Court of Appeal File No : COA-23-CV-0115

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

CANADIAN FRONTLINE NURSES, SARAH CHOUJOUNIAN, KRISTEN NAGLE and KRISTAL PITTER

Plaintiffs
(Appellants)

- and –

CANADIAN NURSES ASSOCIATION, TIM GUEST, MICHAEL VILLENEUVE, TOGETHER NEWS INC. o/a COMOXVALLEY.NEWS and o/a VANISLE.NEWS and JOHN DOE

Defendants
(Respondents)

FACTUM OF THE APPELLANTS

April 14, 2023

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PART I – IDENTIFYING STATEMENT

1. The Appellants are Canadian Frontline Nurses ("CFN"), Sarah Choujounian ("Choujounian"), Kristen Nagle ("Nagle") and Kristal Pitter ("Pitter"). The Appellants appeal the Ontario Superior Court of Justice decision reported at 2022 ONSC 7280[1] and the resulting Order dated December 23, 2022.[2] The decision was rendered by Justice Vermette (the "Motions Judge").

2. There are two groups of Respondents to this appeal. The first group is the Canadian Nurses Association ("CNA"), Tim Guest and Michael Villeneuve (the "CNA Respondents"). The second group is Together News Inc o/a Comoxvalley.news and o/a Vanisle.news ("TNI"), and John Doe (aka William Horter) (the "TNI Respondents").

3. The Appellants commenced an action by Statement of Claim issued December 13, 2021. The Statement of Claim alleges that the CNA Respondents and TNI Respondents defamed them.[3]

4. The CNA Respondents and TNI Respondents both moved under section 137.1 (3) of the *Courts of Justice Act*, RSO 1990 c C.43 ("*CJA"*) for an order dismissing the Appellants' action.

5. The Respondents motion was argued before the Motions Judge on August 24, 2022.[4]

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[1] Appeal Book and Compendium, Tab 3 at pages 16-45. For ease of reference, this Factum will reference Justice Vermette's CanLII publication of Justice Vermette's decision, which allows for hyperlinking to the relevant paragraphs in a manner that references to these paragraphs in Appeal Book and Compendium does not.
[2] Appeal Book, Tab 2 at pages 12-15.
[3] *Canadian Frontline Nurses v. Canadian Nurses Association*, 2022 ONSC 7280, at para 26 [*CFN v. CNA*].
[4] *CFN v. CNA*.

6. The TNI Defendants conceded that there were grounds to believe that, absent a valid defence, that the Appellants' action had substantial merit.[5] The Motions Judge found that there was substantial merit to the Appellants' action against the CNA Respondents.[6]

7. The Motions Judge also found that there the Appellants raised valid arguments in response to each of the defences raised by the Respondents.[7]

8. Ultimately however, the Motions Judge granted the Respondents' motions and dismissed the Appellants' action. The Motions Judge's basis for granting the Respondents' motion was that she found the Appellants did not discharge their burden under section 137.1(4)(b) of the *CJA*.[8]

PART II – OVERVIEW STATEMENT

9. This Appeal, at its core, concerns the purposes of the Anti-SLAPP provisions of section 137.1 of the *CJA*, and the weighing analysis that a judge is to undertake pursuant to section 137.1(4)(b) of that statute.

10. Anti-SLAPP legislation is meant to protect freedom of debate and encourage individuals to express themselves on matters in the public interest. These purposes are specifically set out in section 137.1(1) of the Anti-SLAPP provisions of the *CJA*.

11. It is not the purpose of Anti-SLAPP legislation for the courts to weigh in and decide which side of the debate has more merit.

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[5] *CFN v. CNA*, at para 37.
[6] *CFN v. CNA*, at para 41.
[7] *CFN v. CNA*, at para 71-72.
[8] Section 137.1(4)(b) of the *Courts of Justice Act,* RSO 1990 c C.43.

12. Participation in debates on matters in the public interest is an essential component to a functioning democracy. This includes the freedom to express dissent with respect to institutional policies and mandates and engage in debate about these matters. A democratic society also has an interest in ensuring that its members, including those who express themselves in the public arena, can enjoy and protect their reputation.

13. The weighing exercise set out in section 137.1(4)(b) is meant to have regard to freedom of debate and expression on the one hand and the right of individuals not to be unjustifiably defamed on the other.

14. While the Anti-SLAPP provisions of section 137.1 of the *CJA* are engaged when the expression "relates to a matter of the public interest",[9] the weighing exercise to be undertaken under section 137.1(4)(b) of the *CJA* requires a judge to weigh the public interest in protecting "the moving party's expression" (i.e. the expressions complained of in the proceeding) against the harm that the individuals who have been defamed have suffered or are likely to suffer.[10] If there is no public interest in protecting the defamatory expressions, then *any* harm against those who have been defamed and are seeking to vindicate their reputation through the justice system is sufficient to permit the proceeding to continue.

15. It is important that the courts be vigilant and not conflate the fact that the expression *arises* in the context of a debate of a matter that is in the public interest, with the public interest in protecting defamatory expressions. Just because an expression arises in the context of debate

[9] Section 137.1(3) of the *Courts of Justice Act*, RSO 1990 c C.43
[10] Section 137.1(4)(b) of the *Courts of Justice Act*, RSO 1990 c C.43

relating to a matter in the public interest, does not mean there is public interest in protecting any libelous statements made by participants in the debate.

16. There is no public interest in protecting libelous statements when those statements act to silence debate on matters of public interest. Freedom to debate is not freedom to libel. Anti-SLAPP legislation is not designed to provide proponents of institutional policies a license to libel critics of those policies. This would not encourage freedom of expression and debate. Rather, individuals who wish to express their opposition to institutional policies will be discouraged from doing so if the courts signal that they will have no recourse to the justice system to protect and vindicate their reputations when they have been defamed by the false expressions of those who are on the other side of the debate. Being denied recourse to vindicate one's reputation against false defamatory expressions serves to chill debate and the willingness of individuals to engage in the public arena.

17. The purposes of Anti-SLAPP legislation are turned on its head if the courts sanction its use to permit participants in the public arena to defame one another, as opposed to engaging in vigorous debate on the matters of public interest that are being debated. Protecting expressions that pertain to the matter being debated is in the public interest; protecting unnecessary false libelous statements concerning the participants in the debate is not.

PART III – SUMMARY OF RELEVANT FACTS

18. CFN organized protests outside of hospitals across Canada. The protests took place on September 1, 2021. The protests related to hospitals' implementation of policies that required healthcare workers to provide proof of COVID-19 vaccination if they wished to maintain active employment at their facility. The Appellants were opposed to such policies as they believed that

such policies were not in alignment with medical freedom and the principle of informed and uncoerced consent. The Appellants also did not believe that the evidence supported that COVID-19 vaccines were effective in preventing transmission. The Appellants believed that protesting the policies in the vicinity of hospitals would bring awareness to the difficult situation that the hospitals' policies would increase awareness about nurses who did not wish to receive a COVID-19 vaccine yet wished to continue their work. The Appellants also believed that protesting in the vicinity of hospitals would constitute an expression of solidarity with the nurses inside who faced this predicament.[11]

19. The Appellants' libel action arose out of two publications.

20. The first publication was published by CNA Respondents. The CNA Respondents' statement was entitled "Enough is enough: professional nurses stand for science-based health care" ("CNA Statement"). The CNA Statement was published on September 9, 2021, and reads as follows:

> The Canadian Nurses Association (CNA) and Canadian nurses stand strongly united behind science and the best available evidence as the basis for professional nursing practice and decision-making. Nursing is a rigorously educated, regulated and autonomous profession, and it is first a discipline based in science – not a random gathering of personal opinions and ideologies.
>
> The reckless views of a handful of discredited people who identify as nurses have aligned in some cases with angry crowds who are putting public health and safety at risk. They have drawn in anti-science, anti-mask, anti-vaccine, anti-public health followers whose beliefs align with theirs. For some reason they would have us believe that millions of the best educated health scientists, public health experts, physicians and nurses globally have all missed something they have not. Their outlandish assertions about science would be laughable were they not so dangerous.

[11] *Canadian Frontline Nurses v. Canadian Nurses Association*, 2022 ONSC 7280 (CanLII), at para 11.

> The media used to be filled with images of the public cheering nurses around the world; now the focus is on images of surly mobs happy to stand in front of health-care settings and harass, threaten, and even assault health-care workers coming and going in the business of saving lives. These protests have stunned and saddened exhausted health-care workers. They are demoralizing, infuriating and dangerous. The situation is completely unacceptable, and it must stop immediately.
>
> All opinions are not equal when it comes to public safety. Nurses have worked for more than a century to build the regulatory, education, common competencies, professional and union structures that have generated one of the workforces most respected and trusted by the public. And the Canadian nursing workforce is admired around the world for its high levels of education and standards of practice. CNA is proud of these world-leading achievements. Some are willing to put all that at risk; we are not.
>
> Anti-public health disinformation threatens to confuse a tired and bewildered public by deliberately misrepresenting personal ideology as facts, and science as conspiracy. The public should be assured that the vast majority of Canada's 448,000 regulated nurses are united in their commitment to operate from a stringent code of ethics, and they are duty-bound to use science, evidence, and facts in assessing, planning, and evaluating the care they deliver to people across Canada. This scientific approach is a fundamental ideology of modern nursing.
>
> We will continue to monitor this situation and do all we can to maintain the trust and ensure the safety of people everywhere in Canada.[12]

21. The second publication was published by the TNI Respondents. This publication was entitled "Quack Quack! These Pro-Virus Nurses Have Dangerous Ideas" ("TNI Article"). The TNI Article was published on September 11, 2021, and reads as follows:

> Quack Quack! These Pro-Virus Nurses Have Dangerous Ideas
>
> They call themselves Canadian Frontline Nurses, but the founders are stoking fear, division, and conspiracy
>
> While Canadian health care workers are fighting to keep people safe, a small group of disgraced nurses is putting us in danger

[12] *Canadian Frontline Nurses v. Canadian Nurses Association*, 2022 ONSC 7280 (CanLII), at para 23.

A small group of unhinged, conspiracy touting nurses appear to be the masterminds behind the recent anti-vax protests across Canada.

On September 1st, mobs of people swarmed hospitals to scream and hurl insults at frontline healthcare workers. A nurse was spat at while heading to her shift at Nanaimo General Hospital. They organized the anti-vax rally at Vancouver General Hospital earlier this month.

These protesters made it hard for the workers to do their jobs that day. They also made it harder for sick people to get the care they need.

So it's time to shine a light on the rotten roots of these protests.

For starters, let's talk about Sarah Choujounian, a former registered practical nurse, and Kristen Nagle, a former neonatal ICU nurse. The emphasis here is on the word "former," because they've both been fired.

Now they don't look like they are working as nurses, but rather as full-time anti-vax crusaders.

These two disgraced Ontario nurses are the co-founders of ***Canadian Frontline Nurses***.

The organization, which launched in January 2021 (remember that date), says they stand for freedom and choice while denying the science around COVID-19.

The ***Canadian Frontline Nurses*** Facebook page was launched on January 11, 2021, its website a few days later.

They certainly had a busy January.

Do you remember what else happened in January?

That's right, a right-wing mob attacked the US Capitol Building and rioted in the streets on January 6th.

And guess who was there?

Just a few days before launching their new organization, they went down to Washington, D.C. to be part of the Trump-inspired protests

Kristen Nagle, the former baby nurse, spoke at an anti-lockdown rally before hundreds of extremists invaded the US Congress.

Interesting way to spend your vacation days.

Both of these nurses were fired from their jobs for going against the non-essential travel ban to join the MAGA mob at the White House.

But that wasn't their first controversy. Both have organized and participated in rallies against wearing masks and government-mandated lockdowns during the COVID-19 pandemic.

Another nurse behind these protests is Kristal Pitter. She used to work in long-term care as a home inspector, but she was fired after spewing garbage about Bill Gates using a COVID-19 vaccine to alter people's DNA.

Wait – didn't a huge percentage of Ontario's COVID deaths occur in long-term care facilities?

Pitter is accused of using social media to spread health misinformation, including the myth that vaccines cause autism. She also claims the coronavirus pandemic is a huge conspiracy.

Do you think we're making this stuff up?

Read for yourself! Google their bios on ***Canadian Frontline Nurses***. They are weirdly self-incriminating.

What Nagle doesn't say in her bio – but gleefully shares in her blog and Facebook posts – are some wild, dangerous, and unfounded ideas.

For example, she doesn't think viruses exist. Any viruses, not just the coronavirus.

She believes rabies is caused by malnourishment and mistreatment – not the ***rabies virus***.

And she says there's no such thing as polio.

Hmmmm ...

How comfortable would you be if Nagle was taking care of your very sick baby in a neonatal intensive care unit?

And then there is the question no one seems to have an answer for. <u>Where did these conspiracy-spewing nurses who have no jobs get the money to launch a new organization with nationwide protests, fancy expensive signs, and scripted talking points?</u>

Legitimate nursing organizations have condemned Canadian Frontline Nurses. The Canadian Nurses Association attacked their anti-vax disinformation as "conspiracy" in a release entitled, <u>"Enough is enough."</u>

"The reckless views of a handful of discredited people who identify as nurses have aligned in some cases with angry crowds who are putting public health and safety at risk. They have drawn in anti-science, anti-mask, anti-vaccine, anti-public health

followers whose beliefs align with theirs ... Their outlandish assertions about science would be laughable were they not so dangerous."

The point is not what these science-denying nurses believe or don't believe.

We live in Canada. Freedom of expression, faith, and belief are part of our society, no matter how outside of the norm some of them may be.

But what these former nurses are saying is dangerous and unprofessional.

They are using the authority of the nursing profession to make themselves sound legitimate. They create confusion and division when people need to come together.

Choujounian, Nagle and Pitter can call these protests whatever they like. But their version of freedom would lead to more COVID cases and likely more deaths. That means they're basically pro-virus and their selfish take on freedom is mostly about putting their personal desires above protecting the health of their patients, coworkers and neighbours.

Their ME-FIRST ideas have real-world impacts.

This is not innocent speech. It's like they're yelling FIRE! in a crowded theatre. Everyone panics, but there's no fire.

Doctors can lose their licenses for spreading COVID misinformation. Nurses should, too.

I suppose, if you're like Kristen Nagle and you don't believe in viruses, then none of this matters.

But if you care about your family and neighbours, then think twice before you trust these quacks.

They got fired because their own bosses didn't trust them.

Why should you?[13]

[13] *Canadian Frontline Nurses v. Canadian Nurses Association*, 2022 ONSC 7280 (CanLII), at para 25.

22. The Motions Judge fairly summarized the Appellants' evidence with respect to the harm caused by the CNA and TNI Respondents' publication at paragraphs 76 and 77 of her decision, which is reproduced below:

> [76] Ms. Nagle's evidence regarding the harm that she suffered is set out in her affidavit as follows:
>
> > Canadian Frontline Nurses and I received hateful messages and threats of physical harm in the wake of the September 1, 2021, protests and the Canadian Nurses Association and Together News publications.
> >
> > I verily believe that my personal and professional reputation have been adversely affected by the Canadian Nurses Association and the Together News publications that are set out in the Statement of Claim. The Canadian Nurses Association and Together News publications falsely characterize me as a discredited, dangerous, and unprofessional person. These publications falsely associate me and Canadian Frontline Nurses with protests where healthcare workers were being harassed and assaulted. The Together News publication falsely associates me with protests that impeded healthcare workers from doing their jobs and interfered with patients receiving the care that they needed. The Together News article suggests that I was part of a right-wing mob who attacked the US Capitol Building.
> >
> > In addition to Together News's publication concerning me and Canadian Frontline Nurses, numerous other articles relating to Canadian Frontline Nurses refer to the Canadian Nurses Association's September 9, 2021, publication. Such articles include:
> > […]
> >
> > Canadian Frontline Nurses organized another Canada-wide "silent vigil" protest across Canada, which were [sic] to take place in proximity of hospitals on September 13, 2021. […]
> >
> > I observed that the reaction to the silent vigil protest on September 13, 2021, from the public and government officials was far more hostile than the reaction to the September 1, 2021 rallies spearheaded by Canadian Frontline Nurses. I verily believe that the significant hostility towards the protests that were organized by Canadian Frontline Nurses on September 13, 2021 were [sic] motivated in large part by: the false reports of healthcare workers being harassed, assaulted, and impeded from doing their jobs on account of the September 1, 2021 protests organized by Canadian Frontline Nurses; the false reports that these September 1, 2021 rallies interfered with patients receiving the care that they needed; and the demonization of Canadian Frontline Nurses and its membership in these false reports.

> As a result of the hostile reaction to our September 13, 2021, protests, it became clear to me that Canadian Frontline Nurses and its membership could no longer express its peaceful dissent against COVID-19 related mandates near hospitals. […]
>
> The Canadian Nurses Association and Together News publications, and the damage that these publications have caused to my reputation, have caused me significant mental distress.

[77] Ms. Choujounian's and Ms. Pitter's evidence on the issue of harm is similar to Ms. Nagle's evidence, but Ms. Choujounian adds that on September 13, 2021, her personal address was shared by an unknown individual on social media, and that she and other members of Canadian Frontline Nurses received numerous death threats in and around the same time.[14]

23. The Motions Judge findings with respect to the Appellants failure to discharge their burden under the section 137.1(4)(b) analysis of the *CJA* can be summarized as follows*:*

(a) That the following evidence were "significantly more important sources" of harm to the Appellants' reputation than the Respondents' publications:[15]

i) The Appellants, Nagle, Choujounian, and Pitter are not currently employed as nurses and were terminated from their positions in early 2021.[16]

ii) The College of Nurses ("CNO") Registry entries which relate to the Appellants Nagle, Choujounian, and Pitter's dealings with the Inquiries, Complaints and Reports Committee of the CNO and/or Discipline Committee of the CNO.[17]

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[14] *CFN v. CNA*, at paras 76-77
[15] *CFN v. CNA*, at paras 94-95.
[16] *CFN v. CNA*, at para 79.
[17] *CFN v. CNA*, at paras 80-81

iii) Other news articles published both before and after the September 1, 2021, protests that reference the Appellants in an unfavourable manner.[18]

(b) That the CNA Respondents adduced evidence regarding the chilling effect of the defamation on their action.[19]

(c) That the Appellants injected themselves into the public debate over a contentious topic and must expect that they are to be met with some measure of rebuttal, perhaps forceful rebuttal, by those who take the opposite view, and that this is a relevant factor to consider in assessing the level of damages that the defamatory aspect of the Respondents' publications may create.[20]

(d) That the CNA Respondents and the TNI Respondents' publications related to matters of public interest regarding public health that are of significant importance, including misinformation relating to the COVID-19 pandemic and COVID-19 public health issues.[21]

(e) That CNA has a history of advocacy in the public interest.[22]

(f) That it is puzzling that the Appellants decided to sue the CNA Respondents and TNI Respondents and not other publications that "were similar to the information reported and opinions expressed, and that there appeared to be some merit to the TNI Respondents' submission that the Appellants "deliberately ignore[d] similar expressions made by media

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[18] *CFN v. CNA*, at paras 82-85. The "other news articles" that form part of the evidentiary record in this matter are included at Tab 6 of the Appeal Book at pages 63-110.
[19] Ibid at paras 89-90.
[20] Ibid at para 97
[21] Ibid at para 98.
[22] Ibid at para 99.

giants and public figures who are better resourced and able to respond to a lawsuit than the TNI [Respondents]."[23]

PART IV – ISSUES

24. The main issue on this Appeal is whether the Motions Judge erred in the weighing exercise set out in section 137.1(4)(b) of the *CJA*. The sub-issues relating to the section 137.1(4)(b) analysis are as follows:

(a) Did the Motions Judge err by not having sufficient regard to the purposes of section 137.1 of the *CJA*, as set out in section 137.1(1) of the *CJA?*

(b) Is there a public interest in protecting libelous statements when protecting such statements will stifle, as opposed to encourage, debates on matters of public interest?

(c) What degree of harm, or likely harm, were the Appellants required to demonstrate to discharge their burden?

(d) Is the principle of the presumption of damages in a libel action relevant to the analysis?

(e) Is the Appellants decision of who to sue for libel relevant to the weighing exercise? If so, were the Appellants required to sue every media outlet and organization that gave unfavourable coverage or expressed opinions, even when such outlets and organizations likely had a viable defence, to discharge their burden?

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[23] *CFN v. CNA* at para 100.

(f) Did the Motions Judge err by attempting to adjudicate causation?

PART V – LAW AND ANALYSIS

A. The Overarching Purpose of Anti-SLAPP Provisions of the *CJA*

25. Section 137.1 (1) sets out the purpose of the Anti-SLAPP provisions of the *CJA*. These purposes are applicable to all of the *CJA*'s Anti-SLAPP provisions, including section 137.1 (4)(b). Section 137.1 (1) provides as follows:

> **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.

26. The purposes of the Anti-SLAPP provisions are to protect individuals from expressing themselves on matters of public interest. They also seek to promote *broad* participation in debates on these matters. It engages the interests of *all* participants in the public arena. These participants include the Appellants, not just the Respondents.

27. As the Supreme Court of Canada stated in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 (CanLII), fundamentally "the open-ended nature of s. 137.1(4)(b)

provides courts with the ability to scrutinize what is really going on in the particular case before them."[24]

28. This case is not a debate on the merits of the public health response to COVID-19 and the Appellants' views on same. The real issue is whether the Appellants are entitled to have their day in court to adjudicate a meritorious libel claim.

29. As this Court in stated in *Montour v. Beacon Publishing Inc.:*

> s. 137.1 was not intended to fundamentally change the law of defamation, as it does not alter the substantive law as it relates to claims based on expressions on matters of public interest.[25]

30. If section 137.1 does not fundamentally change the law of defamation, proper regard to the assessment of the legal principles of causation and harm as enshrined in the jurisprudence must be considered in the section 137.1 analysis. The Appellants submit that the Motions Judge did not have sufficient regard to these principles, and in effect, the failure to properly apply these principles are a departure from the established law of defamation.

B. Freedom of Debate is Not Freedom to Libel – It is Not in the Public Interest to Protect the Respondents Libelous Publications

31. Defaming individuals who engage in expressions on matters of the public interest does not encourage broad participation in debate on such matters. It discourages such expressions and

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[24] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 (CanLII) **[*Pointes*]** at para 81.
[25] *Montour v. Beacon Publishing Inc.*, 2019 ONCA 246 (CanLII), at para 34,

debate. The discouraging effect is amplified if participants in such debates are denied recourse to the Court when they are defamed with false invectives.

32. There is considerable public interest in safeguarding the public arena. There is also considerable public interest in ensuring that meritorious defamation claims are not denied a day in court, given that democracy recognizes the fundamental importance of individuals' good reputation.[26] The Supreme Court of Canada has accordingly recognized the protection of individual reputation as a quasi-constitutional value.[27]

33. Accordingly, judges must be vigilant before exercising its powers under section 137.1. A judge's power to summarily dismiss meritorious claims must be exercised with great caution, particularly when the ideology and merit of institutional policies and mandates are at issue. There is considerable public interest in maintaining the confidence that the rule of law still applies, even when established institutional policies are being challenged and debated. The public interest is not served when a party uses libel as a means of discrediting those who are critical of the government and the public health response to COVID-19 and to shut down debate with respect to whether institutional measures imposed in relation thereto are an appropriate response.

34. In assessing the public interest favouring the Respondents' freedom of expression and participation in debate in matters of public interest, a judge must assess the public interest in protecting the *actual* expressions that are the subject of the lawsuit.[28] The Anti-SLAPP provisions

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[26] *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130, at para 108.
[27] *Skafco Limited v. Abdalla*, 2020 ONSC 136 (CanLII), at para 23, citing *Editions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640.
[28] *Lyncaster v Metro Vancouver Kink Society*, 2019 BCSC 2207 (CanLII), at para 62.

of the *CJA* do not act to create a "safe space" for false defamatory statements simply because the subject matter which gave rise to the statement relates to a matter in the public interest.[29] Section 137.1 of the *CJA* is not designed to protect unnecessary statements which damage the reputation of participants in the public arena that are untrue and unnecessary.

35. There is no evidence that the TNI Respondents and CNA Respondents could not engage in the debate, including engaging in forceful rebuttal of the Appellants' position and expressions, without resorting to defaming the Appellants. The TNI Respondents and CNA Respondents could have vehemently expressed their opposition to the protests and the Appellants' position with respect to institutional COVID-19 vaccine mandates, without resorting to false and defamatory invectives concerning the nature of the protests organized by CFN and CFN's members and supporters.

36. While the CNA Respondents suggested that the Appellants' action restricted them from contributing to the discussion relating to COVID-19 and pandemic measures out of a general fear that they would be targeted by another lawsuit for so doing. There was nothing to prevent the CNA Appellants from continuing to contribute to the dialogue regarding matters of public health, including their support of public health measures relating to COVID-19, without libeling the Appellants. The CNA Respondents were at liberty to express that they do not support the protests organized by CFN or the Appellants' views on matters relating to COVID-19 and public health generally. The CNA Respondents' belief that permitting the action to continue would have a chilling impact on their ability to responsibly express and advocate their views and opinions on these matters is not well-founded. The Motions Judge erred by accepting the CNA Respondents'

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[29] *DEI Films Ltd. v. Tiwari*, 2018 ONSC 4423 (CanLII), at para 41.

evidence with respect to the alleged "chilling effect" of the Appellants' action without critically examining their assertions.

37. As the Supreme Court of Canada noted in *Pointes*, the broader or collateral effects on *other* expressions on matters of public interest, the *potential* chilling effect on *future* expression either by a *party* or by *others* is a relevant factor in the 137.1 (4)(b) weighing exercise.[30]

38. As the British Columbia Court of Appeal remarked in *Neufeld v Hansman*, the risk that people will withdraw or not engage in public debate for fear of being inveighed with negative labels, with no opportunity to protect their reputation, is an important consideration in the weighing of the public interest in protecting the expression and the public interest in allowing the action to proceed.[31]

39. The implication of the dismissal of the Appellants' action, is that critics who assemble and speak out against a given institutional or government policy will have no recourse to vindicate their personal and professional reputations when proponents of these policies cast false and damaging statements against them. This is antithetical to the principles of Canadian democracy and equal access to justice.

40. The Appellants provided evidence not only of the *potential* chilling effect, but the *actual* chilling effect arising from the defamatory expressions made by the Respondents. They provided evidence with respect to the chilling impact of defamatory statements which falsely associated them with protests which prevented sick people getting the care that they needed. They provided evidence with respect to the chilling impact of defamatory statements which falsely associated

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[30] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 (CanLII), at para 80,
[31] *Neufeld v. Hansman*, 2021 BCCA 222 (CanLII), at para 65.

them with protests where healthcare workers were being harassed, assaulted, and prevented from doing their jobs. The Appellants deposed to their belief that this resulted in a far more hostile reaction to their subsequent September 13, 2021 "silent vigil" which was also held in the vicinity of hospitals. It led the Appellants to conclude that they could not organize future protests in the vicinity of hospitals, despite this being an important component to the expression they were seeking to make and the debate they sought to generate.[32] As set out in more detail in the portion of this Factum dealing with causation, the Appellants' belief that it was these defamatory statements which led to the hostile reaction to the September 13, 2021 protests is well-founded.

41. There is a significant public interest in permitting dialogue relating to health measures imposed in relation to the COVID-19 pandemic particularly since these measures have had a significant impact on Canadian society and the Canadian population as a whole. However, there is no public interest in silencing critics of these measures and in providing its proponents with a license to libel. Freedom of speech is not absolute, and individuals are deserving of the opportunity to seek justice when their reputation has been unjustifiably assaulted.[33]

42. Permitting the Appellants' action to proceed will not disincentivize individuals from speaking out about in favour of public health measures or engaging in criticism of the views expressed by the Plaintiffs. It will however disincentivize individuals from unnecessarily singling out individuals such as the Appellants in a way that is extraneous or peripheral to the public interest and from making unsubstantiated false and damaging allegations against them. It is in the public

[32] See paras 18 and 22 of this Factum.
[33] *Platnick*, at para 1.

interest to incentivise individuals to exercise reasonable due diligence and tailor their expressions of matters pertaining to the public interest in a manner that avoids needless defamation.[34]

C. Causation and Harm: The Harm to the Appellants is *Sufficiently* Serious to Outweigh the Public Interest in Defending the Respondents' Libelous Publications

43. If there is no public interest in protecting the Respondents' libelous statements that are the subject matter of the Appellants' action, then any harm that these publications caused or will likely cause to the Appellants is sufficiently serious to engage the public interest in allowing their action to proceed.

44. Section 137.1 motions are not the place to resolve causal connection issues as it relates to alleged damages.[35]

45. No definitive determination of harm or causation is required at the section 137.1 (4)(b) stage of the inquiry. Nor is causation an "all-or-nothing proposition."[36] At this stage, the Appellants need only show a basis on which a court could make an assessment about the nature of the harm suffered.[37] The Motions Judge imposed a more onerous burden.

46. Damages are presumed when a defendant publishes a defamatory statement concerning the plaintiff. The Appellants bear no obligation to prove actual loss or injury.[38] This presumption remains intact on Anti-SLAPP motions.[39][40]

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[34] *Platnick*, at para 167.
[35] *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166 (CanLII), at para 25.
[36] *Pointes*, SCC at paras 71-72
[37] *Pointes*, SCC at paras 90-91.
[38] *Rutman v. Rabinowitz*, 2018 ONCA 80 (CanLII),at para. 62.
[39] *Platnick*, at para 144.
[40] *Montour v. Beacon Publishing Inc.*, 2019 ONCA 246 (CanLII), at para 29.

47. The Respondents' statements cast aspersions on the Appellants' professional reputations. The harm is presumed to be more significant when a defamatory publication slanders an individual's professional position and standing, given that this is one of the most valuable assets that an individual can possess. Accordingly, the impact that the TNI Respondents' and CNA Respondents' publications may cause to the Appellants' professional reputations was required to be considered and weighed in the s. 137(4)(b) analysis, even if it is not quantifiable at this stage, and even if there are other sources of harm to their reputation.[41] The Motions Judge did not engage in this consideration.

48. The Appellants' evidence also shows harm beyond the general damages that are presumed by the defamation itself and the injury to their professional reputation. They deposed that they have received hateful messages and threats of harm from members of the public and suffered mental distress in the wake of the Respondents' defamatory publications.[42]

49. The fact that the Appellants' September 13, 2021, protests were met with more hostility than the September 1, 2021, protests suggests that it was defamatory statements relating to the interference, harassment, and assault of healthcare workers that led to the more hostile reaction to the September 13, 2021, protests. There is no reasonable basis to conclude that articles unrelated to the September 1, 2021, protests, the dismissal of Nagle, Choujounian and Pitter from their nursing positions with the employers, and the entries on the CNO Registry, which predated the Respondents' publications, were the source of this hostile reaction. While the Motions Judge did not infer that this was resulted in the more hostile reaction to the September 13, 2021, protests in her decision, she erred by only considering the alleged chilling impact on the CNA Respondents.

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[41] *Platnick*, at paras 146-148.
[42] See paragraph 48 of this Factum, above.

The Motions Judge was required to consider the harmful impact of the defamatory statements on the future expressions of the Appellants, and others who may wish to debate matters of public interest – individuals who wish to have recourse to the judicial system when their reputation has been unfairly defamed. It was also an error to consider other potential sources of harm to the Appellants' reputation generally, instead of focusing the analysis on the impact of the defamatory statements of that were made by the TNI Respondents and CNA Respondents.

50. What is relevant to the assessment of harm and damages is the influence and impact of the status of the individual or organization who published the defamatory statement. An accusation from an organization with impeccable credentials and prestige in the community is more serious due to the aura of credibility it lends to the defamatory statement.[43] The impact of the CNA Respondents' reputation was not considered by the Motions Judge in the assessment of the harm that their defamatory statements caused to the Appellants.

51. It is conceded that there were other publications relating to the September 1, 2021, protests, (many of which cited and/or repeated the CNA Respondents' publication)[44], which contained defamatory reports relating to the nature of the protests that the Appellants organized and participated in. The Appellants submit that this does not mean there is no causal connection between the CNA Respondents and TNI Respondents' defamatory expressions, and the harm the Appellants suffered as a result.

52. As the British Columbia Court of Appeal observed in *Neufeld,* in cases of concurrent defamation committed by multiple sources, it is virtually impossible for the Appellants to prove

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[43] *Myers v. Canadian Broadcasting Corp.*, 2001 CanLII 4874 (ON CA), at para 16.
[44] See Appeal Book, Tab 5.

an exclusive causal link to damages from the words of just one of the defamers. It is submitted that the Court in *Neufeld* was correct in holding that a causal connection between the challenged expression and damages that are more than nominal is all that is required. As Anti-SLAPP legislation does not displace the established law on defamation, the principle that Appellants may elect to sue one of the defamers separately remains intact. It is no defence that the other defamers may be jointly liable, nor will such fact mitigate the damages recoverable.[45]

D. Who the Appellants Chose to Sue and Not Sue is Not a Relevant Consideration

53. The Motions Judge erred in fact and in law in her consideration of who the Appellants chose to sue and not to sue.

54. There is nothing "puzzling" about the Appellants' decision to sue the CNA Respondents and the TNI Respondents.[46] The TNI Respondents conceded that there are grounds to believe that in the absence of a valid defence that the Appellants' action had substantial merit.[47] The Motions Judge found that there were substantial grounds to believe that the Appellants' action against the CNA Respondents had merit.[48] This alone explains the Appellants decision to bring their action against the Respondents.

55. Again, the Appellants were free to elect which parties to name in their action. It is no defence, nor does it mitigate against the damages recoverable against the Respondents, that others

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[45] *Neufeld v. Hansman*, 2021 BCCA 222 (CanLII), at para 59,
[46] *Canadian Frontline Nurses v. Canadian Nurses Association*, 2022 ONSC 7280 (CanLII), at para 100.
[47] *Canadian Frontline Nurses v. Canadian Nurses Association*, 2022 ONSC 7280 (CanLII), at para 35.
[48]

have engaged in libellous publications.[49] The Appellants' decision of who to sue or not to sue should have no bearing on the analysis of whether the public interest to protect the Respondents' libelous expression outweighs the public interest in allowing the Appellants' action to proceed.

56. Even if the decision of who the Appellants elected to sue has a bearing on the 137.1(4)(b) analysis – which it should not – the Motions Judge made errors of mixed fact and law by ignoring or misapprehending the evidence relating to why the Plaintiff chose to sue the CNA Respondents and the TNI Respondents and why they chose not to sue other publishers who commented on the protests organized by CFN.

57. It would be antithetical to the Anti-SLAPP regime embodied in section 137.1 of the *CJA* if the Appellants are required to sue every publisher of libel, particularly when there are grounds to believe that those publishers can avail themselves of a valid defence.

58. At law, there is a difference between publishing attributed reports of others that would tend to lower the reputation of the subject of those reports and publishing false defamatory statements as fact. In the former situation, publishers may be able to avail themselves of the "reportage" element of the "responsible journalism" defence.[50] In the latter situation, no such defence is available.

59. The distinction between publishing reports and publishing statements of fact was recognized by the Appellants. It factored into their decision to limit their lawsuit to the named

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[49] *Neufeld v. Hansman*, 2021 BCCA 222 (CanLII), at para 59, citing *Gatley on Libel and Slander* at ch. 8.2.
[50] *Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII), [2009] 3 SCR 640, at para 120.

Respondents. Ms. Nagle's evidence in response to a question that was put to her on cross-examination reveals this recognition and consideration:

> Q. Okay. Now, there's a Radio-Canada article at Tab 13 of the documents brief, and it's 7 dated September 2nd, 2021. The headline is: (as read)
>
> > "Reports of one assault, verbal 10 abuses, thousands protest vaccine 11 passports outside hospitals across B.C. "
>
> Do you see that?
>
> A. Yes.
>
> Q. And you did not sue CB -- or Radio-Canada for libel with respect to this article or any other broadcast that they did that involved you, correct?
>
> A. Correct. I believe they were a lot more careful in their wording with saying exactly what that top paragraph said, reports of, and they were reporting things versus stating things as -- as fact.[51]

60. There is no evidentiary basis in the record to support the Motions Judge's conclusion that the Appellants deliberately chose to ignore similar expressions made by media giants to target TNI – a small, less-resourced, regional media outlet. The expressions made by the "media giants" were qualitatively different from those published by TNI.[52]

61. None of the other publications in the record evince the same **"**invective-laced mode, style, tenor, tone and language of the TNI Article."[53] The Appellants submit that actions relating to

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[51] Appeal Book, Tab 5, Transcript from Cross-Examination of Kristen Nagle at Q150-151, L5-23, at page 62.
[52] Appeal Book, Tabs 6 to 12.
[53] *Canadian Frontline Nurses v. Canadian Nurses Association*, 2022 ONSC 7280 (CanLII), at para 60.

publications that did not show a reckless disregard for the truth, or that do not smack of malice in the same manner as the TNI Article, are less likely to succeed.[54]

62. The choice of the Appellants not to bring defamatory actions against every publisher ought to be encouraged by the Court, and not counted against the Appellants in the section 137.1(4)(b) weighing analysis: a decision not to bring suit against individuals where the proceeding is unlikely to succeed reduces the unnecessary use of Court and parties' legal resources, and is consistent with what section 137.1 of the *CJA* is designed to prevent.

PART VI – ORDER REQUESTED

63. Even in cases where there are powerful arguments made on both sides of the public interest balancing required in s. 137.1(4)(b), litigation that reveals a genuine controversy, and does not have indicia of improper motives, claims of phantom harm, and bullying tactics ought to be tried on its merits.[55] The Appellants submit that they should be afforded the opportunity to vindicate their reputation, and that their action should be tried on its merits.

64. Accordingly, the Appellants request that their appeal be granted and that the Order dismissing their action be set aside.

65. The Appellants also request their costs of this Appeal and of the underlying motion.

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[54] *Bent v. Platnick*, 2020 SCC 23 (CanLII), at paras 121 and 136.
[55] *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166 (CanLII), at para 28,

ALL OF WHICH IS RESPECTFULLY SUBMITTED
this 14th Day of April 2023

Alexander Boissonneau-Lehner
JOHNSTONE & COWLING LLP
Lawyers for the Appellants

CERTIFICATE

1. An order under subrule 61.09 (2) of the *Rules of Civil Procedure* is not required.

2. The Appellants estimate that they will require 1.5 hours for oral argument, not including reply.

Alexander Boissonneau-Lehner
JOHNSTONE & COWLING LLP
Lawyers for the Appellants

SCHEDULE A:

List of Authorities

Canadian Frontline Nurses v. Canadian Nurses Association, 2022 ONSC 7280 (CanLII)

1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 (CanLII)

Montour v. Beacon Publishing Inc., 2019 ONCA 246 (CanLII),

Hill v. Church of Scientology of Toronto, 1995 CanLII 59 (SCC) [1995] 2 SCR 1130

Skafco Limited v. Abdalla, 2020 ONSC 136 (CanLII)

Lyncaster v Metro Vancouver Kink Society, 2019 BCSC 2207 (CanLII)

DEI Films Ltd. v. Tiwari, 2018 ONSC 4423 (CanLII)

Neufeld v. Hansman, 2021 BCCA 222 (CanLII)

Bent v. Platnick, 2020 SCC 23 (CanLII)

Bondfield Construction Company Limited v. The Globe and Mail Inc., 2019 ONCA 166

Rutman v. Rabinowitz, 2018 ONCA 80 (CanLII)

Myers v. Canadian Broadcasting Corp., 2001 CanLII 4874 (ON CA)

Grant v. Torstar Corp., 2009 SCC 61 (CanLII), [2009] 3 SCR 640

SCHEDULE B:

Statutory Provisions and Regulations

Section 137.1 of the *Courts of Justice Act*, RSO 1990, c C.4

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

Dismissal of proceeding that limits debate
Purposes

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 section (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 section (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.

No further steps in proceeding

(5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of. 2015, c. 23, s. 3.

No amendment to pleadings

(6) Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

(a) in order to prevent or avoid an order under this section dismissing the proceeding; or

(b) if the proceeding is dismissed under this section, in order to continue the proceeding. 2015, c. 23, s. 3.

Costs on dismissal

(7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances. 2015, c. 23, s. 3.

Costs if motion to dismiss denied

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances. 2015, c. 23, s. 3.

Damages

(9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate. 2015, c. 23, s. 3.

Procedural matters
Commencement

137.2 (1) A motion to dismiss a proceeding under section 137.1 shall be made in accordance with the rules of court, subject to the rules set out in this section, and may be made at any time after the proceeding has commenced. 2015, c. 23, s. 3.

Motion to be heard within 60 days

(2) A motion under section 137.1 shall be heard no later than 60 days after notice of the motion is filed with the court. 2015, c. 23, s. 3.

Hearing date to be obtained in advance

(3) The moving party shall obtain the hearing date for the motion from the court before notice of the motion is served. 2015, c. 23, s. 3.

Limit on cross-examinations

(4) Subject to section (5), cross-examination on any documentary evidence filed by the parties shall not exceed a total of seven hours for all plaintiffs in the proceeding and seven hours for all defendants. 2015, c. 23, s. 3.

Same, extension of time

(5) A judge may extend the time permitted for cross-examination on documentary evidence if it is necessary to do so in the interests of justice. 2015, c. 23, s. 3.

Appeal to be heard as soon as practicable

137.3 An appeal of an order under section 137.1 shall be heard as soon as practicable after the appellant perfects the appeal. 2015, c. 23, s. 3.

Stay of related tribunal proceeding

137.4 (1) If the responding party has begun a proceeding before a tribunal, within the meaning of the *Statutory Powers Procedure Act*, and the moving party believes that the proceeding relates to the same matter of public interest that the moving party alleges is the basis of the proceeding that is the subject of his or her motion under section 137.1, the moving party may file with the tribunal a copy of the notice of the motion that was filed with the court and, on its filing, the tribunal proceeding is deemed to have been stayed by the tribunal. 2015, c. 23, s. 3.

Notice

(2) The tribunal shall give to each party to a tribunal proceeding stayed under section (1),

(a) notice of the stay; and

(b) a copy of the notice of motion that was filed with the tribunal. 2015, c. 23, s. 3.

Duration

(3) A stay of a tribunal proceeding under section (1) remains in effect until the motion, including any appeal of the motion, has been finally disposed of, subject to section (4). 2015, c. 23, s. 3.

Stay may be lifted

(4) A judge may, on motion, order that the stay is lifted at an earlier time if, in his or her opinion,

(a) the stay is causing or would likely cause undue hardship to a party to the tribunal proceeding; or

(b) the proceeding that is the subject of the motion under section 137.1 and the tribunal proceeding that was stayed under section (1) are not sufficiently related to warrant the stay. 2015, c. 23, s. 3.

Same

(5) A motion under section (4) shall be brought before a judge of the Superior Court of Justice or, if the decision made on the motion under section 137.1 is under appeal, a judge of the Court of Appeal. 2015, c. 23, s. 3.

Statutory Powers Procedure Act

(6) This section applies despite anything to the contrary in the *Statutory Powers Procedure Act*. 2015, c. 23, s. 3.

Application

137.5 Sections 137.1 to 137.4 apply in respect of proceedings commenced on or after the day the *Protection of Public Participation Act, 2015* received first reading. 2015, c. 23, s. 3.

Court of Appeal File No: COA-23-CV-0115

CANADIAN FRONTLINE NURSES et. al.
Plaintiffs

-and-

CANADIAN NURSES ASSOCIATION et. al
Defendants

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COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

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