Court File No. CV-22-00000096-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

RAINBOW ALLIANCE DRYDEN and CAITLIN HARTLEN

Plaintiffs

and

BRIAN WEBSTER

Defendant

FACTUM OF THE INTERVENER, EGALE CANADA

(Motion pursuant to s. 137.1 of the *Courts of Justice Act,* R.S.O 1990, c. C.43 returnable June 12, 2023)

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West, Suite 3400
Toronto, ON M5H 4E3
T: 416.367.6000
F: 416.367.6749

Daniel Girlando (59805L)
dgirlando@blg.com
T: 416.367.6516

Natalie D. Kolos (60466L)
nkolos@blg.com
T: 416.367.6609

Lauren L. Malatesta (79647N)
lmalatesta@blg.com
T: 416.367.7278

Lawyers for the Intervener,
Egale Canada

TO: **JUDSON HOWIE LLP**
P.O. Box 105
Fort Frances, ON P9A 3M5

Douglas W. Judson (70019H)
doug@judsonhowie.ca
T: 807.861.3684

Peter A. Howie (68443I)
peter@judsonhowie.ca
T: 807.861.0638

MCCARTHY TÉTRAULT LLP
Suite 5300, TD Bank Tower
Box 48, 66 Wellington Street West
Toronto, ON M5K 1E6

Adam Goldenberg (69114R)
agoldenberg@mccarthy.ca
T: 416-601-8357

Ljiljana Stanić (70149C)
lstanic@mccarthy.ca
T: 416-601-7802

Leah Strand (21703)
lstrand@mccarthy.ca
T: 403-260-3523

Lawyers for the Plaintiffs

AND TO: **BRIAN WEBSTER**
Suite 122, 45 – 2000 Airport Road NE
Calgary, AB T2E 6W5
superiorweldinginspection@hotmail.com
T: 519.943.3747

Defendant

TABLE OF CONTENTS

PART 1: OVERVIEW

1. Canadian courts and tribunals have recognized that misinformation contributes to the marginalization of the 2SLGBTQI community. This misinformation includes enduring myths and stereotypes that associate members of the 2SLGBTQI community with dangerous sexual offenders and child abusers. Our courts have further recognized that such commentary exposes the 2SLGBTQI community to hatred, vilification and detestation.

2. Grooming has been defined as the process of manipulating and luring children with the intention of sexually abusing them.[1] False accusations of grooming have long been used against members of the 2SLGBTQI community who are engaged in discussing issues related to sexual orientation and gender identity with children.[2] These accusations also occur against those who simply expose children to gender non-conformity, like many engaged in Drag Story Time.[3] They seek to delegitimize and threaten such discussions and vilify those who lead them.

3. The Defendant's motion is brought pursuant to section 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the *CJA*). A central issue in this motion is whether section 137.1 of the *CJA* was intended to shield those that perpetuate harmful anti-2SLGBTQI tropes and make unfounded accusations that 2SLGBTQI individuals and drag performers are "groomers".

4. Egale intervenes to assist the Court in understanding the historic and current marginalization of the 2SGLBTQI community, and the impact of accusations of grooming levied

---

[1] Affidavit of Corinne Mason affirmed April 20, 2023 ["Mason Affidavit"] at para 5, Responding Record of the Plaintiffs ["RRP"], Tab 3; Affidavit of Caitlin Hartlen, affirmed April 19, 2023 ["Caitlin Affidavit"] at para 40, RRP Tab 1.
[2] Mason Affidavit at paras 31-32, RRP Tab 3.
[3] Mason Affidavit at paras 32-33, 38-39, RRP Tab 3.

against community members. This perspective is particularly relevant when considering whether there are grounds to believe that a defence of fair comment has "no real prospect of success" under s. 137.1 of the *CJA*, and when conducting the weighing exercise between harm suffered by a plaintiff and the public interest in protecting a defendant's expression. Egale makes two submissions in this regard.

5. First, where a defendant recycles the age-old trope that casts 2SLGBTQI people as dangerous sexual offenders and child abusers, the defence of fair comment will not be available.

6. Second, with respect to the final and most important step of the analysis, there is no public interest in protecting expression that exposes 2SLGBTQI individuals to vilification and hatred.

PART 2: RELEVANT BACKGROUND

7. Stigma and prejudice against 2SLGBTQI people are often perpetuated in the form of anti- 2SLGBTQI speech that spreads or reinforces misinformation, myths and stereotypes. Canadian courts and tribunals recognize that harmful and pervasive myths exist about members of the 2SLGBTQI community. An age-old trope portrays 2SLGBTQI individuals as dangerous sexual offenders, pedophiles and child molesters who ought to be feared and hated.

8. In *Whatcott,* the respondent distributed flyers promoting hatred against individuals on the basis of their sexual orientation. In considering whether the flyers were contrary to the *Human Rights Code*, the Supreme Court of Canada recognized that exposure to hatred can "result from expression that equates the targeted group with groups traditionally reviled in society, such as child

abusers, pedophiles … or "deviant" criminals who prey on children."[4] This Court has similarly recognized that the 2SLGBTQI community has been subject to "homophobic tropes such as predation, pedophilia, and socially destructive behaviour."[5] Finally, the Canadian Human Rights Tribunal has recognized that hatred is generated towards the 2SLGBTQI community by equating members of the community with pedophilia, bestiality, and sexual predation.[6]

9. In the recent decision of *Hansman v. Neufeld*, the Supreme Court of Canada recognized that transgender and other gender non-conforming individuals have a regrettably long history of disadvantage and marginalization in our society; that they face harmful stereotypes; and that "courts and tribunals have also recognized that 'despite some gains, transgender people remain among the most marginalized in our society' and continue to live their lives facing 'disadvantage, prejudice, stereotyping, and vulnerability'". [7]

10. Drag is a central aspect of 2SLGBTQI identity and cultural expression.[8] While it has developed and changed over the decades, drag has historically been instrumental in creating spaces and symbols of resistance for 2SLGBTQI people and in increasing the visibility of 2SLGBTQI people, particularly gender diverse or gender non-conforming people.[9] More recently, Drag Story Time has offered children representations that normalize gender and sexually diverse families and

---

[4] *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 at para 45 [*Whatcott*].
[5] *Volpe v Wong-Tam*, 2022 ONSC 3106 at para 261 [*Volpe*].
[6] *Schnell v Machiavelli and Associates Emprize Inc (No 2)*, 2002 CanLII 78260 at paras 102-104 (Can CHRT) [*Schnell*].
[7] *Hansman v Neufeld*, 2023 SCC 14 at paras 84-86, 89 [*Hansman*].
[8] Affidavit of Cameron Crookston affirmed April 20, 2023 ("Crookston Affidavit") at para. 7; RRP, Tab 2.
[9] Crookston Affidavit at paras 8, 25-44; RRP, Tab 2.

has countered the unfounded but enduring stereotype which portrays 2SLGBTQI individuals and culture as dangerous and harmful to children.[10]

PART 3: STATEMENT OF ARGUMENT

11. The test under section 137.1 of the *CJA* is two-pronged. First, the defendant must show that the proceeding arises from an expression made by the defendant that relates to a matter of public interest.[11] If the defendant succeeds in so doing, the burden then shifts to the plaintiff to show that there are grounds to believe that the proceeding has substantial merit and that the defendant has no valid defences.[12] Finally, the plaintiff must also establish that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression.[13] If the plaintiff establish these three elements, then the defendant's section 137.1 motion must fail.

12. In the event the Court finds that the Defendant has met his burden under s. 137.1(3), Egale's submissions will assist the Court in addressing two subsequent portions of the test under section 137.1: (a) there is no valid defence under section 137.1(4)(a)(ii); and (b) the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression under section 137.1(4)(b).

---

[10] Crookston Affidavit at paras 48, 51-53; RRP, Tab 2.
[11] *Courts of Justice Act*, RSO 1990, c C43, s. 137.1(3) [*CJA*].
[12] *CJA*, s. 137.1(4)(a).
[13] *CJA*, s. 137.1(4)(b).

A. Falsely labelling 2SLGBTQI individuals as "groomers" cannot constitute a fair comment.

13. The defence of fair comment is not available for unfounded accusations that a group of 2SLTBTQI individuals are "groomers." For the defence of fair comment to be available, a comment must, among other things:

- "be recognizable as a comment" as opposed to fact, although it can include inference of fact;
- the comment must satisfy the following objective test: "could any person honestly express that opinion on the proved facts?"; and
- the comment must not have been not actuated by express malice.[14]

(a) Accusing 2SLGBTQI individuals of grooming is a statement of fact

14. Recycling of the age-old trope of 2SLGBTQI individuals being "groomers" or having an agenda to abuse children cannot "be recognizable as a comment." For expression to constitute fair comment, the statement must be one that would be understood by a reasonable reader as a comment rather than a statement of fact.[15] A comment includes a "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof."[16]

---

[14] *WIC Radio Ltd v Simpson*, 2008 SCC 40, [2008] 2 SCR 420 at para 28 [*WIC Radio*].
[15] *WIC Radio* at para 28.
[16] *WIC Radio* at para 26.

15. Allegations of fraud, theft, or other criminal conduct have been found to be statements of fact for which a fair comment defence is not available.[17] For example:

- In *Lascaris v. B'nai Brith Canada*, the Court of Appeal found that a statement that the appellant supported terrorists could be characterized as a statement of fact. [18]
- In *Bondfield Construction Company Ltd. v. Globe and Mail Inc.*, the Court of Appeal held that statements suggesting corruption and collusion in a bidding process could be viewed as factual assertions.[19]
- In *Pan v. Gao*, the British Columbia Court of Appeal concluded that a statement that someone was a "seasoned liar" was a statement of fact.[20]
- In *Galloway v. A.B.*, the Court held that a statement that the plaintiff raped and sexually assaulted someone should be characterized as fact, and not as comment.[21]

16. Like allegations of the above various conduct, the statement that someone is a "groomer" refers to an individual's criminal actions, which are verifiable and can be proven or disproven based on underlying facts. Where "a statement can be justified by proof of a specific instances that support it," it will constitute a statement of fact.[22]

---

[17] *Nanda v McEwan*, 2019 ONSC 3357 at para 48, (regarding allegations of theft and corruption), aff'd *Nanda v McEwan*, 2020 ONCA 431; *Hall v Kyburz*, 2006 ABQB 294 at para 33 (regarding allegations of various criminal acts, such as fraud, kidnapping and extortion), aff'd *Hall v Kyburz*, 2007 ABCA 228.
[18] *Lascaris v B'nai Brith Canada*, 2019 ONCA 163 at para 33.
[19] *Bondfield Construction Company Limited v The Globe and Mail Inc*, 2019 ONCA 166 at para 17.
[20] *Pan v Gao*, 2020 BCCA 58 at para 104.
[21] *Galloway v AB*, 2021 BCSC 2344 at para 607.
[22] *Bernier v Kinsella et al*, 2021 ONSC 7451 at para 50 [*Bernier*].

17. An accusation of grooming or child abuse cannot be likened to "loose, figurative or hyperbolic" labels,[23] like being homophobic, transphobic, bigoted, racist, or sexist, which Canadian courts have characterized as comment, not fact. Unlike racist or misogynist, "groomer" is not a "generalization or conclusion that is not itself true or false"[24] or a "debatable assertion as to a state of mind."[25]

18. In *Hansman*, the Supreme Court of Canada acknowledged that the "line between comment and fact can be difficult to draw" and that opinions can often be expressed in a factual way, although they may be more properly construed as comment. The Court held that "[c]ontext is essential in distinguishing comment from fact."[26]

19. The context in this case includes the persistent myth associating members of the 2SLTBTQI community with dangerous sexual offenders and child predators, and the severe discrimination, violence and hatred towards 2SLTBTQI community such myths have caused. Egale submits that the assertion that a group of 2SLTBTQI individuals are "groomers" or have an agenda to abuse children **is** a statement of fact, or at the least could be characterized as factual. If readers react with the vilification that these statements have historically incited, for example, with suggestions that people "buy tags to hunt down these animals,"[27] that reaction could be considered further evidence that the expression was understood as fact.

---

[23] *WIC Radio* at para 26.
[24] *Bernier* at para 50.
[25] *Hansman* at para 111.
[26] *Hansman* at paras 108-109.
[27] Caitlin Affidavit; RRP, Tab 1J.

(b) The "objective honest belief" and malice requirements

20. Egale submits that accusing 2SLBGTQI individuals of having an agenda to abuse children, which are grave allegations, without knowing anything about those targeted by the accusation, cannot satisfy the "objectively honest belief" requirement. Further, the expression should be viewed as actuated by malice.

21. To succeed, a defence of fair comment must satisfy an "objective honest belief" test, which as articulated in *WIC Radio*, is whether "any [person could] honestly express that opinion on the proved facts", "however prejudiced he may be, however exaggerated or obstinate his views".[28] Egale acknowledges that an accusation of grooming made on social media against 2SLGBTQI individuals may be easy to make for those holding prejudiced views, particularly when it is made under the cover of anonymity and without knowing the targeted individuals or what their motivations are. However, Egale submits that a fair and honest person would not make that assertion once aware of the "proved facts", e.g., win 5 minuteshat actually happens at Drag Story Time and its pedagogical value.[29]

22. Malice defeats an otherwise valid fair comment defence. Malice is not limited to spite or ill will. It can also be established by reckless disregard for the truth.[30] The more serious the allegation in issue, the more weight a court will give to a defendant's disregard of indifference to the truth before making a statement.[31] Proof of malice "may be intrinsic or extrinsic: that is, it may

---

[28] *WIC Radio* at paras 40, 49, 63, quoting *Cherneskey v Armadale Publishers Ltd* (1978), [1979] 1 SCR 1067 pp. 1100, 1103 per Dickson J. (dissenting).
[29] Crookston Affidavit at paras 46-51, RRP Tab 2; Mason Affidavit at para 30, RRP Tab 3.
[30] *Hansman* at para 115; *Bent v Platnick*, 2020 SCC 23, [2020] 2 SCR 645 at para 136 [*Bent*].
[31] *Bent* at para 136, quoting P.A. Downard, *The Law of Libel in Canada* (4th ed. 2018) at §9.74.

be drawn from the language of the assertion itself or from the circumstances surrounding the publication of the comment."[32] A person could be acting with reckless disregard for the truth, and therefore malice, if they accuse a group of 2SLBGTQI individuals of having an agenda to abuse children despite knowing little or nothing about what these individuals or what they actually do.

B. No public interest in protecting anti-2SLGBTQI trope

23. There is no public interest in protecting a harmful trope that associates 2SLGBTQI people with sexual predation and child abuse.

24. Even if there are grounds to believe that the proceeding has substantial merit and that the defendant has no valid defence, the court will need to engage in a public interest weighing exercise under s. 137.1(4)(b) and consider whether the likely harm to the plaintiff is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

25. *Pointes* described this weighing exercise as the core of the analysis, as it allows the court to strike an appropriate balance between the protection of individual reputation and freedom of expression, the competing values at the heart of anti-SLAPP legislation.[33]

26. At this final stage of the analysis courts can assess "what is really going on in a particular case before them" and "how allowing individuals or organizations to vindicate their rights through a lawsuit — a fundamental value in its own right in a democracy — affects, in turn, freedom of

---

[32] *WIC Radio* at paras 100-101.
[33] *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22, [2020] 2 SCR 587 at para 82 [*Pointes*].

expression and its corresponding influence on public discourse and participation in a pluralistic democracy."[34]

27. In assessing the harm likely to have been suffered, this court should be mindful of the prior recognition of our courts that depicting 2SLGBTQI individuals as as dangerous pedophiles with an agenda to lure and sexually abuse children is a powerful means of demonizing them and exposing them to hatred.[35] Exposure to hatred or contempt constitutes serious harm, particularly where there is evidence that the expression has fomented hateful responses and threats of violence.[36] However, such evidence may be unnecessary, given the breadth of judicial commentary acknowledging the harmful effects of exposure to hate.

28. In *Pointes*, the Supreme Court of Canada held that, when engaging in the weighing exercise, the "quality of the expression" and "the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group, or a group protected under s. 15 of the *Charter* or human rights legislation" were relevant factors in that assessment.

29. In *Hansman*, the Supreme Court of Canada offered additional guidance on how courts are to weigh the public interest in protecting the defendant's expression, and stated the following:

> In making this assessment, s. 2(b) *Canadian Charter of Rights and Freedoms* jurisprudence "grounds the level of protection afforded to [the defendant's] expression in the nature of the expression". Similarly, s. 15(1) considerations may factor into the weighing analysis in a proper case. […]. As our Constitution recognizes, not all expression is created equal, and the level of protection to be afforded to any particular expression can vary widely

---

[34] *Pointes* at para 81.
[35] *Whatcott* at para 45; *Volpe* at para 261; *Schnell* at paras 102-104.
[36] Mason Affidavit at paras 38-39, RRP Tab 3.

> according to the quality of the expression, its subject matter, the motivation behind it, or the form through which it was expressed. [citations omitted][37]

30. There is no public interest in protecting expression that baldly asserts that 2SLGBTQI individuals are "groomers". This expression only recycles the old-age and harmful trope that conflates 2SLGBTQI people with pedophiles and sexual predators. As the Court held in *Able Translations Ltd,* "[h]ateful or malicious attempts to inflict harm under the guise of free debate of matters of public interest were never intended to be sheltered by the section 137.1 of the *CJA*.[38]

PART 4: ORDER SOUGHT

31. Egale takes no position on the outcome of this motion but requests that it be determined in accordance with these submissions, and that no costs be awarded for or against Egale.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of May 2023.

Daniel Girlando, Natalie Kolos & Lauren Malatesta
Lawyers for the Intervener, Egale Canada

---

[37] *Hansman* at para 79.
[38] *Able Translations Ltd v Express International Translations Inc*, 2016 ONSC 6785 at para 84, aff'd *Able Translations Ltd v Express International Translations Inc*, 2018 ONCA 690.

SCHEDULE "A" – LIST OF AUTHORITIES CITED

Tab	Title	Pinpoints
1	*1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22, [2020] 2 SCR 587	81-82
2	*Able Translations Ltd v Express International Translations Inc*, 2016 ONSC 6785	84
3	*Bent v Platnick*, 2020 SCC 23, [2020] 2 SCR 645	136
4	*Bernier v Kinsella et al*, 2021 ONSC 7451	50
5	*Bondfield Construction Company Limited v The Globe and Mail Inc*, 2019 ONCA 166	17
6	*Cherneskey v Armadale Publishers Ltd* (1978), [1979] 1 SCR 1067 pp. 1100, 1103 per Dickson J. (dissenting).	
7	*Galloway v AB*, 2021 BCSC 2344	607
8	*Hall v Kyburz*, 2006 ABQB 294	33
9	*Hansman v Neufeld*, 2023 SCC 14	79, 84-86, 89, 108-109, 111, 115
10	*Lascaris v B'nai Brith Canada*, 2019 ONCA 163	33
11	*Nanda v McEwan*, 2019 ONSC 3357	48
12	*Pan v Gao*, 2020 BCCA 58	104
13	*Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467	45
14	*Schnell v Machiavelli and Associates Emprize Inc (No 2)*, 2002 CanLII 78260 (Can CHRT)	102-104
15	*Volpe v Wong-Tam*, 2022 ONSC 3106	261
16	*WIC Radio Ltd v Simpson*, 2008 SCC 40, [2008] 2 SCR 420	26, 28, 40, 49, 63, 100-101

SCHEDULE "B" – RELEVANT STATUTES

Courts of Justice Act, R.S.O. 1990, c. C.43

PREVENTION OF PROCEEDINGS THAT LIMIT FREEDOM OF EXPRESSION ON MATTERS OF PUBLIC INTEREST (GAG PROCEEDINGS).

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s. 3.

Definition "expression"

(2) In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.

No dismissal

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. 2015, c. 23, s. 3.

Rainbow Alliance Dryden and Caitlin Hartlin -and- Brian Webster

Plaintiffs Defendant

Court File No. CV-22-00000096-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Kenora

FACTUM OF THE INTERVENER, EGALE CANADA

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West, Suite 3400
Toronto ON M5H 4E3

Daniel Girlando (59805L)
E: dgirlando@blg.com
T: 416.367.6516

Natalie D. Kolos (60466L)
E : nkolos@blg.com
T: 416.367.6609

Lauren L. Malatesta (79647N)
E: lmalatesta@blg.com
T: 416.367.7278

Lawyers for the Intervener,
Egale Canada