

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia Teachers' Association v. Neufeld*,
2023 BCSC 1460

Date: 20230822
Docket: S216167
Registry: Vancouver

In the Matter of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (as amended),
the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (as amended)

Between:

**British Columbia Teachers' Federation
Chilliwack Teachers' Association**

Petitioners

And

**Barry Neufeld,
British Columbia Human Rights Tribunal and
Attorney General for British Columbia**

Respondents

And

Human Rights Commissioner for British Columbia

Intervenor

- and -

Docket: S212258
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Corrected Judgment: The text of the judgment was further corrected on the front page and at paragraph 24 on October 11, 2023

Before: The Honourable Justice Mayer

On judicial review from: Orders of the British Columbia Human Rights Tribunal, dated January 21, 2021 and May 6, 2021 (Chilliwack Teachers Association v. Neufeld, File No. 17364).

Reasons for Judgment

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[1] There are two petitions before me in which the applicants seek judicial review of certain decisions of a member of the BC Human Rights Tribunal (the "Tribunal").

[2] In the first petition, Barry Neufeld seeks judicial review of the Tribunal's decision declining to dismiss certain of the human rights complaints (the "Complaint") brought against him on behalf of LGBTQ¹ members of the British Columbia Teachers' Federation ("BCTF"), who were also members of the Chilliwack Teachers Association ("CTA").

[3] In the second petition, BCTF and CTA seek judicial review of the decision of the Tribunal dismissing the human rights complaint brought on behalf of non-LGBTQ teachers on the basis that the Tribunal did not have the jurisdiction to make this decision at the relevant time and in any case, the decision was unfair and patently unreasonable.

[4] The Complaint includes allegations that, contrary to the BC Human Rights Code, R.S.B.C. 1996, c. 210 [Code], Mr. Neufeld published materials and made public statements which constitute hate speech, that he discriminated against LGBTQ and non-LGBTQ teachers in the CTA in regards to their employment and that he improperly commenced a court action in defamation against the president of BCTF after the Complaint was commenced.

[5] The decision of the Tribunal at issue is an interim decision and a full hearing of the Complaint has not occurred at this time. For the reasons set out below I do not consider it appropriate to hear the petition of Mr. Neufeld because he has not demonstrated exceptional circumstances justifying judicial review. With respect to the petition of BCTF and CTA I find that the Tribunal had the jurisdiction to make the decision they seek to challenge, that making the decision did not result in unfairness and that the decision was not patently unreasonable. As a result, the underlying

¹ The Complaint was filed on behalf of teachers who identify as "lesbian, gay, bisexual and transgender and those who differ on their basis of gender identify or gender expression". The acronym LGBTQ is used by the CTA to describe these individuals and I will do the same in these reasons.

human rights complaints, as they now stand, should proceed forward for consideration by the Tribunal at a full hearing.

Background

The Statements and Publications at Issue

[6] Mr. Neufeld made a number of public statements and publications concerning the issue of gender identity and the SOGI 1 2 3 initiative² starting in approximately the fall of 2017. A sample of some of Mr. Neufeld's statements and publications which formed the basis for the Complaint and were considered by the Tribunal include, in summary form, the following:

- a) A Facebook post made October 23, 2017, in which Mr. Neufeld refers to SOGI 1 2 3 and stated "...I agree with the College of paediatricians that allowing little children choose to change gender is nothing short of child abuse ...".
- b) A statement made at a public event on November 21, 2017, in which Mr. Neufeld described SOGI as "an institutionalization of codependency encouraging and enabling dysfunctional behaviour and thinking patterns" and the "coddling and encouraging what I regard as the sexual addition of gender confusion" and stated that using SOGI 1 2 3 resources amounted to an "attack on the foundation of the child's being which is child abuse";
- c) A December 18, 2017 Facebook post in which Mr. Neufeld referenced his role as a member of the School Board and warned that if the public did not push back against the teaching of "gender based theory" that the government may apprehend children and put them in homes where they will be encouraged to explore homosexuality and gender fluidity, which Mr. Neufeld equated with the residential school system;

² SOGI is an acronym for sexual orientation and gender identity and SOGI 1 2 3 is a program undertaken between the BC Ministry of Education, the UBC Faculty of Education, the ARC Foundation, BCTF and community organizations representing LGBTQ persons involving the sharing of SOGI resources.

- d) A January 1, 2018 email circulated to a number of individuals in which he referred to parents who have supported their transgender children as people who may have caved into threats from “transgender radicals”;
- e) A February 13, 2018 statement at a School Board meeting comparing support for transgender students to government oppression through Indigenous residential schools;
- f) An October 18, 2018 Facebook post referring to SOGI 1 2 3 as an “evil ideology” which affected children’s minds;
- g) An October 26, 2018 email to a local reporter suggesting that transgender persons may have voted twice in a local election using two sets of identification;
- h) An October 2018 Facebook post querying whether heterosexual marriage could be replaced with “the unscientific ideology of non-binary gender”;
- i) A November 17, 2018 Facebook post in which Mr. Neufeld asked followers to donate to an autism society stating that “kids who present as gender Dysphoric are actually on the Autism spectrum” and expressing fear that “if [autistic children] learn about this new non-binary gender ideology” there will be a dramatic increase in children seeking hormone treatment resulting in sterility and brittle bones and when they are over 18, wanting to “chop off perfectly good body parts”; and
- j) A December 9, 2018 Facebook post in which Mr. Neufeld said that “[t]he elites will destroy all gay kids: and “[t]he trans agenda is eugenics”.

Steps Taken in the Complaint

[7] On April 20, 2018, BCTF and CTA filed the Complaint on behalf of teachers employed with the Chilliwack school district, including both LGBTQ and non-LGBTQ teachers, which was amended on April 21, 2019.

[8] The Complaint alleges that Barry Neufeld, then a trustee with the Chilliwack school board (the "School Board"), made and published discriminatory homophobic and transphobic statements. In particular, the Complaint alleges that in making the publications and statements Mr. Neufeld breached s. 7 of the *Code*, which prohibits discriminatory publications and hate speech and breached s. 13 by discriminating against both LGBTQ and non-LGBTQ teachers regarding their employment. In addition, the Complaint alleges that by commencing a defamation action in BC Supreme Court on October 12, 2018 against the President of BCTF, after the Complaint was filed, Mr. Neufeld breached s. 43 of the *Code*, which prohibits what BCTF and CTA describe as retaliatory conduct.

[9] Mr. Neufeld filed a response to the original and amended complaint on December 21, 2018 and July 24, 2019, respectively. On September 20, 2019, he filed an application under s. 27 of the *Code* to dismiss the Complaint on the basis that, in summary, for various reasons the Tribunal lacked jurisdiction to hear the complaint, his publications and statements did not constitute hate speech and did not constitute discrimination in the context of employment – because they lacked sufficient nexus with the teachers' employment. In his application Mr. Neufeld said that BCTF and CTA had not tendered any evidence that the publications and statements had an adverse impact in their employment. Finally, Mr. Neufeld said that his defamation claim did not constitute retaliation.

[10] In a decision dated January 12, 2021, followed by a clarification letter (or amendment³) dated May 6, 2021 (collectively, the "Decision"), the Tribunal dismissed Mr. Neufeld's application to dismiss the Complaint, with the exception of the complaints brought on behalf of non-LGBTQ teachers under ss. 7 and 13 of the *Code* - which were dismissed, with the remaining portions of the Complaint to be remitted to the Tribunal for a full hearing.

³ The petitioners dispute whether the Tribunal Member's May 6, 2021 letter constitutes a clarification or a new decision. I will address this issue later in my reasons.

Relevant Code Provisions

[11] With respect to discriminatory publications, s. 7(1) of the *Code* provides as follows:

Discriminatory publication

7 (1) A person must not publish, issue or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that

- (a) indicates discrimination or an intention to discriminate against a person or a group or class of persons, or
- (b) is likely to expose a person or a group or class of persons to hatred or contempt

because of the Indigenous identity, race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or that group or class of persons.

[12] With respect to discrimination in employment s. 13(1) of the *Code* provides that:

Discrimination in employment

13 (1) A person must not

- (a) refuse to employ or refuse to continue to employ a person, or
- (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.

[13] With respect to retaliation, s. 43 of the *Code*, provides as follows:

Protection

43 A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, deny a right or benefit to or otherwise discriminate against a person because that person complains or is named in a complaint, might complain or be named in a complaint, gives evidence, might give evidence or otherwise assists or might assist in a complaint or other proceeding under this Code.

[14] Section 27(1) of the *Code* provides the Tribunal with the discretion to dismiss all or part of a complaint under a number of circumstances. Mr. Neufeld's application to the Tribunal relied upon subsections (a) through (d) which read as follows:

Dismissal of a complaint

27 (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

- (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
 - (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
 - (c) there is no reasonable prospect that the complaint will succeed;
 - (d) proceeding with the complaint or that part of the complaint would not
- ...
- (ii) further the purposes of this Code; ...

Summary of the Parties' Positions in Their Petitions

[15] In his petition, Mr. Neufeld asks this Court to quash portions of the Decision on the basis that the Tribunal failed to apply the correct legal test (or tests), and thereby reached a patently unreasonable decision when it failed to dismiss the following: the complaint concerning hate speech; the employment-based discrimination allegations; and, the complaint concerning retaliation.

[16] In particular, with respect to the portion of the Decision dealing with the complaints concerning hate speech under s. 7(1)(b) of the *Code*, Mr. Neufeld submits that the Tribunal failed to apply the analysis set out in the decision of the Supreme Court of Canada in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 [*Whatcott*].

[17] With respect to the portion of the Decision dealing with "retaliation" in violation of s. 43 of the *Code*, Mr. Neufeld submits that the Tribunal failed to identify what conduct by him breached this provision.

[18] In addition, Mr. Neufeld contends that the Tribunal erred in failing to dismiss the s. 7 and s. 13 complaints brought on behalf of non-LGBTQ teachers pursuant to ss. 27(1)(a) and (b) of the *Code*. The Tribunal in fact dismissed this complaint under s. 27(1)(c). Before the Tribunal, Mr. Neufeld argued that the s. 7 and s. 13 complaints could not be brought on behalf of non-LGBTQ teachers because they did not possess the characteristic which is the basis of the alleged discriminatory or otherwise prohibited conduct.

[19] Mr. Neufeld acknowledges that the question whether a non-LGBTQ teacher can advance a complaint arising from discrimination against an LGBTQ person is moot if BCTF and CTA petition is not successful. Despite this acknowledgement, he submits that the question is a legal importance and therefore should be considered by this Court. He says that as a matter of statutory interpretation the *Code* does not allow non-LGBTQ teachers to advance claims under ss. 7 and 13 of the *Code* for discrimination against LGBTQ teachers (or others).

[20] With respect to the portion of the Decision dealing with the complaint alleging discrimination against LGBTQ teachers in the context of their employment in breach of s. 13 of the *Code*, Mr. Neufeld submits that the Decision is patently unreasonable because there was no evidence of an adverse impact and because there is no nexus, as is required, between the alleged discriminatory publications and statements and CTA members' workplace.

[21] Mr. Neufeld submits that his petition does not invoke the prematurity principle and it is appropriate for this Court to render a decision in this judicial review – rather than allowing the Tribunal process to continue to a full hearing.

[22] In terms of a remedy, Mr. Neufeld asks that this Court quash the Tribunal decisions concerning hate speech, discrimination in the context of employment and retaliation, and remit his s. 27 application back to the Tribunal for reconsideration with directions from this Court.

[23] In BCTF and CTA petition, the complainants submit that the decision dismissing the complaint on behalf of non-LGBTQ teachers under s. 7 of the *Code* should be quashed. They say that this decision was a revision made in May 2021, of the initial decision in January 2021, which only dismissed the complaint of non-LGBTQ teachers under s. 13. They submit that the May 2021 “decision” was made contrary to the rules of natural justice and procedural fairness and at the time when the Tribunal was functus. In any event, they say that this decision was patently unreasonable.

[24] The Human Rights Commissioner for British Columbia was added as an intervenor and filed submissions in respect of Mr. Neufeld’s petition for judicial review. The Attorney General is named as a respondent. The Tribunal and Commissioner provided helpful materials with respect to relevant legal principles. None of these parties take a position on the substantive issues raised by Mr. Neufeld or BCTF and CTA.

[25] The Tribunal submits that two preliminary issues arise from Mr. Neufeld’s petition. The first is whether this Court should refuse to exercise its discretion to entertain the petitions - on the basis that it is premature to do so because the Tribunal has not yet made a final decision on the merits of the Complaint. The second issue is whether this Court should decline to address the question whether the Tribunal erred in declining to dismiss the complaints on behalf of non-LGBTQ members of the CTA under ss. 27(1)(a) and (b) of the *Code*, on the basis of mootness.

Issues

[26] Logically, the first issue to be addressed is whether Mr. Neufeld’s application for judicial review should be dismissed on the basis of prematurity.

[27] The second issue is whether this Court should decline to address the question whether the Tribunal erred in declining to dismiss the complaints brought on behalf of non-LGBTQ members of the CTA pursuant to ss. 27(1)(a) and (b) of the

Code on that basis that this question is now moot – given the Tribunal's decision to dismiss this complaint pursuant to s. 27(1)(c).

[28] If I find that Mr. Neufeld's petition is not premature, the issues raised by Mr. Neufeld's petition to be addressed include the following:

- a) With respect to the portion of the Complaint brought under s. 7, did the Tribunal err in determining that BCTF and CTA had a reasonable prospect of proving at a hearing that Mr. Neufeld's publications and statements exposed LGBTQ persons to hatred?
- b) With respect to the portion of the Complaint brought under s. 13 of the *Code*, did the Tribunal err in determining that BCTF and CTA had a reasonable prospect of proving at a hearing that Mr. Neufeld's publications and statements adversely impacted LGBTQ members of the CTA regarding employment?
- c) With respect to the portion of the Complaint under s. 43, did the Tribunal err in determining that BCTF and CTA had a reasonable prospect of proving at a hearing that the filing of a defamation claim against the BCTF President was prohibited?

[29] Mr. Neufeld did not contend that the petition of BCTF and CTA was premature and, in any case, I would not dismiss this petition for this reason. Accordingly, the issues raised in the complainants' petition include the following:

- a) Was the Tribunal member *functus officio* when it issued further reasons in May 2021 "clarifying" the initial decision made in January 2021, confirming dismissal of both the ss. 7 and 13 complaints made on behalf of non-LGBTQ teachers?
- b) In issuing further reasons in May 2021, did the Tribunal member breach the principles of procedural fairness and natural justice?

- c) In any case, was the decision of the Tribunal member to dismiss the s. 7 allegations in relation to non-LGBTQ teachers patently unreasonable?

Mr. Neufeld's Petition

[30] The burden is on Mr. Neufeld, in respect of his petition, to persuade this Court to hear his judicial review applications – given that the Tribunal has not rendered a final decision in respect of the Complaint: *British Columbia (Workers' Compensation Appeal Tribunal) v. Hill*, 2011 BCCA 49, at para. 38.

[31] In general, a court should not hear a judicial review petition before a tribunal has rendered a final decision – to avoid amongst other things fragmentation of issues resulting in cost and delay: *Chu v. British Columbia (Police Complaint Commissioner)*, 2021 BCCA 174, at para. 63, referring to *Díaz-Rodríguez v. British Columbia (Police Complaint Commissioner)*, 2020 BCCA 22, at para. 29. In addition where a tribunal has special expertise, it is often helpful for the court to have an evidentiary record and the tribunal's analysis of the dispute: *Kelowna (City) v. British Columbia (Human Rights Commission)*, [1999] B.C.J. No. 1848 (S.C.)(Q.L.), at para. 11.

[32] Courts should be reluctant to intervene during an administrative process to avoid “short-circuiting the decision-making role of the tribunal process, particularly when asked to review a preliminary screening decision ...”: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] 1 S.C.R. 364 at para. 36.

[33] The decision to consider a petition to review an interim decision by an administrative tribunal is discretionary, with discretion to be exercised with due regard to the criterion set out in the cases: *Chu*, at para. 61, referring to *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220 at para. 39.

[34] Typically, it is necessary to find exceptional circumstances justifying judicial intervention when an administrative decision-making process remains underway:

Chu, at para. 65, referring to *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61, at para. 31.

[35] Factors which may be considered in determining whether exceptional circumstances exist include hardship or prejudice to the applicant, waste of resources, delay if judicial review proceeds, fragmentation of proceedings, the strength of the case and the statutory context. No single factor is determinative: *Chu*, at para. 66.

[36] As I have stated, the onus is on the applicant to satisfy this Court that it is appropriate to judicially review a decision.

Prematurity Analysis – Neufeld Petition

[37] In determining whether exceptional circumstances exist, I will address the salient *Chu* factors below.

Hardship or prejudice

[38] Mr. Neufeld submits that judicial review of the portions of the Decision he challenges is necessary to avoid substantial inconvenience and expense to him and to protect his right of freedom of expression.

[39] Mr. Neufeld contends that forcing him to defend all of the allegations which remain as a result of the Decision in a lengthy hearing is, in and of itself, an attack on freedom of expression. He submits that “for many individuals” having to defend themselves against the remaining allegations in the Complaint, as it currently stands after the Decision, would be cost prohibitive and therefore result in a chilling effect on freedom of expression.

[40] In addition, Mr. Neufeld contends that his judicial review application is analogous to an application brought under the *Protection of Public Participation Act*, S.B.C. 2019, c. 3, occasionally referred to as anti-slapp (strategic lawsuits against public participation) legislation. He referred to the decision of the Court of Appeal in *Neufeld v. Hansman*, 2021 BCCA 222, in which the court noted that this *Act* which is

“intended to protect an essential value of our democracy, which is public participation in the debates of the issues of the day” with particular concern for lawsuits “brought by the wealthy and powerful to shut down public criticism”: *Neufeld*, at para. 3. I note that the decision of the Court of Appeal has been overturned by the Supreme Court of Canada: *Hansman v. Neufeld*, 2023 SCC 14 [*Hansman (SCC)*]

[41] Mr. Neufeld has offered no evidence with respect the extent of inconvenience or expense which may result if this Court declines to hear his petition. I have difficulty understanding how hearing this judicial review application will result in a decrease in expense. Mr. Neufeld proposes that some aspects of the Decision be remitted back to the Tribunal, an additional step in the Tribunal process which may result in an increase in cost, if for example, Mr. Neufeld is not successful in a new application to dismiss portions of the Complaint.

[42] Further, Mr. Neufeld does not explain how his freedom of expression rights will be stifled if his judicial review is not heard and the Complaint proceeds forward to a full hearing. I am not satisfied that requiring Mr. Neufeld to participate in a Tribunal process on the portions of the Complaint, as it currently stands, will stifle his freedom of expression rights.

[43] These factors do not favour judicial review.

Fragmentation

[44] Mr. Neufeld submits that the Tribunal proceeding is at a specific juncture. He contends that there is no risk of fragmenting the Tribunal’s complaint review process proceedings in this case, which have been put in abeyance pending the resolution of the petition currently before this Court.

[45] In a sense, I agree with Mr. Neufeld’s position on this factor. This is not a situation where the Tribunal has commenced the formal portion of its review of the Complaint, which will be fragmented or otherwise interfered with by a judicial review at this stage. Mr. Neufeld was entitled to bring an application to dismiss the

Complaint under s. 27 of the *Code* and to seek judicial review of the Tribunal's decision of this application – and therefore this application does not constitute “fragmentation” of the human rights complaint process in its entirety.

Delay

[46] Mr. Neufeld's submissions do not address the issue of delay arising from a decision of this Court to proceed with judicial review. In my view this is an important consideration, considering the extent of delay to date.

[47] With respect to delay to date, the Decision was made in January and May 2021, approximately 24 months after Mr. Neufeld first applied to dismiss the Complaint. A judicial review at this stage, potentially resulting in a second s. 27 dismissal application, will result in further delay. Assuming that it will take approximately one year for a further dismissal application to be heard and decided, the complaint review process will not be “back on track” until some time in mid to late 2024 – some five years after the Complaint was initially filed – or later if further judicial review applications are brought.

[48] There is no question that judicial review in the middle of these proceedings has diverted attention from the hearing of the Complaint proper before the Tribunal. As was expressed in *Golden Eagle Blueberry Farm v. Gatica*, 2022 BCSC 304, at para. 53, that the Tribunal complaints review process is intended to resolve complaints in a just and timely manner.

[49] The delays to date and what I expect would be a significant additional delay if this judicial review is heard and issues are sent back to the Tribunal for reconsideration, do not favour judicial review.

Strength of the Case

[50] In my view, Mr. Neufeld raises some legitimate concerns with respect to the portions of the Decision concerning hate speech (s. 7), discrimination regarding employment, and retaliation (s. 43), but I am not satisfied that this Court should conduct a judicial review of these interim decisions.

[51] As was noted by the Court of Appeal in *Hill* at para. 38, a respondent to a human rights complaint does not lose rights to challenge a complaint when the Tribunal dismisses a preliminary application to dismiss under s. 27(1) because a hearing affords them with the opportunity to fully defend against the allegations: *College*, at para. 39.

The Hate Speech Complaint

[52] With respect to the Tribunal's decision not to dismiss the hate speech complaint Mr. Neufeld submits, in summary that this decision was patently unreasonable because the Tribunal failed to apply the test for hate speech set out by the Supreme Court of Canada, which includes first determining whether a reasonable person aware of the relevant context and circumstances, would view the expression targeting an individual or group as inciting others to vilify them and second, whether a reasonable person would view the expression considered in its context, as likely to lead to discriminatory conduct: see, *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, [*Ward*], at paras 83 and 83.

[53] In the Decision the Tribunal noted that BCTF submitted that Mr. Neufeld's statements "question the very existence and legitimacy of LGBTQ persons and reinforce stereotypes" and pointed to both the content, tone of the statements and social and historical background. The Tribunal was not persuaded that the hate speech allegations did not have a reasonable prospect of success and was persuaded that a full hearing was required to make credibility assessments and findings of fact "about the collective statements, including the target, proper interpretation, impact and legal consequences flowing from those facts ... ". The Tribunal decided that both parties should be given the benefit of a hearing to address these matters.

[54] Further, with respect to whether or not Mr. Neufeld's statements and publications constitute hate speech, I do not consider that the alleged failure of the Tribunal to specifically address the test set out in *Ward* is determinative. I note the

recent comments of the Supreme Court of Canada, set out in the headnote of *Hansman (SCC)*, that “[t]he history of transgender individuals in Canada has been marked by discrimination and disadvantage” and that “courts and tribunals have recognized that transgender people remain among the most marginalized in Canadian society, and continue to live their lives facing disadvantage, prejudice, stereotyping and vulnerability”. This decision will in all likelihood be considered by the Tribunal in its consideration of the Complaint at a full hearing.

The Discrimination Regarding Employment Complaint

[55] Mr. Neufeld contends that the Tribunal member reached a patently unreasonable decision by finding that the complaint concerning discrimination regarding employment had a reasonable prospect of success in the absence of evidence of adverse impact. In this respect, Mr. Neufeld refers to the decision in *University of British Columbia v. Chan*, 2013 BCSC 942, in which Justice Loo decided that a decision not to dismiss a complaint was incorrect, in part, because the Tribunal based its decision on evidence that may be produced at a full hearing. In addition, Mr. Neufeld contends that the Tribunal member reached a patently unreasonable decision because she did not dismiss the allegations that had no clear connection to the complainants' workplace.

[56] In my view, when the Tribunal member stated that social context and historical evidence may offer a sufficient evidentiary foundation for a finding of adverse impact, she was not suggesting that such evidence may be produced in the future. Second, with respect to evidence of adverse impact, the Tribunal member found that Mr. Neufeld's statements used derogatory language in direct reference to LGBTQ persons (who were teachers), including words such as propaganda, absurd theory, insidious teaching, evil and unscientific ideology, trans agenda, and transgender indoctrination. Although the Tribunal member did not state in the Decision that use of these words directed towards teachers may allow an inference of adverse impact to be drawn, reading the Decision as a whole I consider that this was likely her position.

[57] In addition, the Tribunal member found that there was a reasonable prospect of the complainants establishing a link to the complaints' workplace at a full hearing. She noted that Mr. Neufeld's statements contained references to the Ministry of Education, SOGI 1 2 3 resources and concept, School Board members, teachers and the District Parents Advisory Committee Chair, touching on subjects including the delivery of education.

The "Retaliation" Complaint

[58] Mr. Neufeld contends that the decision of the Tribunal member not to dismiss the portion of the Complaint under s. 43 is patently unreasonable because the Tribunal did not identify the specific conduct which breached this section.

[59] The Tribunal's reasons state that the connection between Mr. Neufeld's commencement of a defamation action against the president of the BCTF and the Complaint may be proven by inference. The Tribunal reasoned that the Tribunal will "need to make findings of fact regarding the circumstances of the [defamation suit] in order to determine whether the filing of the claim is retaliation contrary to s. 43."

[60] I agree with the comments of the Tribunal that whether or not Mr. Neufeld committed prohibited conduct is a question of fact which will likely be decided by inference – and therefore is a question best left to the Tribunal. It is possible that BCTF and CTA will be able to prove inferentially, that Mr. Neufeld sought to, for example, intimidate the president of the BCTF by commencing his defamation action.

Conclusion on Prematurity of the Neufeld Petition

[61] I do not consider that Mr. Neufeld has demonstrated exceptional circumstances justifying early intervention by this Court in the Tribunal's process. As a result, I do not consider that it is appropriate for this Court to decide whether Mr. Neufeld's statements and publications constitute hate speech or whether filing of his defamation suit was prohibited conduct. Instead, I consider that is more appropriate for the legitimacy of these complaints to be dealt with first by the

Tribunal, which has the specific expertise to evaluate them, and will have the opportunity to do so at a full hearing of the Complaint, in consideration of the entire record, the relevant social context and current law.

Mr. Neufeld's application to quash the Decision Not to Dismiss the Complaints of Non-LGBTQ Teachers Pursuant to ss. 27(1)(a) and (b)

[62] As I have stated earlier, Mr. Neufeld concedes that the question of whether the Tribunal erred in declining to dismiss all of the complaints brought on behalf of non-LGBTQ members of the CTA, pursuant to ss. 27(1)(a) (jurisdiction) and (b) (no arguable contravention of the *Code*), is now moot given the Tribunal's decision to dismiss these complaints pursuant to s. 27(1)(c) – but only if this Court dismisses the petition of BCTF and CTA to overturn the decision dismissing the complaints brought on behalf of non-LGBTQ teachers.

[63] Despite this concession, Mr. Neufeld contends that the question of whether as a matter of law and statutory interpretation a person who does not possess or has been alleged to possess a protected characteristic which is the source of discrimination can advance a discrimination or hate speech complaint, is a matter of legal importance. Mr. Neufeld submits that this question should still be answered, even if moot, relying in this regard on the decision of *Binnersley, v. BCSPCA*, 2016 BCCA 259, para. 26.

[64] In the Decision dated January 12, 2021, the Tribunal noted that Mr. Neufeld had sought dismissal of ss. 7 and 13 complaints of non-LGBTQ teachers pursuant to ss. 27(1)(a),(b) and (c). With respect to question whether the Tribunal had jurisdiction (27(1)(a)), the Tribunal considered that BCTF and CTA had “met the low threshold of alleging acts against both LGBTQ and non-LGBTQ teachers which, if proven, could contravene the *Code*”. With respect to the question whether there was no arguable contravention of the *Code* (27(1)(b)), the Tribunal again considered that the complaints had met the low evidentiary threshold of demonstrating a possible contravention.

[65] The Tribunal decided that the chance of success of the complaints on behalf of both LGBTQ and non-LGBTQ teachers was better addressed under subsection 27(1)(c). Ultimately, the Tribunal dismissed the allegations made on behalf of non-LGBTQ teachers of discrimination regarding employment “as having no reasonable prospect of establishing a discriminatory impact as contemplated by s. 13 of the *Code*.” In the follow up dated May 6, 2021, the Tribunal issued what the Tribunal member described as a clarification, stating that it had been her intention to dismiss all allegations made on behalf of non-LGBTQ teachers in the CTA “as having no reasonable prospect of establishing a discriminatory impact as contemplated by ss. 7 and 13 of the *Code*.”

[66] It is important to recognize that the Tribunal’s analysis under ss. 27(1)(a) and (b) was part of a preliminary screening under s. 27 of the *Code*. The Tribunal’s analysis necessarily focussed on the allegations of discrimination set out in the Complaint, essentially the “pleading”, and to a lesser extent on the specific evidence in support of the allegation. It was open to the Tribunal member to determine at a high level, that material facts concerning jurisdiction and a possible *Code* violation had been set out in the Complaint, necessary to overcome the low threshold required to allow the non-LGBTQ complaints to move forward – at least under a s. 27(1)(a) and (b) analysis.

[67] Although I agree that the question whether non-LGBTQ teachers can advance complaints under ss. 7 and 13 of the *Code* for discrimination concerning or directed towards LGBTQ teachers or persons is of legal importance, it is in my view, more appropriate for this question to be answered first by the Tribunal, a specialized body, on a full evidentiary record and with the benefit of submissions of all parties.

[68] In conclusion, I decline to judicially review the decision of the Tribunal declining to dismiss complaints made on behalf of non-LGBTQ teachers under ss. 27(1)(a) and (b). In my view, this will not prejudice the ability of Mr. Neufeld to respond to the remaining portions of the Complaint which will be heard in a full hearing before the Tribunal.

BCTF and CTA Petition

[69] As set out earlier in these reasons BCTF and CTA seek to quash the decision of the Tribunal dismissing the s. 7 complaints made on behalf of non-LGBTQ teachers. BCTF and CTA contend that the clarification letter issued by the Tribunal member on May 6, 2021 constitutes a new decision, issued in breach of the rules of natural justice and procedural fairness and at a time when the Tribunal was *functus*. In addition, and in any case BCTF and CTA say that the decision to dismiss this complaint was patently unreasonable.

[70] In the May 2021 clarification letter the Tribunal member stated that “I did not specifically address the s. 7 allegations made by non-LGBTQ CTA members”. The Tribunal member stated that she considered it to be in interests of justice to clarify this point and did not require further submissions because the parties had already provided fulsome submissions. The Tribunal member referred to the portion of the Decision dealing with dismissal of the s. 13 complaint of non-LGBTQ teachers and stated that it was her intention (in January 2021) to also dismiss this group’s s. 7 complaint – also on the basis that the CTA complaint on behalf of non-LGBTQ teachers had no reasonable prospect of success.

Was the Tribunal *functus officio* when the Tribunal member issued the May 6, 2021 clarification letter?

[71] BCTF and CTA take the position that the May 6, 2021 clarification was not a clarification but rather was a new decision, revising the initial decision released in January 2021. They say that the Tribunal member was unable to issue this revision because she was *functus officio* once the judicial reviews which are currently before this Court were commenced.

[72] There is no authority for the proposition that the commencement of a judicial review renders a decision maker *functus*. The question is whether the January 2021 decision constituted a final decision which the Tribunal member sought to revise.

[73] As a general rule, once a tribunal has reached a final decision that cannot be revisited because the tribunal has changed its mind: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at para. 20

[74] Subject to two exceptions, once a final decision has been made, a decision maker is generally unable to revise an earlier decision – that is, they are *functus officio*. Exceptions include, when there has been a “slip” in drawing up a decision or where there has been an error in expressing the decision maker’s manifest intention: *Chandler*, citing *Paper Machinery Ltd. v. J.O. Ross Engineering Corp. et Al*, [1934] S.C.R. 186, at para. 4. It is the manifest intention exception which applies in this case.

[75] It is necessary for this Court to first determine what the Tribunal member’s manifest intention was in the January 2021 decision in order to determine whether the subsequent clarification made in May 2021 simply gave effect to this intention: *Capital District Health Authority v. Nova Scotia Government and General Employees Union*, 2006 NSCA 85 [NSGEU], at para. 22.

[76] BCTF and CTA submit that there is no manifest intention evident in the January 2021 decision to dismiss the s. 7 complaint made on behalf of non-LGBTQ teachers. They say this is evident for three reasons: the January 2021 decision did not dismiss the s. 7 complaint made on behalf of non-LGBTQ teachers pursuant to section 27(1)(b); the Tribunal member expressly dismissed the s. 13 complaint pursuant to s. 27(1)(c); and, the Tribunal member did not dismiss any aspect of the s. 7 complaint (on behalf non-LGBTQ teachers).

[77] BCTF and CTA submit that in any event, an injustice would result if the May 2021 clarification is allowed to stand given that a judicial review had been commenced at the relevant time.

[78] I agree the January 2021 decision does not expressly state whether the s. 7 complaint made on behalf of non-LGBTQ teachers should be dismissed or allowed to proceed. The Tribunal member stated, generically that “I am persuaded that the

allegations made under s. 7 would benefit from a full hearing.” In determining manifest intention, it is necessary to look at the Decision as a whole.

[79] In the portion of the Decision dealing with Mr. Neufeld’s application to dismiss the s. 7 complaint, the Tribunal member referred to submissions including those from BCTF that Mr. Neufeld “statements question the very existence and legitimacy of LGBTQ persons and reinforce stereotypes” and stated “the statements use strong language in reference to LGBTQ and transgender issues and persons ... and allusions to regimes where LGBTQ persons are subject to state endorsed discrimination” (emphasis added). In my view, this portion of the Decision was clearly focussed on LGBTQ persons and does not demonstrate a manifest intention to dismiss the s. 7 complaints brought on behalf of non-LGBTQ teachers.

[80] As already stated, in the May 2021 clarification letter the Tribunal member referred to the portion of the January 2021 decision dealing with dismissal of the s. 13 complaint of non-LGBTQ teachers. Boiling these portions of the Tribunal’s January 2021 reasons down to their essence, it is apparent that the Tribunal member dismissed the s. 13 complaint of non-LGBTQ teachers on the basis that there was no evidence, for example, demonstrating “any specific discriminatory impact on non-LGBTQ teachers”. I infer from the May 2021 clarification letter that Tribunal member had come to the same conclusion with respect to the evidentiary basis (or lack thereof) for the complaints made on behalf of non-LGBTQ teachers under s. 7.

[81] I also note that in the penultimate paragraph of the January 2021 decision the Tribunal stated that “[t]he s. 13 allegations BCTF brought on behalf of CTA members who do not identify as LGBTQ are dismissed. The complaint group will now include only those CTA members who identify as LGBTQ” (emphasis added). The last sentence suggests the actual intention of the Tribunal member, which was to dismiss the complaint filed by non-LGBTQ teaches in its entirety.

[82] Reading the January 2021 decision as a whole, I do not conclude that the decision demonstrates a manifest intention not to dismiss the s. 7 complaints

brought on behalf of non-LGBTQ teachers. The Tribunal member's May 2021 clarification letter is described as just that, a clarification of the decision released in January 2021. I take the Tribunal member's description of her May 2021 letter as a "clarification" at face value.

[83] As a result, I conclude that the exception to the rule preventing the issuance of a further decision after a final decision has been made applies in this case. That is, the Tribunal was not *functus officio*.

[84] With respect to the question whether an injustice results from issuance of the May 2021 clarification arises, whether or not the Tribunal member was *functus officio*, is properly addressed in consideration of natural justice and procedural fairness.

Did the issuance of the May 2021 clarification letter result in a breach of BCTF and CTA's natural justice and procedural fairness rights?

[85] BCTF and CTA contend that the Tribunal member did not contact the parties to advise them of her intention to issue the May 2021 clarification letter, or seek submissions on the appropriateness of doing so, or on the merits of the s. 7 claim of non-LGBTQ teachers.

[86] As well, BCTF and CTA also submit that the May 2021 clarification letter does not constitute a reconsideration of the January 2021 decision which they say, pursuant to Rule 36 of the Tribunals' *Rules of Practice and Procedure*, is only initiated on the application of a party.

[87] As set out in my reasons above, the May 2021 clarification letter did not include a new decision but rather was a clarification – consistent with the manifest intention of the Tribunal member set out in the January 2021 decision. That is, I agree that the May 2021 clarification letter does not constitute a reconsideration of the January 2021 decision, which invokes Rule 36.

[88] The question is, does the issuance of the May 2021 clarification letter constitute a breach of rights to natural justice or procedural fairness owing to non-

LGBTQ teachers who were members of CTA? In my view, it does not. The Tribunal member stated in the May 2021 clarification letter in summary, that further submissions from the parties were not required because the parties had already made fulsome submissions on the question of whether the complaints brought on behalf of non-LGBTQ teachers could survive. It is apparent from a review of the extensive submissions filed by the parties and the Tribunal member's January 2021 reasons, that this was the case. No further submissions from the parties were required.

[89] In addition, although it is true that Mr. Neufeld's petition seeking judicial review of the Decision was filed in March 2021, before the Tribunal member issued the May 2021 clarification letter, I am not satisfied that this resulted in any prejudice to non-LGBTQ members of the CTA. Mr. Neufeld points out that in his petition he did not raise any new arguments concerning the validity of the complaint brought on behalf of non-LGBTQ persons, because he took the position in his petition that these complaints had been dismissed by the Tribunal member. In my view, there were no new arguments raised in Mr. Neufeld's petition that the CTA did not have an opportunity to respond to (regarding the s. 7 complaint of non-LGBTQ teachers) on which the Tribunal member may have relied before issuing the May 2021 clarification.

[90] In summary, I fail to see how the Tribunal members clarification resulted in a breach of BCTF and CTA's rights concerning natural justice or procedural fairness.

Was the Decision to Dismiss the s. 7 Complaint of non-LGBTQ teachers Patently Unreasonable?

[91] There is no dispute that that standard of review to be applied to the decision of the Tribunal member to dismiss the s. 7 complaint of non-LGBTQ teachers is patent unreasonableness.

[92] BCTF and CTA submit that this decision was patently unreasonable because the Tribunal member relied on irrelevant factors, was arbitrary or failed to take statutory requirements into account.

[93] The onus is on BCTF and CTA to demonstrate that this decision of the Tribunal member was patently unreasonable. They submit, only, that by referring in the May 2021 clarification letter to reasons in the January 2021 decision falling under the heading "Discrimination in employment: s. 143" as a basis for dismissing the complaint of non-LGBTQ, the Tribunal member relied on irrelevant factors.

[94] In my view, this bald statement by BCTF and CTA does not identify what irrelevant factors were relied upon by the Tribunal member or how the relevant decision was arbitrary. As well, BCTF and CTA do not identify any factors which it says ought to have been considered instead and how consideration of such factors may have yielded a different result.

[95] In addition, it is apparent when the Decision of the Tribunal member is read as a whole that the decision to dismiss the s. 7 complaint of non-LGBTQ teachers was resulted from a conclusion that there was a lack of an evidentiary basis for the complaints made on behalf of non-LGBTQ teachers under s. 7.

[96] I find that BCTF and CTA have not satisfied their burden to demonstrate that the decision of the Tribunal member to dismiss the s. 7 complaint brought on behalf of non-LGBTQ teachers was patently unreasonable.

Conclusion

[97] I decline to hear the petition for judicial review brought by the petitioner Barry Neufeld.

[98] The judicial review application brought by BCTF and CTA is dismissed.

"Mayer, J"