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

Court File No.: CV-21-00673636-0000

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 RESPONDENTS CANADIAN NURSES ASSOCIATION,
TIM GUEST AND MICHAEL VILLENEUVE**

June 23, 2023

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PART I - OVERVIEW

1. On the date the CNA Respondents¹ published their Statement *Enough is enough: professional nurses stand for science-based health care*², COVID-19 was an unprecedented healthcare crisis and the defining public health issue of our time.
2. Public health authorities in Canada responded to the COVID-19 pandemic with health mandates such as vaccines and the wearing of masks in public spaces. The Appellants responded by organizing protests outside of hospitals throughout Canada to “reject the tyranny of mandatory vaccines”.³ The CNA Respondents responded to the Appellants' hospital protests by publishing the CNA Statement, a publication in issue in this appeal.
3. The Motions Judge dismissed the Appellants' libel action pursuant to an anti-SLAPP motion brought by the CNA Respondents under section 137.1(3) of the *Courts of Justice Act*.⁴ The Motions Judge appropriately exercised her discretion under subsection 137.1(4) (b) of the *CJA* in finding that the public interest in the continuation of this libel action did not outweigh the public interest in protecting the CNA Statement.
4. The Motions Judge made no palpable and overriding error in finding that the Appellants failed to show a causal link between the harm they allege and the CNA

¹ The CNA Respondents are the Canadian Nurses Association, Tim Guest, and Michael Villeneuve.

² The “CNA Statement”. Exhibit 1 to Affidavit of Tim Guest sworn June 26, 2022 (“**Guest Affidavit**”), Respondent’s Compendium dated June 23, 2023 (“**RCOM**”) Tab 1, pp. 7-9; Endorsement of Justice Vermette, December 23, 2023 at para 98 (“**Endorsement**”), Appellants’ Appeal Book and Compendium (“**ABCO**”) Tab 3, p. 44.

³ Canadian Frontline Nurses’ Digital Flyer - Canada Wide Protest – September 1, 2021, Exhibit C to the Affidavit of Sarah Choujounian sworn July 14, 2022, RCOM Tab 2, p. 11.

⁴ *Courts of Justice Act*, RSO 1990, c C.43; the “CJA”.

Statement because there were significantly more important sources of harm to the Appellants' reputations that are unrelated to the CNA statement. The Motions Judge found the following sources of harm to the Appellants' reputations that occurred prior to the release of the CNA Statement:

- (1) the College of Nurses of Ontario's professional misconduct investigations of the Appellants as a result of their public statements about COVID-19 health mandates and the pandemic;
- (2) the termination of the Appellants from their employment for cause as a result of their public statements about COVID-19 health mandates and the pandemic; and
- (3) numerous media reports about the Appellants, including many articles published by high profile media organizations such as the Canadian Broadcasting Corporation.

5. The Motions Judge had ample evidence to make the factual findings that:

- (1) the Appellants failed to establish that they suffered serious harm caused by the CNA Statement;
- (2) the public interest in the CNA Statement was substantial and relates to matters of public interest regarding public health that are of significant importance⁵; and
- (3) the harm suffered by the Appellants caused by the CNA Statement was not sufficiently serious that the public interest in permitting the libel action to continue outweighed the public interest in protecting the CNA Statement.

6. The Motions Judge's determination under subsection 137.1(4) (b) of the *CJA* is entitled to deference, especially with respect to the Motions Judge's weighing of the public interests. It is submitted that there is no basis to interfere with the Motions Judge's decision and this appeal must be dismissed.

⁵ Endorsement at paras 93-94, 97-98, 101, ABCO Tab 3, pp. 43-45.

PART II - FACTS

A. THE CANADIAN NURSES ASSOCIATION

7. The Canadian Nurses Association⁶ is the national and global professional voice of Canadian nursing.

8. The Respondent Michael Villeneuve is the former Chief Executive Officer of the CNA. Villeneuve has over four decades of experience in health care. The Respondent Tim Guest is the former President of the CNA and is now the CNA's Chief Executive Officer.⁷

9. The CNA represents and speaks for the 448,000 registered nurses, nurse practitioners, licensed and registered practical nurses, registered psychiatric nurses, retired nurses, and nursing students, nationwide. The CNA has been providing national nursing leadership for 114 years.⁸

10. In 2020, the CNA shifted nearly all of its operations to focus on a response to the COVID-19 pandemic.⁹ The CNA contributed to Canada's science-based policy-making in response to the pandemic, including by sending regular briefing notes to the federal Minister of Health.¹⁰ The CNA expressed its support for the health mandates to combat the spread of COVID-19.¹¹

⁶ "CNA".

⁷ Guest Affidavit at paras 6-7, RCOM Tab 3, pp. 14-15.

⁸ Guest Affidavit at paras 8-9, RCOM Tab 3, p. 15,

⁹ Guest Affidavit at para 24, RCOM Tab 3, pp. 20-21; Endorsement at para 92, ABCO Tab 3, p. 43.

¹⁰ Guest Affidavit at paras 25-26, RCOM Tab 3, pp. 21-22; CNA Briefing Notes to Health Minister dated July 16, 2020 – December 17, 2020, Exhibits 16-25 to Guest Affidavit, RCOM Tab 4, pp. 30-66.

¹¹ Guest Affidavit at paras 25-26, RCOM Tab 3, pp. 21-22; CNA Briefing Notes to Health Minister dated July 16, 2020 – December 17, 2020, Exhibits 16-25 to Guest Affidavit, RCOM Tab 4, pp. 30-66; Endorsement at para 92, ABCO Tab 3, p. 43.

B. PROTESTS OUTSIDE OF HOSPITALS ORGANIZED BY THE APPELLANTS ON SEPTEMBER 1, 2021

11. During the COVID-19 pandemic, the Appellants organized protests that took place outside of hospitals across Canada¹² opposing workplace vaccine mandates and other COVID-19 related public health measures.¹³

12. A digital flyer distributed by the Appellants regarding the September 1st hospital protests declared: “It’s Time! Stand Together. REJECT THE Tyranny of MANDATORY VACCINES”.¹⁴ The Appellants wanted to have as many protests as possible outside of hospitals with as large of crowds as possible on September 1, 2021.¹⁵

13. The media reported that the September 1st hospital protests were organized by the Appellants and that some protestors had harassed, threatened and/or assaulted healthcare workers, and inhibited their access to hospitals.¹⁶

14. The Ontario Hospital Association released a Media Statement on September 3, 2021 titled *OHA Disheartened by Anti-Vaccine Demonstrations in Midst of a 4th Wave* which stated in part:

“It was truly disheartening for the OHA and hospitals to see these demonstrations unfold. They impeded patient access to the hospitals themselves. By denying the effectiveness of COVID-19 vaccines they also inflicted moral injury on healthcare

¹² The “protests”.

¹³ Endorsement at para 10, ABCO Tab 3, p. 18.

¹⁴ Canadian Frontline Nurses Digital Flyer, Exhibit C to the Affidavit of Sarah Choujounian sworn July 14, 2022, RCOM Tab 2, p. 11.

¹⁵ Transcript from the Cross-Examination of Sarah Choujounian held on July 22, 2022 (“**Choujounian Transcript**”), pp. 88-89, Q. 279-289, RCOM Tab 5, pp. 71-72; Transcript from the Cross-Examination of Kristal Pitter held on July 22, 2022 (“**Pitter Transcript**”), pp. 62-63, Q. 154-155, RCOM Tab 6, pp. 84-85; Transcript from the Cross-Examination of Kristen Nagle held on July 22, 2022 (“**Nagle Transcript**”), pp. 106-107, Q. 322-323, RCOM Tab 7, pp. 92-93.

¹⁶ Endorsement at para 15-16, ABCO Tab 3, p. 21.

workers who are working tirelessly on the frontlines caring for patients sick and dying from this dangerous virus.”¹⁷

15. A *Statement by the Canadian Medical Association and the Ontario Medical Association on bullying, attacks and violence against health workers* released on September 3, 2021 stated in part:

“We have not signed up for bullying, attacks and violence, at the hands of those who do not subscribe to science or health advice. The healthcare workers who have worked tirelessly for months on end are being bullied and harassed for doing their jobs. This is wrong and unacceptable – full stop. We are in a health crisis of unprecedented proportion. In medicine, we rely on scientific facts, evidence and rigorous research.”¹⁸

16. The CNA received a large number of calls and messages from nurses saying “you’ve got to say something”.¹⁹ The Respondent Villeneuve’s evidence is that when organizations such as the Canadian Medical Association issue public statements on issues impacting their practices, nurses often expect that their own professional nursing association and unions will also speak on the issue.²⁰ The CNA Respondents did so through the CNA Statement released on September 9, 2021.

¹⁷ Ontario Hospital Association statement titled “OHA Disheartened by Anti-Vaccine Demonstrations in Midst of a 4th Wave”, published September 3, 2021, Exhibit 8 to Villeneuve Affidavit, RCOM Tab 8, p. 95.

¹⁸ Statement by the Canadian Medical Association and the Ontario Medical Association on bullying, attacks and violence against health workers published September 3, 2021, Exhibit 9 to Villeneuve Affidavit, RCOM Tab 9, pp. 97-99.

¹⁹ Transcript from the Cross-Examination of Michael Villeneuve held on July 21, 2022 (“**Villeneuve Transcript**”), pp. 14-15, Q. 28, RCOM Tab 10, pp. 101-102.

²⁰ Affidavit of Michael Villeneuve sworn June 24, 2022 (“**Villeneuve Affidavit**”) at para 25, RCOM Tab 11, p. 115.

C. THE CNA STATEMENT

17. As of September 9, 2021 over 1.5 million cases of COVID-19 had been recorded in Canada and COVID-19 had caused over 27,000 deaths in Canada.²¹ All of Canada's provinces and territories declared states of emergency to combat the pandemic²²

18. The purposes of the CNA include the advancement of positive health outcomes in the public interest and to act in the public interest for Canadian nursing and nurses.²³ The CNA Statement was drafted and published in furtherance of the CNA's purposes, beliefs and responsibilities.²⁴

19. The CNA Statement relates to a number of matters of public interest: science-based health care; the safety of health care workers; anti-science, anti-vaccine, anti-public health advocates; protests in front of health care settings; anti-public health disinformation; and the public's trust in the nursing profession, one of the most trusted professions in Canada.²⁵

20. The Respondent Guest's uncontroverted evidence is that nurses have an obligation to disseminate evidence-based information about pandemic measures to the Canadian public to maintain public trust.²⁶ Disinformation can lead patients to make dangerous decisions contrary to the best science evidence at the time.²⁷

²¹ Guest Affidavit at para 19, RCOM Tab 3, p. 18.

²² Guest Affidavit at para 18, RCOM Tab 3, p. 18.

²³ Guest Affidavit at para 9, RCOM Tab 3, p. 15.

²⁴ Guest Affidavit at para 41, RCOM Tab 3, p. 26.

²⁵ Guest Affidavit at para 32, RCOM Tab 3, pp. 24-25.

²⁶ Guest Affidavit at paras 29, 33, RCOM Tab 3, pp. 23, 25.

²⁷ Transcript from the Cross-Examination of Tim Guest held on July 21, 2022 ("**Guest Transcript**"), p. 10, Q. 11, RCOM Tab 12, p. 135.

21. The Respondent Villeneuve's uncontroverted evidence is that the public trust in the nursing profession is damaged if a "nurse" misrepresents truth or science,²⁸ and that the CNA has an obligation to correct misinformation and misrepresentations to promote evidence-based health care, and to maintain confidence in the nursing profession.²⁹

22. The CNA Statement assured the public that the vast majority of Canada's regulated nurses operate from a stringent *Code of Ethics* and use science, evidence and facts in assessing, planning and evaluating the care they deliver to people across the country.³⁰

23. The CNA Respondents first learned of the Appellants' libel action regarding the CNA Statement from a Canadian Broadcasting Corporation reporter who provided them a copy of the Statement of Claim³¹. The CNA Respondents were served with the Statement of Claim after CBC News published an article headlined "3 Ontario Nurses disciplined for social media posts related to pandemic launch \$1M libel suit"³²

24. Justice Vermette granted the CNA Respondents' anti-SLAPP motion on December 23, 2022 and dismissed the Appellants' libel action.

²⁸ Villeneuve Affidavit at para 44, RCOM Tab 11, p. 129.

²⁹ Guest Affidavit at para 39, RCOM Tab 3, p. 26.

³⁰ Guest Affidavit at para 17, RCOM Tab 3, p. 18; College of Nurses of Ontario's Code of Conduct, Exhibit 7 to Guest Affidavit, RCOM Tab 13, pp. 140-152.

³¹ Villeneuve Affidavit at para 55, RCOM Tab 11, p. 131.

³² Villeneuve Affidavit at paras 57-57, RCOM Tab 11, pp. 131-132.

PART III - STATEMENT OF ISSUES, LAW, AND ARGUMENT

A. ISSUES

25. The Appellants' Factum states that the "main issue" on this Appeal is whether the Motions Judge erred in the weighing exercise set out in subparagraph 137.1(4)(b) and that there are six sub-issues relating to the section 137.1(4)(b) CJA analysis:³³

- (i) **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 (para 24(a) Appellants' Factum)?**

The Motions Judge was alive to the purposes of the anti-SLAPP legislation which are set out in paragraph 29 of the Endorsement.

- (ii) **Is there a public interest in protecting libelous statements when protecting such statements will stifle, as opposed to encourage, debates on matter of public interest (para 24(b) Appellants' Factum)?**

The Supreme Court of Canada in *Pointes Protection*³⁴ and the majority in *Hansman v. Neufeld*³⁵ unequivocally held that technically meritorious actions can be dismissed pursuant to an anti-SLAPP motion.

- (iii) **What degree of harm, or likely harm, were the Appellants required to demonstrate to discharge their burden (para 24(c) Appellants' Factum)?**

Subsection 137.1(4)(b) of the CJA requires the Appellants to establish on a balance of probabilities that the harm caused by the CNA Statement was sufficiently serious that it outweighed the public interest in protecting the

³³ Factum of the Appellants dated April 14, 2023 ("**Appellants' Factum**") at para 24, p. 12-13.

³⁴ [1704604 Ontario Ltd v Pointes Protection Association](#), 2020 SCC 22 at para 62 [**"Pointes Protection"**].

³⁵ [Hansman v Neufeld](#), 2023 SCC 14 at para 5 [**"Hansman"**].

CNA Statement. The Motions Judge made no palpable and overriding error in finding that the Appellants failed to establish sufficiently serious harm caused by the CNA Statement.

(iv) **Did the Motions Judge err by attempting to adjudicate causation (para 24(f) Appellants' Factum)?**

The Motions Judge made no palpable and overriding error in finding that the Appellants failed to establish on a balance of probabilities that the harm caused by the CNA Statement was not sufficiently serious that it outweighed the public interest in protecting the CNA Statement.

(v) **Is the principle of the presumption of damages in a libel action relevant to the analysis (para 24(d) Appellants' Factum)?**

There is no presumption of serious damage in a libel action. The presumption of damages cannot establish that the harm is "serious".

(vi) **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? (para 24(e) Appellants' Factum)?**

The Motions Judge never decided that the Appellants were required to sue every media outlet and organization that defamed them. In assessing other sources of harm to the Appellants' reputations, the Motions Judge appropriately considered media reports about the Appellants that defamed the Appellants in determining whether the CNA Statement caused serious harm to the Appellants' reputations.

B. THE STANDARD OF REVIEW

26. A Motion Judge's determination on a section 137.1 *Courts of Justice Act* anti-SLAPP motion is entitled to deference absent an error of law or a palpable and overriding factual error.³⁶ This is especially so with respect to a Motion Judge's weighing of the public interests.³⁷

C. THE PUBLIC INTEREST WEIGHING EXERCISE UNDER SUBSECTION 137.1(4)(b) OF THE CJA

27. The Appellants' Factum states at paragraph 24 that the main issue on appeal is whether the Motions Judge erred in the weighing exercise set out in section 137.1(4)(b) of the *CJA*.

28. Subsection 137.1(4)(b) of the *CJA* requires that the harm suffered by the Appellants caused by the CNA Statement is sufficiently serious that the public interest in permitting the libel action to continue outweighs the public interest in protecting the CNA Statement. Where one factor must outweigh the other, the ratio between the two must be at least 51/49.³⁸

29. At the public interest hurdle stage, the "grounds to believe" standard is replaced with the more onerous "balance of probabilities" standard³⁹:

³⁶ [Park Lawn Corporation v Kahu Capital Partners Ltd](#), 2023 ONCA 129 at para 42 [*"Park Lawn"*].

³⁷ [Park Lawn](#) at para 42.

³⁸ [Pointes Protection](#) at para 66.

³⁹ [Pointes Protection](#), at paras 82, 103, and 126; [Bent v Platnick](#), 2020 SCC 23 at paras 141, 174 [*"Bent"*].

30. Weighing the public interest is the crux of the analysis⁴⁰. This is the stage where Motion Judges can “scrutinize what is really going on in the particular case before them”.⁴¹

The Motions Judge was alive to these principles at paragraph 73 of the Endorsement.

31. The Motions Judge considered the Appellants evidence of harm and whether there was a causal link between alleged harm and the CNA Statement at paragraphs 74-86 of the Endorsement. The Motions Judge made no palpable and over-riding error in finding that the Appellants failed to show a causal link between the harm they alleged and the CNA Statement because there are significantly more important sources of harm to Appellants’ reputation which are unrelated to the CNA Statement (paragraphs 94-97 of the Endorsement).

32. In weighing the public interests, the Motions Judge then reviewed the factors to consider at paragraphs 87-92 of the Endorsement, including the chilling effects of the libel action on the CNA Respondents.

33. To overcome the weighing of public interests hurdle, a plaintiff must provide evidence that enables the Motions Judge to draw an inference of likelihood of harm of a magnitude sufficient to outweigh the public interest in protecting the defendant’s expression.⁴² The Motions Judge concluded that the Appellants failed to establish that they suffered sufficiently serious harm that outweighed the public interest in protecting the CNA Statement (paragraph 93 Endorsement).

⁴⁰ [Hansman](#) at para 57; [Pointes Protection](#) at para 82.

⁴¹ [Pointes Protection](#) at para 81.

⁴² [Hansman](#) at para 67

34. The Motions Judge found that the public interest in protecting the CNA Statement was substantial and that the CNA Statement related to matters of public interest regarding public health that were of significant importance.⁴³

35. The Motions Judge appropriately weighed the public interests and did not err in her approach to the subsection 137.1(4)(b) of the *CJA* public interest hurdle.⁴⁴

36. The Motions Judge concluded at paragraph 101 of the Endorsement that the Appellants have not shown on a balance of probabilities that they likely suffered harm as a result of the CNA Statement that is sufficiently serious that the public interest in permitting this libel action to continue outweighs the public interest in protecting the CNA Statement. This finding is entitled to deference, especially with respect to the Motions Judge's weighing of the public interests.⁴⁵

D. TECHNICALLY MERITORIOUS CLAIMS ARE DISMISSED BY ANTI-SLAPP MOTIONS

37. The Appellants' Factum submits at paragraph 28 that the “real issue is whether the Appellants are entitled to have their day in court to adjudicate a meritorious libel claim” and that there is “considerable public interest in ensuring that meritorious defamation claims are not denied a day in court”.⁴⁶

38. This proposition was rejected by the majority of the Supreme Court of Canada in *Hansman v Neufeld*:

⁴³ Endorsement at para 98, ABCO Tab 3, p. 44.

⁴⁴ Endorsement at paras 30, 73, 87-88, ABCO Tab 3, p. 28-29, 38, 41-42.

⁴⁵ *Park Lawn* at para 42; *Bent* at para 77.

⁴⁶ Appellants' Factum at para 32, p. 16.

“Even claims with substantial merit will be dismissed where the public interest in preserving free debate outweighs the harm to the plaintiff that the litigation purports to address. In this way, anti-SLAPP legislation instructs judges to deny claimants a day in court on a meritorious claim, given a more compelling social goal.”⁴⁷

39. Paragraph 73 of the Endorsement cited *Pointes Protection* that held subsection 137/1(4) (b) of the *CJA* serves as a robust backstop for motion judges to dismiss even technically meritorious claims:

... While s. 137.1(4)(a) directs a judge’s specific attention to the merit of the proceeding and the existence of a valid defence in order to ensure that the proceeding is meritorious, s. 137.1(4)(b) open-endedly engages with the overarching concern that this statute, and anti-SLAPP legislation generally, seek to address by assessing the public interest and public participation implications. In this way, s. 137.1(4)(b) is the key portion of the s. 137.1 analysis, as it serves as a robust backstop for motion judges to dismiss even technically meritorious claims if the public interest in protecting the expression that gives rise to the proceeding outweighs the public interest in allowing the proceeding to continue.⁴⁸

40. Technically meritorious actions are dismissed under the anti-SLAPP regimes in Ontario and British Columbia.⁴⁹ The Motions Judge made no error of law in dismissing the Appellants’ libel action.

E. THE PURPOSES OF SECTION 137.1 OF THE CJA

41. The sub-issue at paragraph 24(a) of the Appellants’ Factum asks whether the Motions Judge erred 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*.

⁴⁷ [Hansman](#) at paras 4, [51](#), emphasis added.

⁴⁸ [Pointes Protection](#) at para [62](#).

⁴⁹ See e.g. [Levant v DeMelle](#), 2021 ONSC 1071, aff’d [2022 ONCA 79](#); [Marcellin v LPS](#), 2022 ONSC 5886; [Armstrong v Corus Entertainment Inc](#), 2018 ONCA 689; [Rebel News Network Ltd v Gilmore](#), 2021 ONSC 3490; [910938 Ontario Inc v Moore](#), 2020 ONSC 4553; [Bullard v Rogers Media Inc](#), 2020 ONSC 3084; [Air Georgian Limited v Eugeni](#), 2019 ONSC 3250.

42. The Motions Judge had regard to the purposes of section 137.1 of the *CJA* which are set out in paragraph 29 of the Endorsement. Paragraph 73 of the Endorsement correctly stated that subsection 137.1(4)(b) of the *CJA* is the crux or core of the section 137.1 analysis that provides the Courts with the ability to scrutinize what is really going on in the particular case before them. The Motions Judge made no error of law regarding the purposes of section 137.1 of the *CJA*.⁵⁰

F. THE CHILLING EFFECT ON THE APPELLANTS IS NOT A RELEVANT CONSIDERATION IN THE WEIGHING EXERCISE

43. The sub-issue at paragraph 24(b) of the Appellants' Factum asks:

“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?”

44. The Appellants' Factum at paragraphs 38 and 39 relies on the British Columbia Court of Appeal's decision in *Neufeld v Hansman* as follows:

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.

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.⁵¹

45. The majority of the Supreme Court of Canada overturned the British Columbia Court of Appeal's decision in *Hansman v. Neufeld*:

⁵⁰ Endorsement at para 29, ABCO Tab 3, p. 27-28.

⁵¹ Appellants' Factum at para 38-39, p. 18.

[77] The Court of Appeal’s consideration of a “chilling effect” flowing from a plaintiff’s inability to pursue a defamation claim turns the concept on its head. Our jurisprudence addresses the concern that the possible imposition of a legal penalty would cause speakers to refrain from commenting on matters of public interest. Instead, the Court of Appeal held that the inability to inflict a legal penalty on Mr. Hansman would chill Mr. Neufeld’s expression and those of others who wish to express unpopular views. Simply put, there is no chilling effect in barring potential plaintiffs from silencing their critics and collecting damages through a defamation suit.⁵²

46. The "chilling effect" identified by the British Columbia Court of Appeal in *Hansman* does not constitute a "harm" suffered by a libel plaintiff for the purpose of the weighing exercise.⁵³ The consideration of the public interest in continuing the proceeding must be grounded in harm to the plaintiff caused by the expression and not in the consideration of a “chilling effect” on others if the plaintiff’s defamation action cannot proceed.⁵⁴

(a) The CNA Statement Had No Chilling Effect On The Appellants

47. In any event, the CNA Statement had no chilling effect on the Appellants.

48. The Appellants' Factum submits at paragraph 49 that the Motions Judge erred in “only considering the alleged chilling impact on the CNA Respondents” and not the “fact that the Appellants’ September 13, 2021, protests were met with more hostility than the September 1, 2021, protests”. The Appellants’ allegation regarding the September 13, 2021 protests outside of hospitals is pure conjecture and inadmissible opinion evidence. No evidence was provided to the Motions Judge from any third party who attended the September 13, 2021 hospital protests attesting to the fact that: (1) they were hostile towards the Appellants and, (2) their hostility was caused by the CNA Statement.

⁵² [Hansman](#) at para [77](#). Emphasis added.

⁵³ [Hansman](#) at para [75](#).

⁵⁴ [Hansman](#) at para [78](#).

49. Nor were the Appellants “chilled” in expressing themselves after the publication of the CNA Statement. The September 13, 2021 protests outside of hospitals were organized by the Appellants after the publication of the CNA Statement – the Appellants were not deterred.

50. The Appellants also continued posting content relating to COVID-19 pandemic health mandates on their social media profiles after the publication of the CNA Statement.⁵⁵ The Motions Judge found that many of the Appellants' postings on social media were marked as false or partly false by independent third party fact checkers⁵⁶, including a post by the Respondent Pitter that Bill Gates planned to use a COVID-19 vaccine to permanently alter people's DNA⁵⁷

(b) The Appellants' Libel Action Had A Chilling Effect On The CNA Respondents

51. The Motions Judge considered the libel chill evidence of the CNA Respondents and made no error of law in doing so.

52. The CNA Respondents Villeneuve and Guest provided evidence that this libel action has restricted their participation in public debates on matters of public interest for fear of legal action against them, and that since the commencement of this libel action, they have been hesitant to engage in discussions about COVID-19 and pandemic

⁵⁵ Social Media posts by Canadian Frontline Nurses on various dates, Exhibit 18 to Villeneuve Affidavit; Social Media posts by Kristen Nagle on various dates, Exhibit 19 to Villeneuve Affidavit; Social Media posts by Sarah Choujounian on various dates, Exhibit 20 to Villeneuve Affidavit; Social Media posts by Kristal Pitter on various dates, Exhibit 26 to Villeneuve Affidavit; RCOM Tab 14, pp. 154-206.

⁵⁶ Endorsement at para 86, ABCO Tab 3, p. 41.

⁵⁷ Pitter Transcript, pp. 41-43, Q. 95-98, RCOM Tab 6, pp. 77-79; CBC News article titled "Ontario nurse under investigation after anti-vax, COVID conspiracy social media posts" dated July 23, 2020, Exhibit 25 to Villeneuve Affidavit, RCOM Tab 15, pp. 208-216.

measures, and have remained largely silent while other organizations continue to speak on these matters.⁵⁸

53. The Respondent Guest's uncontroverted evidence was that:

- (i) "The Plaintiffs' Libel Action has caused the CNA to be very hesitant in engaging in discussions about COVID-19 and pandemic measures. While other organizations have spoken on these matters, the CNA has remained largely silent since the commencement of the Libel Action."⁵⁹
- (ii) "Since the Plaintiffs commenced their Libel Action, CNA has also foregone opportunities to engage with the media and advocate for nurses because it fears further lawsuits."⁶⁰
- (iii) "The CNA has been extremely hesitant to speak about the Plaintiffs because it fears being targeted by further lawsuits. The Libel Action's impact on the CNA has reduced the CNA's effectiveness as an advocate for Canadian nurses and public-health measures."⁶¹
- (iv) "I feel restricted in making comments about COVID-19, masking, vaccinations, or social distancing, including not liking or sharing the comments of others, on social media. I am afraid that if I do comment publicly on these matters, I will be sued again."⁶²
- (v) During cross-examination the Respondent Guest testified:
"Q. 139. And have you made any comments related to COVID-19 masking, vaccination or social distancing on Facebook since you became aware of the lawsuit?

A. I do not believe so.

Q. 140. How about on LinkedIn, did you make any statements relating to COVID-19, masking, vaccination or distancing on LinkedIn?

A. I don't believe I have there either, no.

Q. 141. Nor have you shared any comments relating to COVID-19 on your personal Facebook profile?

⁵⁸ Guest Affidavit at paras 42-43, RCOM Tab 3, pp. 26-27; Media Releases published by the Canadian Medical Association between January to June 2022, Exhibit 29 to Guest Affidavit, RCOM Tab 16, pp. 218-232; Canadian Nurses Association statement titled "CNA urges caution as COVID-19 cases rise across the country" published April 11, 2022, Exhibit 30 to Guest Affidavit, RCOM Tab 17, pp. 237-238.

⁵⁹ Guest Affidavit at para 42, RCOM Tab 3, p. 26.

⁶⁰ Guest Affidavit at para 44, RCOM Tab 3, p. 27.

⁶¹ Guest Affidavit at para 45, RCOM Tab 3, p. 27.

⁶² Guest Affidavit at para 46, RCOM Tab 3, pp. 27-28.

A. I don't have any recollection that I have."⁶³

54. The Respondent Villeneuve's uncontroverted evidence was that:

- (i) "The Plaintiff's Libel Action has had a major effect on my willingness to comment publicly and engage in discussions about COVID-19 and Pandemic measures."⁶⁴
- (ii) "Since learning of the Plaintiffs' Statement of Claim against me, I have made limited statements about COVID-19, masking, vaccinations, or social distancing."⁶⁵
- (iii) "This Libel Action has cast a pall over me personally as well as the CNA's admirable record of speaking out about nursing and health issues regarding COVID-19 and Pandemic measures."⁶⁶
- (iv) During cross-examination the Respondent Villeneuve testified:
 - Q. 173. "...what I stated here is the fact that, you know, in the last two months of a 44 year career, to have this [action] arrive after Christmas, first was shocking. I've never been in trouble in any way with -- with the College or in any other way around libel. So, it -- when you say, hey, we have a duty as leaders at CNA when we see something that's not right to speak to it. We did it and look what happened. So, it makes you think, well, geez, I better be pretty damn careful about anything else I say and I tend to be pretty vocal, I admit. You know, I participate in a lot of public things and I try to be careful. But this really, I mean, all I can say is it put a pall over CNA and my time there and Tim can speak to you about what he feels now. And then -- and me personally, I just basically didn't comment on it anymore. It just scared me."⁶⁷
 - Q. 174. "...in my role as a leader, I did what -- what we're supposed to do as the -- as the leader of CNA. Respond to a problem in a -- in as thoughtful a way as we could and if that causes this sort of result, it scares -- well, I don't know what it does. I don't see it scares you. It scared me."⁶⁸
 - Q. 175. "what we did then is we just said, "We're not saying anything about that." So, for example, we had a very senior person in the country, a nurse leader, who got yelled at when she just went for a walk downtown wearing a mask. And a very, very senior person who normally would support some of those things, so that -- this is -- I'm not talking now about the Plaintiffs. But those -- when those kind of things arose, if nurses said, "Are you going to say anything about the convoy?" Just like are you going to say anything about the protests? We would go through the same, "Do we have anything

⁶³ Guest Transcript, p. 50, Q. 139-141, RCOM Tab 12, pp. 137-138.

⁶⁴ Villeneuve Affidavit at para 58, RCOM Tab 11, p. 132.

⁶⁵ Villeneuve Affidavit at para 59, RCOM Tab 11, p. 132.

⁶⁶ Villeneuve Affidavit at para 60, RCOM Tab 11, p. 133.

⁶⁷ Villeneuve Transcript, p. 69-70, Q. 173, RCOM Tab 10, pp. 104-105.

⁶⁸ Villeneuve Transcript, p. 70-71, Q. 174, RCOM Tab 10, pp. 105-106.

to say? Do we not?" But we didn't even go into the process. We just said, "We're not saying anything about anything."⁶⁹

55. The Motions Judge made no palpable and overriding error in accepting the CNA Respondents' evidence regarding the chilling effect this libel action had on them and taking this fact into consideration in the weighing exercise she conducted under subsection 137.1(4)(b) of the *CJA*.

G. NO SERIOUS HARM

56. The sub-issue at paragraph 24(c) of the Appellants' Factum asks:

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

57. Paragraph 45 of the Appellants' Factum submits:

"[a]t this stage, the Appellants need only show a basis on which a court could make an assessment about the nature of the harm suffered. The Motions judge imposed a more onerous burden."⁷⁰

The Motions Judge did not impose a more onerous burden on the Appellants.

58. Subparagraph 137.1(4)(b) of the *CJA* requires "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."⁷¹ The Appellants were required to prove on a balance of probabilities that the harm caused by the CNA Statement was sufficiently serious that it outweighed the public interest in protecting the CNA Statement.⁷²

⁶⁹ Villeneuve Transcript, p. 71-72, Q. 175, RCOM Tab 10, pp. 106-107.

⁷⁰ Appellants' Factum at para 45, p. 20.

⁷¹ *CJA*, s 137.1(4)(b)

⁷² *Pointes Protection* at paras 70-72, 82; *Bent* at paras 140-141, 144; *Park Lawn* at para 47; *Levant v DeMelle*, 2022 ONCA 79 at paras 53-54, 67-71 [*"Levant"*].

59. The Motions Judge correctly held that subsection 137.1(4)(b) requires two showings: “(1) the existence of harm and (2) causation - the harm was suffered as a result of the moving party’s expression.”⁷³

60. The individual Appellants provided affidavits that contained essentially identical wording regarding the harm they allegedly suffered, and attached no documentary exhibits to corroborate their statements.⁷⁴ The evidentiary record contains no emails, texts or other communications from third parties regarding the CNA Statement. Bare assertions of harm caused by the expression in issue are insufficient to meet the evidentiary burden.⁷⁵

61. The Motions Judge had ample evidence to find that the Appellants failed to prove on a balance of probabilities that the harm caused by CNA’s Statement was sufficiently serious that the public interest in permitting this libel action to continue outweighed the public interest in protecting the CNA Statement.

H. PRESUMED DAMAGES ARE NOT SUFFICIENT TO ESTABLISH “SERIOUS HARM”

62. The sub-issue at paragraph 24(d) of the Appellants’ Factum asks:

“Is the principle of the presumption of damages in a libel action relevant to the analysis?”

⁷³ Endorsement at para 74, ABCO Tab 3, p. 38. Emphasis in original.

⁷⁴ Affidavit of Kristen Nagle sworn July 14, 2022 at paras 34-35, RCOM Tab 18, pp. 240-241; Affidavit of Sarah Choujounian sworn July 14, 2022 at paras 33-35, RCOM Tab 19, pp. 245-246; Affidavit of Kristal Pitter sworn July 14, 2022 at paras 13-14, RCOM Tab 20, p. 249.

⁷⁵ [Hansman](#) at para [67](#).

63. The Appellants submit at paragraph 46 of their Factum that they bear no obligation to prove actual loss or injury as damages are presumed when a defendant publishes a defamatory statement. This submission is wrong – there is no presumption of serious damage in a libel action.⁷⁶

64. Further, the majority of the Supreme Court of Canada recently held in *Hansman v. Neufeld* that the presumption of damages can establish the *existence* of harm, but cannot establish that the harm is “serious”:

[67] Although general damages are presumed in defamation law, s. 4(2)(b) prescribes a weighing exercise which requires that the harm to the plaintiff be serious enough to outweigh the public interest in protecting the defendant’s expression. While the presumption of damages can establish the existence of harm, it cannot establish that the harm is “serious”. To hold otherwise would be to presumptively tip the scales in favour of the plaintiff in defamation cases and effectively gut the weighing exercise. Rather, to succeed on the weighing exercise, a plaintiff must provide evidence that enables the judge “to draw an inference of likelihood” of harm of a magnitude sufficient to outweigh the public interest in protecting the defendant’s expression (*Pointes*, at para. 71; *Bent*, at para. 154). Presumed general damages are insufficient for this purpose, as are bare assertions of harm.⁷⁷

I. NO CAUSAL LINK BETWEEN THE APPELLANTS' ALLEGED HARM AND THE CNA STATEMENT

65. The sub-issue in paragraph 24(f) of the Appellants’ Factum asks: “Did the Motions Judge err by attempting to adjudicate causation?”

66. In *Pointes Protection*, the Supreme Court of Canada held that the plaintiff must “simply provide evidence for the motion judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link”.⁷⁸

⁷⁶ *Levant* at para 68

⁷⁷ *Hansman* at para 67, emphasis added. See also *Bent* at para 144.

⁷⁸ *Pointes Protection* at para 71.

67. Further, "evidence of a causal link between the expression and the harm will be especially important where there may be sources other than the defendants' expression that may have caused the Plaintiff harm".⁷⁹

68. Where the defendant is not the only one speaking out against the plaintiff, inferring a causal link between the defendant's expression and the harm suffered by the plaintiff becomes both more important, and more difficult. Something more than bare assertions of harm is needed to prove a causal link.⁸⁰

69. In *Levant v DeMelle*, this Court held that a consideration of a plaintiff's reputation was a necessary step to be taken in order to conduct a proper weighing of the public interests:

[53] For the purposes of that weighing, however, it is sufficient to recognize the state of Rebel News' reputation as it appears from the record (not unblemished, as I put it earlier). Given that fact, it was incumbent on Rebel News to lead evidence, either of business lost because of the impugned expressions, or at least evidence that its reputation had been harmed in some respect by them. This requirement is evidenced in *Pointes*, at para. 72, where Côté J. said:

[E]vidence of a causal link between the expression and the harm will be especially important where there may be sources other than the defendant's expression that may have caused the plaintiff harm.⁸¹

70. The Motions Judge found as a fact that the Appellants had not established on a balance of probabilities that they likely had suffered or would suffer harm as a result of the CNA Statement that was sufficiently serious that the public interest in allowing this

⁷⁹ [Pointes Protection](#) at para 72.

⁸⁰ [Hansman](#) at paras [68](#), [72](#); Endorsement at para 75, ABCO Tab 3, p. 38.

⁸¹ [Levant](#) at para [53](#).

proceeding to continue outweighed the deleterious effects on expression and public participation and the public interest in protecting that expression.⁸²

71. The Appellants' bare assertions, opinions, and speculation as to a causal link between their alleged harm suffered and the CNA Statement provide no evidentiary foundation for a finding that the CNA Statement caused sufficiently serious harm to the Appellants' reputations.⁸³

72. The Motions Judge found as a fact that there are significantly more important sources of harm to the Appellants' reputations which are unrelated to the CNA Statement:

[94] In my view, the Plaintiffs have failed to show a causal link between the harm that they allege and the publications in issue in this action. This is because there are significantly more important sources of harm to the Plaintiffs' reputations which are unrelated to the CNA Statement and the TNI Article. They are:

- a. the professional misconduct investigations of the Plaintiffs by the CNO;
- b. the terminations of the Plaintiffs from their employment for cause; and
- c. numerous media reports about the Plaintiffs, including many articles published by high-profile media organizations.⁸⁴

⁸² Endorsement at para 101, ABCO Tab 3, p. 45.

⁸³ Affidavit of Kristen Nagle sworn July 14, 2022 at paras 34-35, 38, RCOM Tab 18, pp 240-241, 243; Affidavit of Sarah Choujounian sworn July 14, 2022 at paras 33-35, RCOM Tab 19, pp. 245-246; Affidavit of Kristal Pitter sworn July 14, 2022 at paras 13-14, RCOM Tab 20, p. 249.

⁸⁴ Endorsement at para 94, ABCO Tab 3, p. 43-44.

Other sources of harm to the Appellants' reputations that occurred prior to the release of the CNA Statement are set out below.

(a) The Appellants Were Terminated For Cause

73. All of the individual Appellants were terminated for cause from their employment prior to the publication of the CNA Statement because of public statements they made about COVID-19 health measures and the COVID-19 pandemic.⁸⁵

(b) Media Reports About The Appellants That Were Damaging To Their Reputations

74. News articles published prior to the release of the CNA Statement reported that the Appellants were under investigation by the College of Nurses of Ontario and that their employment was terminated for cause. The news articles also reported that the Appellants' put the public in danger, propagated health misinformation, and promoted conspiracy theories.⁸⁶

75. Kristen Nagle posted a video on social media in which she stated that "CBC has ruined my career", "CBC has literally destroyed my life", and said on a Facebook webcast that CBC had destroyed her entire career and reputation.⁸⁷

⁸⁵ Endorsement at para 79, ABCO Tab 3, p. 40; Termination of the employment of Sarah Choujounian with cause by Sienna Senior Living on November 3, 2020, Exhibit 5 to the Cross-Examination of Sarah Choujounian, RCOM Tab 21, p. 251; Termination of the employment of Kristen Nagle for cause by London Health Sciences Centre on January 15, 2021, Exhibit 7 to the Cross-Examination of Kristen Nagle, RCOM Tab 22, p. 253; Termination of the employment of Kristal Pitter by the Ontario Ministry of Long-Term Care on March 10, 2021, Exhibit 14 to the Cross-Examination of Kristal Pitter, RCOM Tab 23, pp. 255-259.

⁸⁶ CBC News articles relating to Kristen Nagle, Exhibit 22 to Affidavit of Michael Villeneuve sworn June 24, 2022, RCOM Tab 24, pp. 261-283; Pitter Transcript, p. 40, Q. 90, p. 58, Q. 135, RCOM Tab 6, pp. 76, 82.

⁸⁷ Nagle Transcript, p. 64, Q. 157, RCOM Tab 7, p. 90; Villeneuve Affidavit at paras 37-38, RCOM Tab 11, pp. 122-123; Video of Kristen Nagle's Instagram Live from February 8, 2022, Exhibit 21 to Villeneuve Affidavit, RCOM Tab 25, p. 285; Video of "The Shadoe Davis Show – Shadoe At Night", broadcast on Facebook on March 3, 2022, Exhibit 20 to Villeneuve Affidavit, RCOM Tab 26, p. 287.

76. Kristal Pitter testified that a CBC News article headlined “Ontario Nurse Under Investigation After Anti-Vax COVID Conspiracy Social Media Posts” was harmful to her reputation.⁸⁸

(c) **The Professional Misconduct Investigations Of The Appellants By The College of Nurses Of Ontario**

77. The College of Nurses of Ontario has taken disciplinary action against the Appellant Sarah Choujounian for engaging in disgraceful, dishonorable or unprofessional conduct for public statements the College alleges were false and/or misleading in relation to the public health response to the COVID-19 pandemic⁸⁹ and which encouraged non-compliance with public health orders.

78. The College of Nurses of Ontario directed the Appellant Kristen Nagle to attend before the Inquiries, Complaints and Reports Committee to be cautioned with respect to Professional Standards, Code of Conduct, and Ethics regarding anti-vaccine and other anti-health measure statements she made publicly as a nurse.⁹⁰ The media also reported that Appellant Nagle was charged for failing to comply with the *Emergency Management and Civil Protection Act*.⁹¹

⁸⁸ Pitter Transcript, pp. 57-58, Q: 134-135, RCOM Tab 6, pp. 81-82; CBC News article titled "Ontario nurse under investigation after anti-vax, COVID conspiracy social media posts" dated July 23, 2020, Exhibit 25 to Villeneuve Affidavit, RCOM Tab 15, pp. 208-216.

⁸⁹ Endorsement at para 81, ABCO Tab 3, p. 40-41; CNO “Find a Nurse” results for Sarah Choujounian-Abulu, Exhibit 3 to the Cross-Examination of Sarah Choujounian held on July 22, 2022, RCOM Tab 27, pp. 289-292.

⁹⁰ Endorsement at para 80, ABCO Tab 3, p. 40; CNO “Find a Nurse” results for Kristen Nagle, Exhibit 7 to the Cross-Examination of Kristen Nagle held on July 22, 2022, RCOM Tab 28, pp. 294-297.

⁹¹ Endorsement at para 83, ABCO Tab 3, p. 41; CNO “Find a Nurse” results for Kristen Nagle, Exhibit 7 to the Cross-Examination of Kristen Nagle held on July 22, 2022, RCOM Tab 28, pp. 294-297.

79. The College of Nurses of Ontario directed the Appellant Kristal Pitter to be cautioned by the Inquiries, Complaints and Reports Committee with respect to Professional Standards, Code of Conduct, and Ethics regarding anti-vaccine and other anti-health measure statements she made publicly as a nurse.⁹²

80. The Appellants agreed that the College of Nurses proceedings caused damage to their reputations.⁹³

81. The Motions Judge made no palpable and overriding error in finding that the Appellants had failed to show a causal link between the harm they allege they suffered to their reputations and the CNA Statement.⁹⁴

J. THE APPELLANTS FAILURE TO SUE MEDIA ORGANIZATIONS THAT DEFAMED THEM

82. The sub-issue at paragraph 24(e) of the Appellants` Factum asks:

“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 unfavorable coverage or expressed opinions, even when such outlets and organizations likely had a viable defence, to discharge their burden?”

83. The Motions Judge never decided that Appellants were required to sue any media outlet and organization that defamed them.

⁹² Endorsement at para 80, ABCO Tab 3, p. 40. CNO “Find a Nurse” results for Kristal Pitter, Exhibit 12 to the Cross-Examination of Kristal Pitter dated July 22, 2022 held on July 22, 2022, RCOM Tab 29, p. 299-302.

⁹³ Nagle Transcript, pp. 37-38, Q. 70-71, RCOM Tab 7, p. 87-88; Choujounian Transcript, pp. 31-32, Q. 56-60, RCOM Tab 5, pp. 68-69; Pitter Transcript, p. 26, Q. 61, RCOM Tab 6, p. 74.

⁹⁴ Endorsement at para 94, ABCO Tab 3, p. 43-44.

84. At paragraph 100 of the Endorsement, the Motions Judge noted that she was puzzled about the Appellants' decision to sue the CNA Respondents and the TNI Respondents "given that the information reported and opinions expressed in the CNA Statement and the TNI Article, were similar to the information reported and opinions expressed in numerous articles published across Canada". This note was made in the context of the Motions Judge appropriately considering the significantly more important sources of harm to the Appellants' reputation which were unrelated to the CNA Statement.⁹⁵

85. The defining feature of a SLAPP is to silence the defendant and suppress debate on matters of public interest⁹⁶. The Appellants' \$1 million libel action did just that by chilling the CNA Respondents as described above. The Motions Judge made no error of law in noting at paragraph 100 of the Endorsement who the Appellants chose to sue.

PART IV - ADDITIONAL ISSUES

86. The CNA Respondents raise no additional issues.

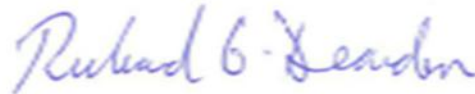
⁹⁵ Endorsement at para 94, ABCO Tab 3, p. 43-44.

⁹⁶ [Hansman](#) at para [98](#).

PART V - ORDER REQUESTED

87. The CNA Respondents respectfully request that this appeal be dismissed with costs on a partial indemnity basis.

Date: June 23, 2023



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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 –

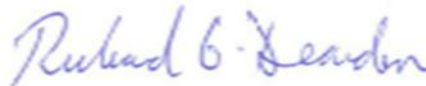
**CANADIAN NURSES ASSOCIATION,
TIM GUEST, MICHAEL VILLENEUVE, TOGETHER NEWS INC.
o/a COMOXVALLEY NEWS and o/a VANISLE NEWS,
and JOHN DOE**

Defendants/Respondents

CERTIFICATE

The Notice of Hearing dated June 5, 2023 has allocated 45 minutes for the oral argument of the Respondents.

An Order under subrule 61.09(2) (original record and exhibits) is not required.



Date: June 23, 2023

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SCHEDULE “A” - LIST OF AUTHORITIES

Case Law

1. [1704604 Ontario Ltd v Pointes Protection Association](#), 2020 SCC 22
2. [910938 Ontario Inc v Moore](#), 2020 ONSC 4553
3. [Air Georgian Limited v Eugeni](#), 2019 ONSC 3250
4. [Armstrong v Corus Entertainment Inc](#), 2018 ONCA 689
5. [Bullard v Rogers Media Inc](#), 2020 ONSC 3084
6. [Bent v Platnick](#), 2020 SCC 23
7. [Hansman v Neufeld](#), 2023 SCC 14
8. [Levant v DeMelle](#), 2021 ONSC 1071
9. [Levant v Demelle](#), 2022 ONCA 79
10. [Marcellin v LPS](#), 2022 ONSC 5886
11. [Park Lawn Corporation v Kahu Capital Partners Ltd](#), 2023 ONCA 129
12. [Rebel News Network Ltd v Gilmore](#), 2021 ONSC 3490

SCHEDULE “B” - TEXT OF STATUTES

1. *Courts of Justice Act*, RSO 1990, c C43, s 137.1

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 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.

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.

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Court File No. CV-21-00673636-0000

CANADIAN FRONTLINE NURSES et al.

-and-

CANADIAN NURSES ASSOCIATION. et al.

Plaintiffs/Appellants

Defendants/Respondents

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE CNA RESPONDENTS

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