiss an entire proceeding with full indemnity costs is a powerful remedy, making this motion deeply attractive to defendants facing a defamation suit. The plaintiff, facing this possibility, will fight to have their proceeding to continue. As keenly noted by the Ontario Superior Court:

> Plaintiffs are usually not willing to leave evidence in their briefcases when they risk their claims being dismissed. Defendants similarly want to show that there are no grounds to defeat their defences, that the plaintiff has suffered little if any actual harm, and that the dismissal of the proceeding is the just outcome.[94]

In other words, despite urging to the contrary, our anti-SLAPP motions have become akin to summary judgement motions, with "virtually the entire trial being played out in advance."[95]

See, for instance, *Gill v Maciver*, a very recent Ontario Court of Appeal case that outlined the typical steps undertaken in an anti-SLAPP motion:

> As the motion judge explained in her costs endorsement, in order for the defendants to properly pursue these motions, it was necessary for extensive affidavit material to be filed and cross-examinations to be conducted. Presence of counsel was required for the cross-examinations as well as all other necessary steps leading up to the hearing of the motions themselves. The issues were of great importance to the parties and submissions were required to be tailored to the specific fact situations bearing on the claims brought against them by the appellant.[96]

Further, while by no means a run-of-the-mill example, the frighteningly enormous Catalyst and West Face dispute between two dueling private equity firms indicates that anti-SLAPP motions, themselves, can be a tactic of oppression or silencing. There, the anti-SLAPP motions had taken "weeks of court time, not to

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[92] *Park Lawn Corporation v Kahu Capital Partners Ltd.*, 2023 ONCA 129 ["***Park Lawn***"] at para 37.
[93] See, e.g., *Galloway*, supra at paras 9-10.
[94] *Tamming v Paterson*, 2021 ONSC 8306 ["***Paterson***"] at para 7.
[95] *Paterson*, supra at para 7.
[96] *Gill*, supra at para 66.

mention a significant amount of productions, over 30,000 documents and, days of cross-examinations," including various preliminary motions.[97]

The access to justice problem is further exacerbated by failures to enforce the legislation itself. The 60-day timeline in the legislation is "routinely ignored", either because counsel need more time or because motion appointments are backlogged by far more than 60 days. In Toronto, for instance, we face backlogs where we are booking motions months or even years out.

Further, the costs consequences in the legislation have lost their teeth, undermining the promise to defendants of an economical solution. Courts routinely award a successful moving party less than full indemnity, often where they don't find the "indicia" of an archetypal SLAPP suit,[98] or the plaintiff was successful on the merits prong but unsuccessful on the weighing prong.[99] This should not make a difference—the weighing prong is the crux of our anti-SLAPP legislation, and its legislative endorsement of full costs does not dictate deviation because a plaintiff can show merit to the claim or because the plaintiff's lawsuit does not fit the mold of an "archetypal" SLAPP. Even a technically meritorious claim should be dismissed if the public interest demands it. The more room plaintiffs have to skirt around full indemnity costs, the weaker the remedy to the defendant.

*Neufeld*, in part, has made the problem worse. By leaving definitions vague, and by implanting a whole new realm of equality principles into anti-SLAPP's weighing prong, the majority has made our anti-SLAPP legislation more complicated and unwieldy.

By making counter speech so vague and unwieldy, we undercut its promise to those who could most benefit from its protection. The judgments that must be made under the weighing prong are usually already "difficult and contentious, involving arguable claims of defamation with potentially significant, if undetermined, damages and contestable claims about the importance of the impugned expression."[100] Further, academics have already expressed concerns that counter speech doesn't always operate on an equal playing field: as noted by professor Lynne Tirell, "often the most vulnerable targets of nasty speech are not in a position to reply with 'more speech.' … Where inequality reigns, the odds are not in favor of someone who tries to combat the bad speech of the powerful with the more speech of the vulnerable."[101] The *Neufeld* decision adds to this burden. If transgender kids engaging in counter speech cannot afford the upfront costs of bringing an anti-SLAPP motion, *Neufeld*'s protective language doesn't actually benefit them in practice.

In other ways, *Neufeld* may yet assist with our access to justice concerns. By decisively determining that the "archetypal" SLAPP suit is not the only type of lawsuit our anti-SLAPP legislation is intended to address, the *Neufeld* decision has provided helpful language strengthening the strong statutory presumption in

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[97] *The Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2023 ONCA 381 at para 120.
[98] See, e.g., *B.W. (Brad) Blair v Premier Doug Ford*, 2021 ONSC 695; *Kam v CBC*, 2021 ONSC 2537; *A&H Asset Auctions Inc. v ABC Corporation et al*, 2024 ONSC 893.
[99] See, e.g., *Kam v CBC*, 2021 ONSC 2537.
[100] *Mondal*, supra at para 72.
[101] Lynne Tirrell, "Toxic Misogyny and the Limits of Counterspeech" (2019) 87 Fordham L Rev 2433 at pp 2435, 2438.

favour of full indemnity costs. Lower courts should no longer be looking at the traditional "indicia" of an archetypal SLAPP suit to enforce the presumption of full indemnity. Helpfully, the post-*Neufeld* case of *Mawhinney v Stewart*, 2023 BCCA 484 has indicated that even a finding that a defamation suit has "substantial merit" will not be enough to insulate a plaintiff from full indemnity costs if they are ultimately unsuccessful on the rest of the test.[102] This is a positive development. If we are going to increase the evidentiary burden of those engaging in counter speech, we should at least ensure that they can get their full legal costs recovered for the time and expenses incurred defending themselves. Lower courts must continue to enforce this trend.

Further, the Ontario Court of Appeal has recently indicated that the ability to skip right to the weighing prong "may reduce the extensive time and cost spent on a detailed analysis of [the merits]."[103] This is the crux of the analysis, and a "technical, granular analysis is not required."[104] If counsel can avoid arguing the merits of a defamation suit, and focus instead on what is really going on under the weighing prong, we may move closer to creating a speedy and cost-effective solution for retaliatory lawsuits.

**Advice for Practitioners**

The *Neufeld* decision should be a wake-up call to all counsel, clients, and courts that we all play a role in ensuring anti-SLAPP motions are truly efficient and economical, so that those who can most benefit from this type of motion can actually afford to bring one.

The following suggestions may prove helpful.

First, consider how to narrow down the fight.

*Neufeld* has opened the door to skip straight to the weighing prong, which allows for the dismissal of even a technically meritorious action.[105] In appropriate cases, where there is clear merit to the lawsuit or where the merit of the lawsuit is far too complicated a fight to engage in at such an early stage, parties may be able to agree to focus the fight on the weighing prong. This will substantially reduce the evidentiary burden on all parties, particularly the burden needed to respond to all engaged defences.

Where a fight must happen on the merits prong, there may still be further winnowing where it is possible to avoid the truth/justification defence, which usually always requires the most amount of evidentiary support. Where possible, counsel should avoid putting in play the defence of truth/justification for the purposes of an anti-SLAPP motion, while reserving the right to rely on it as pleaded if the motion is unsuccessful on other grounds. This will ensure that the motion is not bogged down by the fact and evidence specific analysis needed for the defence of truth/justification, while still allowing the defendant to avail themselves of it if the proceeding is not dismissed.

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[102] *Mawhinney v Stewart*, 2023 BCCA 484.
[103] *2110120 Ontario Inc. v Buttar*, 2023 ONCA 539 at para 33.
[104] *Park Lawn*, supra at para 38.
[105] See also *Kim v Norton Rose Fulbright Canada LLP*, 2023 BCSC 1251 ["***Kim***"] at para 162.

On a related note, while it can be tempting to couple an anti-SLAPP motion with another alternative basis for speedier resolution, such as a motion to strike or a summary judgment motion, this should be avoided. It will undermine the use of anti-SLAPP legislation as limited, efficient, and economical.[106]

Second, the 60-day timeline should be strictly enforced by both counsel and the courts. As recently noted by the Ontario Superior Court of Justice, "While the compression of preparation time does not prohibit overkill, at least it imposes a practical limit. There are only 14,400 six-minute periods in 60 days and counsel have to sleep for at least some of that time."[107] In jurisdictions where motion dates are scarce and hard to come by, like Toronto, courts and registrars must ensure that scheduling priority is given as a matter of course to these motions.

Third, where these motions can be brought on a written record alone, counsel should strive to do so, and the courts should encourage it. Further, motions judges should be entitled to rely on relaxed standards of admissibility; the B.C. Court of Appeal has already encouraged this in a recent decision holding that a motions judge could rely on hearsay evidence without the need to do a full-blown admissibility analysis.[108]

Lastly, counter speech should not require extrinsic evidence for defendants to avail themselves of it; they should, instead, be able to rely on legal argument and precedent, if available. If precedent is unavailable, counsel should request the court's power to take judicial notice. Courts similarly should be clear that extrinsic evidence is not required, and be willing to engage its powers of judicial notice where appropriate. A technical, granular analysis of the counter speech should be avoided, and only limited evidence should be adduced.

**Conclusion**

The Supreme Court of Canada's decision in *Neufeld* has much to offer. It acknowledges that the trans community has been historically marginalized and affirms that this community deserves legal recognition under our *Charter*'s section 15 guarantee. Subsequent case-law has already used this holding to support legal rights for trans folks in other arenas.[109] Further, the decision's recognition of counter speech comes as welcome protection for members of vulnerable communities and their allies who wish to call out issues, advocate in the public sphere, or criticize people in positions of power, without fear of the law being used against them.

However, *Neufeld*'s murky analysis of "counter-speech" and its apparent inclusion of new evidentiary requirements under anti-SLAPPs' weighing prong complicates an already over-burdened analysis. The weighing prong requires assiduous balancing between a fundamental *Charter* right on the one hand—the right to free expression, the very lifeblood of democracy—and the right to protect one's reputation—a plant of tender growth whose blossom, once lost, is not easily restored.[110] But the more evidence we

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[106] *Kim*, supra at para 167.
[107] *Paterson*, supra at para 14.
[108] *Christman v Lee-Sheriff*, 2023 BCCA 363 at paras 76-78.
[109] See, e.g., *Ontario (Health Insurance Plan) v K.S.*, 2024 ONSC 206 at para 44 (relying on *Neufeld*, supra, to support an interpretation of the *Health Insurance Act* that allowed a vaginoplasty without penectomy to be eligible for OHIP funding).
[110] *Bent v Platnick*, 2020 SCC 23 at para 1.

require under this prong, and the farther we move away from clear, bright-line rules, the more unwieldy this balancing exercise becomes.

Anti-SLAPP legislation, working properly, allows people to freely criticize others without fear that they will be sued. To do so effectively, it must be efficient and economical. Counsel, clients, and the courts should take *Neufeld* as an opportunity to recognize that changes need to be made to our country's anti-SLAPP legislation if it is to work properly and truly benefit those who need it the most.