



File No. S-212258
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

**IN THE MATTER OF THE
HUMAN RIGHTS CODE, R.S.B.C. 1996, C. 210 (AS AMENDED) AND THE
JUDICIAL REVIEW PROCEDURE ACT, R.S.B.C. 1996, C. 241 (AS AMENDED)**

**AND IN THE MATTER OF A DECISION MADE BY THE BRITISH COLUMBIA
HUMAN RIGHTS TRIBUNAL ON JANUARY 12, 2021**

BETWEEN:

BARRY NEUFELD

PETITIONER

AND:

**BRITISH COLUMBIA TEACHERS' FEDERATION obo CHILLIWACK TEACHERS'
ASSOCIATION**

RESPONDENTS

NOTICE OF APPLICATION

Name of applicant: Human Rights Commissioner for British Columbia

To: Barry Neufeld, Petitioner
Guild Yule LLP
2100 – 1075 Georgia Street West
Vancouver, BC V6E 3C9
Attention: David Bell and Shauna Gersbach

And to: British Columbia Teachers' Federation obo Chilliwack Teachers' Association,
Respondent
100 – 550 West 6th Avenue
Vancouver, BC V5Z 4P2
Attention: Robyn Trask and Stefanie Quelch

And to: British Columbia Human Rights Tribunal, Respondent
1270 – 605 Robson Street
Vancouver, BC V6B 5J3
Attention: Barbara Korenkiewicz

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smithe Street on October 15, 2021, at 9:45 a.m. for the order(s) set out in Part 1 below.

PART 1: ORDER(S) SOUGHT

1. The Human Rights Commissioner for B.C. (the “Commissioner”) is granted intervenor status in this proceeding.
2. The Commissioner may file written submissions not exceeding 25 pages in length.
3. The Commissioner may make oral submissions at the hearing of the Pctition.
4. The Commissioner will neither be entitled to costs nor will she be liable for costs to any party.

PART 2: FACTUAL BASIS

The Applicant, the Human Rights Commissioner for British Columbia

1. From 2002 until 2019, B.C. was without a Human Rights Commission or Commissioner. In 2017 the provincial government announced its intention to re-establish a human rights commission for B.C. and tasked Mr. Ravi Kahlon, Parliamentary Secretary for Sport and Multiculturalism, with making recommendations for re-establishing a commission.
2. PS Kahlon conducted extensive stakeholder engagements and a scan of human rights commissions in other jurisdictions before making recommendations in his report to the Attorney General, dated December 11, 2017, and entitled *A Human Rights Commission for the 21st Century: British Columbians talk about Human Rights* (the “Kahlon Report”): Affidavit #1 of Kasari Govender, Exhibit “A”.
3. Among other things, the Kahlon Report recommended that the Commissioner should have the power to intervene in disputes involving “human rights matters with a systemic aspect”: Affidavit #1 of Kasari Govender, Exhibit “A” at page 33.
4. On November 27, 2018, Bill 50 (the *Human Rights Code Amendment Act*, 2018) was passed amending the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the “Code”) to, amongst other things, establish the role of Human Rights Commissioner as an independent officer of the Legislature: *Code*, s. 47.01. The legislative amendments in Bill 50 closely reflected the recommendations made in the Kahlon Report, including its recommendations concerning the Commissioner’s powers to intervene.
5. Pursuant to s. 47.12 of the *Code*, the Commissioner is responsible for protecting and promoting human rights in B.C. The breadth of this statutory mandate requires equally broad powers. The *Code* expressly sets out a non-exhaustive list of powers to be exercised by the Commissioner, including intervening in complaints before the Tribunal, as of right, and in any proceeding in any court: *Code*, s. 47.12(1)(j).

6. This is the Commissioner's second application for leave to intervene since she assumed the position of B.C.'s Human Rights Commissioner in 2019: Affidavit #1 of Kasari Govender at para. 40.
7. In *Gibraltar Mines Ltd. v. Harvey*, 2021, BCSC 927, the Commissioner sought leave to intervene on the legal test to be applied to complaints regarding discrimination on the basis of family status in employment. The chambers judge found that the Commissioner had a genuine interest in the legal issue she proposed to address and that it was "entirely suitable to be addressed by an intervenor". He further found:

25 The Commissioner's interest in the issue is direct and obvious. It is within the Commissioner's mandate to be concerned about the interpretation of the Code and the systemic impact of the test for family status discrimination and to seek to address these matters by intervening in this proceeding.
8. At paras. 34 and 36 of *Gibraltar Mines* chambers judge concluded the Commissioner's proposed submissions would likely assist the court and that she would not expand the litigation or change its focus.
9. In order to fulfil her statutory mandate, the Commissioner seeks leave to intervene in these proceedings to ensure that the Tribunal's jurisdiction over discriminatory publications published on the internet is properly addressed in view of the principles of cooperative federalism, and that considerations related to assessing hate speech targeting transgender and non-binary people are specifically considered.

The Decision under Review

10. The underlying application for judicial review is from a decision of the Human Rights Tribunal refusing to dismiss the entirety of a complaint pursuant to 27(1)(a), (b), (c), and (d)(ii) of the *Code: Chilliwack Teachers' Association v. Neufeld*, 2021 BCHRT 6 (the "Decision").
11. The basis for the complaint are multiple statements, communications, and publications made by the Petitioner – online and in person - between October 23, 2017, and December 3, 2018, that the Respondent says breached ss. 7 and 13 of *Code* on the basis of sexual orientation, gender identity and gender expression (the "Publications").
12. Mr. Barry Neufeld (the "Petitioner") is a school trustee of the Chilliwack Board of Education, School District No. 33 (Chilliwack) (the "School District"). Trustees are elected to serve as members of the School Board and oversee the delivery of public education in the School District. The *School Act*, R.S.B.C. 1996, c. 412, sets out trustees' responsibilities.
13. The Publications expressed the Petitioner's opposition to the introduction of teaching resources called "SOGI 1 2 3" into the School District, including teaching children about gender fluidity and gender transitioning: Decision at para. 2. "SOGI" refers to sexual orientation and gender identity.

14. The Petitioner made the majority of the Publications on the social media website, Facebook, but some of the allegations involve in-person speech or other internet sites.
15. Two examples of the publications at issue, posted by the Petitioner on his Facebook page on October 23, 2017 and December 17, 2017, respectively, are as follows:

Okay, so I can no longer sit on my hands. I have to stand up and be counted. A few years ago, the Liberal minister of education instigated a new curriculum supposedly to combat bullying. But it quickly morphed into a weapon of propaganda to infuse every subject matter from K-12 with the latest fad: Gender theory. The Sexual Orientation and Gender Identity (SOGI) program instructs children that gender is not biologically determined but is a social construct. At the risk of being labelled a bigoted homophobe, I have to say that I support traditional family values and I agree with the College of paediatricians that allowing little children choose to change gender is nothing short of child abuse. But now the BC Ministry of Education has embraced the LGBTQ lobby and is forcing this biologically absurd theory on children in our schools. Children are being taught that heterosexual marriage is no longer the norm. Teachers must not refer to "boys and girls" they are merely students. They cannot refer to mothers and fathers either. (Increasing numbers of children are growing up in homes with same sex parents). If this represents the values of Canadian society, count me out! I belong in a country like Russia, or Paraguay, which recently had the guts to stand up to these radical cultural nihilists... [as written].

Decision at para. 24

... My job description is that of a policy maker. And the current emphasis is on inclusion. I do not want to give in to the self-serving agenda of the LGBTQ+ groups who want to be given priority as the most downtrodden of victims...

... But the scary thing is that it has already demonized people of faith who believe that God created humans male and female: In the Image of God. Here is my prophecy to the Church. If you don't get off your duffs and push back against this insidious new teaching, the day is coming (maybe it is already here) when the government will apprehend your children and put them in homes where they will be encouraged to explore homosexuality and gender fluidity. There already is a special group foster home for LGBTQ+ kids in Red Deer, AB.

You think that is impossible? Well the Canadian government did exactly that to Aboriginal families until a few decades ago. Determined to destroy the traditional teachings of their culture and re-educate children into the prevailing worldview of the government. The Government have already ensured that families with traditional family values will not be approved as foster homes and are refused the right to adopt children. But the government has always done a horrid job of being a parent... [as written]

Decision at para. 27

16. The Respondent, the British Columbia Teachers' Federation (the "BCTF") obo Chilliwack Teachers Association (the "CTA") is the certified bargaining agent for teachers employed by all public school boards in the province and the CTA is a local of the BCTF ("Respondent").

17. The Respondent filed a representative complaint on behalf of its members, including but not limited to those teachers who identify as lesbian, gay, bisexual, and transgender and “who differ based on gender identity or expression”, alleging the Petitioner breached ss. 7 and section 13 of the *Code*: Decision at paras. 1 and 3
18. Section 7 addresses publications which indicate discrimination or an intent to discriminate or which are likely to expose a person or group of persons to hatred or contempt based, *inter alia*, on the sexual orientation, gender identity or expression of that person or group of persons. Section 13 addresses discrimination in employment.
19. The Respondent alleges that in expressing his opposition the Petitioner made and published homophobic and transphobic comments that have a negative impact on the work environment for teachers in the School District and are likely to expose transgender people to hatred and discrimination: Decision at para. 3.
20. The Complaint also alleges that the Respondent breached s. 43 of the *Code*, commonly referred to as the *Code*’s prohibition against retaliation. The basis for this allegation is a defamation suit the Respondent filed against BCTF’s then President.
21. The Petitioner brought an application to dismiss the Complaint in its entirety pursuant to subsections 27(1)(a), (b), (c), and (d)(ii) of the *Code* (the “Application to Dismiss”).
22. The Tribunal granted the Application to Dismiss in part. The Tribunal dismissed the allegations under s. 13 brought on behalf of CTA members who do not identify as LGBTQ pursuant to s. 27(1)(c) but it declined to dismiss the remainder of the Complaint. The Tribunal allowed the Complaint to proceed to hearing with a complainant group consisting of LGBTQ members of the CTA under s. 13 and CTA members generally under s. 7: Decision at paras. 136 -137.
23. The Tribunal considered the Petitioner’s arguments that the allegations pertaining to the Publications on Facebook and in an internet news article fell within federal jurisdiction and should be dismissed under s. 27(1)(a) of the *Code*. The Tribunal concluded that “a review of the cases does not unequivocally support the view that all communication occurring on the internet is within federal jurisdiction”: Decision at para. 88.
24. The Tribunal found that previous cases did not address “how to determine what brings conduct on the internet within exclusive federal jurisdiction”: Decision at para. 89. It declined to dismiss the complaint on the basis of jurisdiction without a full record, including fulsome arguments and an evidentiary record: Decision at para. 90.
25. In respect of the Petitioner’s argument that the Complaint should be dismissed because there was no reasonable prospect of establishing that any of the Publications rise to the level of hate speech, the Tribunal found that the Complaint had met the low bar required at this stage of the proceeding. That is, the Complaint had alleged facts that brought it out of the realm of conjecture: Decision at para. 127.

26. The Tribunal found that a full hearing was required to make findings of fact about the collective Publications, including the target, proper interpretation, impact, as well as the legal consequences that result from those facts. The Tribunal declined to dismiss the Complaint on the basis that the s. 7 claims had no reasonable prospect of success.
27. The Tribunal also declined to dismiss the Complaint in regards to retaliation: Decision at paras. 105-106.

The Petition

28. The Petitioner is seeking to quash the Decision declining to dismiss the Complaint in its entirety, and an order that the Complaint is dismissed in its entirety or, alternatively, be remitted to the Tribunal with directions for a rehearing by a different Tribunal member.
29. The Respondent has filed a response to the Petition opposing the orders sought by the Petitioner. The Tribunal has also filed a response: it opposes the relief sought on the basis of prematurity but takes no position on the merits of the order seeking to quash the Decision.
30. The Commissioner seeks leave to intervene with respect to the following two issues raised in the Petition:
 - a. Did the Tribunal err or act in a patently unreasonable manner in determining that the question of whether the *Code* applies to alleged hate speech that occurs via the internet should be determined at a hearing and not on the preliminary application?
 - b. Did the Tribunal err or act in a patently unreasonable manner in assessing whether the Publications could potentially meet the definition of “hate speech” ?
31. The Petition and Responses to Petition raise numerous additional issues. The Commissioner does not seek to intervene on any issue other than those set out above.

PART 3: LEGAL BASIS

The Test for Granting Intervenor Status

32. The Supreme Court of British Columbia can grant intervenor status in appropriate circumstances as an exercise of its inherent jurisdiction: *Gibraltar Mines Ltd. v. Harvey*, 2021 BCSC 927 at para. 9.
33. The well-known principles governing applications for leave to intervene were set out in *British Columbia v Imperial Tobacco Canada Ltd.*, 2016 BCCA 203 (Chambers) rev'd on other grounds, 2016 BCCA 363 (“*Imperial Tobacco*”). Simply put, the court may grant intervenor status either where the applicant has a direct interest in the proceeding or where the proceeding raises public law issues that legitimately engage the applicant's interests and the applicant brings a different and useful perspective to those issues that will

be of assistance to the Court: *Imperial Tobacco* at para. 8. The court will consider the nature of the proposed intervenor and the nature of the issue: *Imperial Tobacco* at para. 9.

34. An intervenor's role is not to support the position of a particular party or to make submissions on the outcome of the proceeding. Rather, the role of an intervenor is to make principled submissions on pertinent points of law: *Friedmann v. MacGarvie*, 2012 BCCA 109 at para. 28.
35. Submissions from intervenors should not broaden the *lis* between the parties and expand the scope of the litigation: *Imperial Tobacco* at para. 10.
36. These principles apply to intervention applications in the Supreme Court of British Columbia as well as the Court of Appeal: see, for example, *British Columbia (Forest, Lands and Natural Resource Operations) v. Forest Appeals Commission*, 2014 BCSC 2534 at para. 7.

The Commissioner meets the test for intervenor status

37. The Commissioner submits that the analysis and conclusion of the chambers judge in *Gibraltar Mines Ltd. v. Harvey*, 2021 BCSC 927 is equally applicable in this case.
38. The Commissioner seeks to intervene to address public law issues about (a) the determination of jurisdiction of the Tribunal to address hate speech that takes place over the internet and (b) the approach to assessing hate speech in the particular context of discrimination on the basis of gender identity or expression. These are public law matters that are integral to protecting and promoting human rights in the Province and the Commissioner's interest in them is fundamental to her statutory mandate. The Commissioner's submissions will not duplicate those of the parties. The Commissioner's expertise and unique perspective will ensure that her submissions are useful to the Court.
39. The Petitioner argues that the law has definitively established that the *Code* does not apply to communications on the internet. The Tribunal held that the law is not so settled and that it was appropriate for the determination about jurisdiction to be made in the context of a full hearing with a more extensive record.
40. As an Officer of the Legislature with a statutory mandate to intervene in Tribunal hearings, the Commissioner has a strong interest in ensuring that important issues such as the scope and application of the *Code* are determined on a complete factual record, after full legal argument and with the participation of all appropriate parties. Among other issues, it does not appear that a Notice of Constitutional Question has been filed such that the Attorneys General were not given notice of the Petitioner's argument that the *Code* is inapplicable to internet communications.
41. It is well accepted that administrative tribunals that can determine questions of law should determine constitutional questions before those are addressed by the Courts. This will ensure that the Tribunal's expertise with respect to the subject matter of the law and the statutory scheme will be brought to bear on the issue: *Denton v. British Columbia* 2017 BCCA 40; *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 45; *Code*, s. 32(i).

42. The Commissioner seeks leave to make the following submissions on the Tribunal's determination that the law is not settled, and to make the following submissions on the substantive jurisdictional question, in the event that this Court decides that it is appropriate to address it in this proceeding:
- a. Parliament's exclusive jurisdiction over telecommunications undertakings encompasses the planning, construction, management, location, use and upkeep of telecommunications networks, in addition to whether to keep those networks in place: *Calgary (City) v Bell Canada Inc*, 2020 ABCA 211 at paras. 94 and 111. Parliament's exclusive jurisdiction does not render s. 7 of the *Code* inapplicable to publications on the internet where the complaint is otherwise within provincial jurisdiction.
 - b. Section 7 is a valid provincial law. Its pith and substance is a matter of civil rights within the jurisdiction of the province pursuant to s. 92(13) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5: *Oger v Whatcott* (No 7), 2019 BCHRT 58, *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11.
 - c. There is no operational conflict between Parliament's exclusive jurisdiction over telecommunications that would render s. 7 inoperable to speech published on the internet. The doctrine of inter-jurisdictional immunity does not apply.
 - d. Contemporary constitutional analysis emphasizes that Canada's is a flexible and cooperative federalism where some overlap in provincial and federal legislative regimes is inevitable and acceptable: *Canadian Western Bank v Alberta*, 2007 SCC 22, *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39.
 - e. Jurisprudence relied on for the proposition that the Tribunal has previously found it lacks jurisdiction over internet publications, including but not limited to *Strikes With A Gun v. Patel*, 2006 BCHRT 367, *Elmasry and Habib v. Roger's Publishing and MacQueen (No. 4)*, 2008 BCHRT 378; *Fossum v. Society of Notaries*, 2009 BCHRT 392, and *Paquette v. Amaruk Wilderness and another (No. 4)*, 2016 BCHRT 35, are not binding or should be given little weight because:
 - i. they do not reflect the contemporary approach to the division of powers analysis;
 - ii. any conflict that may have existed between provincial and federal human rights legislation prior to the repeal of s. 13 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 in 2013 no longer exists; and/or
 - iii. they were decided without full submissions and consideration of the division of powers analysis and without notice under the *Constitutional Questions Act*, R.S.B.C. 1996 c. 68, s. 8.

43. The Commissioner also says that the question of whether the Publications constitute “hate speech” is a matter for the Tribunal to consider at a hearing with a complete record. Alternatively, to the extent that this Court were to consider that issue in this proceeding, the Commissioner seeks leave to intervene to make the following arguments about the approach to be taken to determining whether a breach of s. 7(1)(b) has occurred in relation to the protected characteristic of gender identity or expression:

- a. *Oger v Whatcott (No 7)*, 2019 BCHRT 58 is the leading authority on how to assess whether impugned publications meet the threshold of hatred and contempt in relation to gender identity and expression; and
- b. Impugned publications must be viewed in context, but it is acceptable to scrutinize more closely those terms and phrases that appear likely to come within the ambit of s.7’s protection. Such scrutiny must take into account the particular pernicious stereotypes about transgender and non-binary people that is the basis for much of the discrimination against them.

44. In sum, the Commissioner’s submissions, as described above, will be of assistance to the Court on important issues of public law, and will neither duplicate the submissions of others nor expand the *lis* between the parties.

Costs

45. The usual rule is that intervenors are not entitled to, or liable for, costs associated with a proceeding: see, for example, *Faculty Association of the University of British Columbia v. University of British Columbia*, 2009 BCCA 56 at para. 4 (Chambers). The present case presents no reason to depart from the usual rule and the Commissioner accordingly seeks an order that costs be neither awarded for or against her both with respect to this application for leave to intervene and with respect to her participation at the hearing of the Petition.

PART 4: MATERIAL TO BE RELIED UPON

1. Affidavit No. 1 of Kasari Govender, made on September 17, 2021.

The applicant estimates that the application will take one (2) hours.

[] This matter is within the jurisdiction of a master.

[x] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- a) file an application response in Form 33,

- b) file the original of every affidavit, and of every other document, that
 - i. you intend to refer to at the hearing of this application, and
 - ii. has not already been filed in the proceeding, and
- c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - i. a copy of the filed application response;
 - ii. a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - iii. if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: Sept. 17/2021



Sarah X. Khan, Q.C. and Heather D. Hoiness
Counsel for the Applicant,
Human Rights Commissioner for British Columbia

Address for Service:
BC's Office of the Human Rights Commissioner
#536, 999 Canada Place
Vancouver, BC V6C 3E1
Telephone: 1- (844) 922-6472
Facsimile: (604) 681-0559
Email: [REDACTED]@bchumanrights.ca

To be completed by the court only:

Order made

- in the terms requested in paragraphs _____ of Part 1 of this notice of application
 with the following variations and additional terms:

Date: _____

 Signature of judge Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
 discovery: production of additional documents
 other matters concerning document discovery
 extend oral discovery
 other matter concerning oral discovery
 amend pleadings
 add/change parties
 summary judgment
 summary trial
 service
 mediation
 adjournments
 proceedings at trial
 case plan orders: amend
 case plan orders: other
 experts
 none of the above