Court File No.: CV-24-00095074-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

EDWARD CORNELL, VINCENT GIRCYS, LINDSAY MILNER, SHAUN ZIMMER, ANDREW MILLER, JONKER TRUCKING INC., ANDREW FERA, WAYNE NARVEY, CLAYTON MCALLISTER, KATHLEEN MARKO, NICOLA FORTIN, ARIELLE FORTIN, THOMAS QUIGGIN, TIMOTHY TIESSEN O'JAY LAIDLEY, ERIC BUECKERT, PETER TERRANOVA, NANCY TERRANOVA, RICHARD OCELAK, and KERRI-ANN HAINES

Plaintiffs

-and-

JUSTIN TRUDEAU, CHRYSTIA FREELAND, DAVID LAMETTI, DOMINIC LEBLANC, BILL BLAIR, MARCO MENDICINO, ATTORNEY GENERAL OF CANADA, JODY THOMAS, ROYAL CANADIAN MOUNTED POLICE, DENIS BEAUDOIN, BRENDA LUCKI, STEVE BELL, ROBERT BERNIER, OTTAWA POLICE SERVICES BOARD, OTTAWA POLICE SERVICE, THE TORONTO-DOMINION BANK, CANADIAN IMPERIAL BANK OF COMMERCE, BANK OF MONTRÉAL, NATIONAL BANK OF CANADA, ROYAL BANK OF CANADA, BANK OF NOVA SCOTIA (SCOTIABANK), CANADIAN TIRE SERVICES LTD. doing business as CANADIAN TIRE BANK, MERIDIAN CREDIT UNION, ASSINIBOINE CREDIT UNION, GULF & FRASER CREDIT UNION, STRIDE CREDIT UNION, SIMPLII FINANCIAL, CANADIAN ANTI-HATE NETWORK, BERNIE FARBER, JOHN DOE, and ABC CORP.

Defendants

FACTUM OF THE DEFENDANTS/MOVING PARTIES, CANADIAN ANTI-HATE NETWORK AND BERNIE FARBER

June 24, 2024

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PART I – OVERVIEW

1. This is a motion by the Defendants, the Canadian Anti-Hate Network ("**CAHN**") and Bernie Farber pursuant to s. 137.1 of the *Courts of Justice Act*[1] for the dismissal of a $44,000,000 claim brought against them by the Plaintiffs.

2. The underlying action is a classic strategic lawsuit against public participation ("**SLAPP**"). The impugned expressions at issue all relate to the protests (also known as the "**Freedom Convoy**") that occupied Ottawa in January and February 2022 (the "**Ottawa Protests**"). Bernie Farber and CAHN's expressions relate to reporting on elements of right-wing extremism, including the presence of the swastika, during the Ottawa Protests.

3. The Plaintiffs are an organized and funded group that allege being victimized by the invocation of the *Emergencies Act*[2] to bring an end to the Ottawa Protests. They complain of police brutality and that their bank accounts were frozen. As such, the Plaintiffs have sued various government actors and agencies, police defendants, along with several financial institutions.

4. CAHN and Mr. Farber are stand outs. CAHN is a not-for-profit organization with a mandate to counter right-wing extremism and hate group activity. Mr. Farber frequently speaks about human rights issues. They are the only non-government, non-police, or non-banking defendants in the litigation. They are being targeted because they, in the Plaintiffs' theory, made expressions that convinced the federal government to invoke the *Emergencies Act*, thereby justifying a $44,000,000 claim against them.

5. CAHN and Mr. Farber submit that they should be removed from this action before any further steps are taken in what appears to be, by the Plaintiffs' own admission, a "massive" piece

[1] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1 ("*CJA*").
[2] *Emergencies Act*, RSC 1985, c 22 (4th Supp) ("*Emergencies Act*").

of litigation seeking vindication for allegations of *Charter* breaches by government officials.[3]

6. Without commenting on the legitimacy of the action against the other defendants, CAHN and Mr. Farber should certainly not be involved, and have only been included in this lawsuit for a punitive purpose.

7. As such, not only should the claim against CAHN and Mr. Farber be dismissed, but an award of full indemnity costs should be ordered against the Plaintiffs, along with an award of damages in favour of CAHN and Mr. Farber, as provided for in s. 137.1(9).

PART II – FACTUAL BACKGROUND

A. Parties

8. CAHN is an independent, non-profit organization whose mandate is to monitor, research, and counter hate groups by providing education and information to the public, media, researchers, courts, law enforcement and community groups. It is not a public body nor a governmental organization.[4]

9. Because of its expertise, CAHN's staff and board members are frequently quoted in news reports dealing with far-right individuals, groups, and movements. CAHN is often referenced in academic reports. Representatives of CAHN have testified on its behalf in both the House of Commons and the Senate of Canada.[5]

10. Mr. Bernie Farber is the Founding Chair Emeritus of CAHN. Having dedicated his life to issues relating to human rights, anti-racism, pluralism, and interethnic/faith/race relations, he is frequently asked to publish commentary in the media and is regularly interviewed on these issues. Mr. Farber has been cited in academic publications and in several books, newspapers, and

[3] Affidavit of Richard Warman, sworn May 31, 2024 ("Warman Affidavit") at Exhibit BB, 14:00-14:20 time marker. **[Motion Record, p. 390].**
[4] Warman Affidavit at paras 3-4. **[Motion Record, p. 113].**
[5] Warman Affidavit at para 5. **[Motion Record, p. 113].**

magazines.[6]

11. Unfortunately, Mr. Farber has been dealing with ongoing health issues.[7] This unmeritorious and punitive litigation negatively impacts his ability to focus on his recovery.[8]

12. Much of the Plaintiffs' disdain for CAHN appears to relate to the fact that it has received funding from the federal "Liberal" government, specifically under the banner of the Anti-Racism Action Program. This appears to have led to conspiracy theories that CAHN is in the service of the currently governing Liberal Party of Canada.

13. This conspiracy theory, that CAHN is funded by the Liberal government to help it achieve its own political goals, is a recurring theme raised by CAHN's opponents, and is unfounded.[9] This theory was again advanced by the Plaintiffs through their cross-examination of CAHN's representative.[10]

14. The Plaintiffs describe themselves in the Statement of Claim as "Canadians from all walks of life" who "were subjected to the unreasonable use of the *Emergencies Act*".[11] Only one Plaintiff has provided evidence on this motion, Vincent Gircys, who describes himself as a retired member of the Ontario Provincial Police who attended the Ottawa Protests.[12]

B. Background and Procedural History

15. It is incontrovertible that the Ottawa Protests were one of the most important events of public interest in 2022. The events were widely reported on and discussed in the media and online to the extent of attracting international attention.[13] The Ottawa Protests, and the people

[6] Affidavit of Bernie Farber, sworn May 31, 2024 ("Farber Affidavit"), at para 2. **[Motion Record, p. 395].**
[7] Farber Affidavit at para 4. **[Motion Record, p. 395].**
[8] Farber Affidavit at para 4. **[Motion Record, p. 395].**
[9] Warman Affidavit at para 6. **[Motion Record, p. 113].**
[10] References to cross-examination transcript to be provided once available.
[11] Statement of Claim at paras 1 and 3. **[Motion Record, p. 54 and 57].**
[12] Affidavit of Vincent Gircys, sworn June 14, 2024 ("Gircys Affidavit"), at paras 4 and 15.
[13] See for example, NBC News reporting in the Farber Affidavit at Exhibit B. **[Motion Record, p. 402].**

participating in those protests, were the subject of significant conversation and public debate.

16. In the weeks leading up to the Ottawa Protests, and in accordance with the organization's mandate, CAHN published a series of articles relating to the protests, and specifically the connections between the movement and various elements of the far right.[14]

17. Mr. Richard Warman, a board member and the affiant representing CAHN in this motion, confirms that CAHN staff searched for all publications mentioning the Ottawa Protests in which a CAHN representative (including Mr. Farber) was quoted or cited. The Warman affidavit sets out all of the organization's expressions about the Ottawa Protests up to the date of the invocation of the *Emergencies Act* that were located.[15] This was done since no specific expressions are impugned in the Plaintiffs' Statement of Claim. However, in the Gircys affidavit (the only affidavit tendered by any of the Plaintiffs), Mr. Gircys takes issue with only three sets of expressions[16]:

a. An article published on Salon.com on January 29, 2022, where a CAHN representative, Evan Balgord, was interviewed.

b. An interview Mr. Farber gave on CBC News on January 30, 2022.

c. An article published on CAHN's website dated February 4, 2022.

18. Mr. Gircys affirms that he became aware of these impugned expressions in or around November or December 2022.[17] There is no other evidence as to when any of the other Plaintiffs became aware of these expressions (or any of the other expressions concerning the Ottawa Protests found by CAHN's search).

19. No Notice of Libel has been served on CAHN or Mr. Farber pursuant to the requirements

[14] Warman Affidavit at para 10. **[Motion Record, p. 114].**
[15] Warman Affidavit at para 11. **[Motion Record, p. 114].**
[16] Gircys Affidavit at paras 24-43.
[17] Gircys at para 24.

of the *Libel and Slander Act*.[18]

20. The Plaintiffs issued a Notice of Action on February 14, 2024.[19] They subsequently misfiled with the Court by issuing a Statement of Claim on March 15, 2024[20] (thus bearing a new court file number) instead of filing the Statement of Claim pursuant to Rule 14.03(3).[21] For the purposes of this motion, CAHN and Mr. Farber accept that the limitation period ceased to run on February 14, 2024.

21. This claim has been framed as a mass tort, listing twenty (20) different plaintiffs. It is not a class action. The claim lists no fewer than thirteen (13) different causes of action, often without distinguishing between the different defendants, and seeks $44,000,000 against them on a joint and several basis.[22]

22. CAHN and Mr. Farber were not served with the originating documents of this proceeding.[23] In fact, none of the Defendants named in the Notice of Action or the Statement of Claim have yet been served.[24]

23. Instead, CAHN and Mr. Farber were made aware of the litigation by learning of a post made on X (formerly Twitter) by Mr. Gircys.[25] These posts showed a screenshot of the Notice of Action issued on February 14, 2024 that listed CAHN and Mr. Farber as defendants.[26]

24. CAHN also discovered that Plaintiffs' counsel had issued a "Press Release" announcing the action and describing it as follows:

Today Loberg Ector LLP commenced proceedings in Ontario Superior Court of Justice

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[18] *Libel and Slander Act*, RSO 1990, c L.12, s 5; Warman Affidavit at para 56 **[Motion Record, p. 120];** Farber Affidavit at para 27 **[Motion Record, p. 398].**
[19] Notice of Action dated February 14, 2024. **[Motion Record, p. 20].**
[20] Statement of Claim dated March 15, 2024. **[Motion Record, p. 48].**
[21] *Rules of Civil Procedure*, RRO 1990, Reg 194, s 14.03.
[22] Statement of Claim at para 283. **[Motion Record, p. 107].**
[23] Warman Affidavit at para 40. **[Motion Record, p. 118].**
[24] Warman Affidavit at para 42. **[Motion Record, p. 118].**
[25] Warman Affidavit at para 28. **[Motion Record, p. 117].**
[26] Gircys Affidavit at Exhibit C.

> *(Ottawa) on behalf of 20 victims of the Trudeau government's unconstitutional misuse of the provisions of the Emergencies Act in February, 2022. The Plaintiffs in this action seek compensation and related relief arising from the unjustified and unconstitutional actions of the Liberal government, as well as the actions of certain police agencies and Canadian financial institutions who followed the unlawful orders of the Liberal government, and other defendants who participated in or promoted these actions.*[27]

25. The publicity of the issuance of the claim by Plaintiffs' counsel appears to be aimed at a fundraising objective, with hyperlinks being provided to fundraising campaigns by credit card, PayPal, e-transfer, and a GiveSendGo online campaign.[28]

26. The very existence of this claim against CAHN and Mr. Farber has a chilling effect on their ability to comment on these issues of public importance. As Mr. Farber and Mr. Warman explain in their affidavits, even though they wish to continue CAHN's work, litigation (including this claim) makes Mr. Farber and CAHN "think twice" before speaking out on these issues.[29]

27. Given the condensed timeline in which this motion is being heard (in accordance with s. 137.1), cross-examinations in this matter occurred on Thursday, June 20 and Friday, June 21, 2024. Mr. Farber and Mr. Warman were cross-examined by Plaintiffs' counsel. Mr. Gircys was not cross-examined. This factum is being filed on the next business day (June 24, 2024) without the benefit of cross-examination transcripts. The cross-examination (and the fishing expedition the Plaintiffs sought through undertakings) confirmed the abusive nature of these proceedings brought against CAHN and Mr. Farber. While some of these issues are addressed in this factum, pinpoints to the cross-examination transcript will be provided to the Court at the hearing.

28. CAHN and Mr. Farber have exercised every reasonable effort to ensure that this anti-SLAPP motion does not become the "deep dive" into the proceeding discouraged by the Supreme

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[27] Warman Affidavit at para 30 and Exhibit P. **[Motion Record, p. 117 and 283].**
[28] Warman Affidavit at pars 30-35. **[Motion Record, p. 117-118].**
[29] Farber Affidavit at para 6. **[Motion Record, p. 395].** Warman Affidavit at para 69. **[Motion Record, p. 122].**

Court and the Ontario Court of Appeal.[30] The same cannot be said about the Plaintiffs, who have sought to turn this motion into a true fishing expedition, attempting to gain access to a bounty of records to try and make out a meritless claim.[31]

PART III – ISSUES

29. In CAHN and Mr. Farber's view, the issues to be determined in this motion are as follows:

a. Should no weight be given to the impugned paragraphs of the Gircys affidavit?

b. Does the proceeding arise from an expression that relates to a matter of public interest?

c. Have the Plaintiffs failed to meet their burden to prove that the proceeding has substantial merit and that CAHN and Bernie Farber have no valid defence in the proceeding?

d. Have the Plaintiffs failed to meet their burden to prove that the harm suffered is sufficiently serious that permitting the proceeding to continue outweighs the public interest in protecting the expressions made by CAHN and Bernie Farber?

e. Should damages be awarded to CAHN and Bernie Farber pursuant to s. 137.1(9)?

30. CAHN and Mr. Farber respectfully submit that the answer to all these questions is "yes".

PART IV – LAW AND ARGUMENT

A. Portions of the Gircys Affidavit Are Inadmissible

31. CAHN and Mr. Farber submit that no weight should be placed on the statements made in paragraphs 26, 27, 29, 30, 37, 39, 42, 43, 44, 54, 55, 57, 59-66, 72, 74, 76, 77, 78, 79, 82, 83, 84, 85, 86, 89, 90, 96, and 98, to the extent that they are improper and/or inadmissible.

32. The statements contained in those paragraphs are argumentative (paras 26, 27, 29, 30, 37, 39, 42, 43, 44, 54, 55, 57, 59, 74, 76, 77, 78, 82, 83, 85, 86, 90), constitute improper and

[30] *Park Lawn Corporation v. Kahu Capital Partners Ltd*., 2023 ONCA 129, at paras 33-38.
[31] References to cross-examination transcript to be provided once available.

inadmissible opinion (65, 72, 79, 84, 89, 96, 98) or are simply irrelevant (66). In particular, both in the Gircys affidavit and during the cross-examination, the Plaintiffs have attacked CAHN and its representative with allegations that are entirely irrelevant to these proceedings.[32] These irrelevant and vexatious allegations point to the SLAPP nature of this action.

33. It is trite law that it is for the trier of fact and not a witness to form opinions and draw inferences and conclusions.[33] The statements made in these paragraphs are legal positions or arguments (i.e. "which I believe to be defamatory", "which also speaks to CAHN's bias"), which are improper for an affidavit. It is entirely irrelevant what Mr. Gircys believes to be the truth or what he thinks are the legal conclusion and factual inferences that can be drawn from a set of facts. As an affiant, he must only relate the facts. It is for this Court to draw inferences and conclusions that it deems appropriate.

34. Several other portions of the affidavit contain inadmissible hearsay. Most noteworthy, Mr. Gircys relies heavily on the so-called conclusions of an online post entitled the "HateGate Affair".[34] It is significant that the authors of that self-published website post, Caryma Sa'd and 'Elisa Hategan' (real name Elisa FERRYMAN-COHEN), have previously sued CAHN and Mr. Farber. Ms. Sa'd's claim against CAHN in Federal Court was dismissed without leave to amend as having no factual or legal basis, and therefore no reasonable prospect of success.[35] Ms. Hategan's claim against Mr. Farber in this Court was dismissed as frivolous and vexatious and "a waste of the time and resources of the courts."[36] These are but further angles of the same baseless conspiracy theories levelled at CAHN in this litigation, demonstrating it is a SLAPP.

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[32] Gircys Affidavit at pars 73-97; References to cross-examination transcript to be provided once available.
[33] *Ismail v Fleming*, 2018 ONSC 6780, at para 19.
[34] Gircys Affidavit at para 60.
[35] *Sa'd v. Yew,* 2023 FC 1286.
[36] *Hategan v. Farber*, 2021 ONSC 874, at paras 65-66 and 152.

B. Overview of 137.1 Section Framework

35. Section 137.1 of the *Courts of Justice Act* is rooted in the fundamental Canadian principle of freedom of expression.[37] The provision allows this Court to "screen out lawsuits that unduly limit expression on matters of public interest, through the identification and pre-trial dismissal of such actions".[38]

36. Subsections 137.1(3) and (4) set out a two-part test that is to be applied:

a. First, the moving parties/defendants (here CAHN and Mr. Farber) have the onus of establishing that the proceeding arises from an expression that "relates to a matter of public interest" (the "**public interest hurdle**");

b. Second, the burden shifts to the responding parties/plaintiffs to establish all of the following:

i. That there are grounds to believe that:

1. The proceeding has "substantial" merit; and,

2. the moving party has no "valid" defence

(referred to as the "**merits-based hurdle**"); and,

ii. That the harm "likely to be suffered" by the respondent is sufficiently serious such that the public interest in allowing the proceeding to continue outweighs the public interest in protecting the expression (the "**weighing exercise**").[39]

C. CAHN and Mr. Farber's Expressions Relate to a Matter of Public Interest – s. 137.1(3)

37. The first step of the analysis under s.137.1 places an initial burden on the moving party to satisfy the Court that the proceeding arises from an expression relating to a matter of public

[37] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, ("*Pointes*") at paras 1, 2, 62.
[38] *Marcellin v. London (Police Services Board)*, 2024 ONCA 468, ("*Marcellin*") at para 3.
[39] *CJA* at s. 137.1(3)-(4); *Marcellin* at para 3.

interest.[40]

38. The "public interest" concept under s. 137.1(3) is given a liberal interpretation to ensure a "*broad scope of protection*" in a "*generous and expansive fashion*."[41] The Supreme Court has defined the concept of public interest as follows:

> *(...) involving matters in which the public has some substantial concern beyond curiosity or prurient interest, and includes a matter of public interest that affects the welfare of citizens or concerns an issue of public controversy or concerns an issue about which citizens have the right to make fair comment*.[42]

39. At this stage of the analysis, the burden is "*purposefully not an onerous one*" and "*it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest".* Stated differently, "*there is no qualitative assessment of the expression at this stage*."[43]

40. In his affidavit, Mr. Gircys has raised three expressions as "defamatory". For the purposes of this motion, these are the only expressions that have, even remotely, been particularized by the Plaintiffs.

41. The first is a January 30, 2022 interview of Mr. Farber on CBC News regarding the Ottawa Protests and the presence of "bullies, racists, bigots and Nazis" at the protests. He also raises the issue of the presence of the swastika and provides his opinion that the convoy has "*seeded the ground* […] *for the worst display of Nazi and racist propaganda that* [he] *has ever seen in Canada*."[44]

42. The second is a January 29, 2022 interview of Mr. Balgord published on Salon.com. In that article, Mr. Balgord discusses the far-right elements within the "Freedom Convoy" and explains

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[40] *Pointes* at para 18.
[41] *Pointes* at para 30.
[42] *Grant v Torstar Corp.*, 2009 SCC 61 ("*Grant"*) at para 102; *Pointes* at para 27.
[43] *Pointes* at para 28.
[44] Farber Affidavit at Exhibit A, Time stamp 1:12-1:23. **[Motion Record, p. 400].**

that far-right hate groups monitored by CAHN were involved in the Ottawa Protests.[45]

43. The third is a February 4, 2022 article published by CAHN. That article explains how the Ottawa Protests have demonstrated the need for the federal government to adopt anti-hate legislation. The article contains a short introduction referring to the Ottawa Protests, which is followed by detailed commentary on the need to adopt legislation to respond to online hate. The article urges readers to contact their Members of Parliament to advocate for anti-hate legislation.[46]

44. The Plaintiffs had access to all of the possible expressions by CAHN and/or Mr. Farber about the Ottawa Protests identified by CAHN and Mr. Farber in their affidavits in addition to any research of their own. The Plaintiff Mr. Gircys has identified only three expressions that he complains of. All the other Plaintiffs chose not to submit any evidence in response to this motion. The Statement of Claim itself identifies no impugned expressions by CAHN and/or Mr. Farber.

45. The expressions identified by the Plaintiff Mr. Gircys (and indeed, any of the expressions identified by CAHN and/or Mr. Farber) relating to the Ottawa Protests easily meet this preliminary burden of concerning a matter of public interest.

46. In the context of the *Li et al. v. Barber et al*. class action proceedings initiated by Ottawa residents and businesses against protest participants, RSJ MacLeod has already found that the protests were expressions on matters of public interest.[47] If the protests themselves are expressions on matters of public interest, any expressions that relate to those protests are *ipso facto* also matters of public interest.

47. CAHN's very mandate is to monitor, research and counter hate groups.[48] This activity is clearly one that affects the welfare of citizens and is of substantial concern. Citizens have a right,

[45] Warman Affidavit at Exhibit I. **[Motion Record, p. 210].**
[46] Warman Affidavit at Exhibit K **[Motion Record, p. 238].**
[47] *Li et al. v. Barber et al*., 2024 ONSC 775 at para 18.
[48] Warman Affidavit at para 3 **[Motion Record, p. 113].**

if not a duty, to make fair comment on matters concerning hate groups.

48. Here, CAHN and Mr. Farber's expressions on the Ottawa Protests, namely the connection between certain actors in the Ottawa Protests and known far-right hate groups, and the presence of hate symbols at the protests (including Confederate flags and the much discussed and intolerable presence of a swastika), are exactly the type of public interest expressions s. 137.1 is meant to protect.

49. With respect to the article published by CAHN on February 4, 2022, it is effectively a call to the federal government to legislate on the issue of online hate (and an encouragement to readers to contact their Members of Parliament). An expression attempting to engage the public on whether legislation should be passed is the epitome of an issue of public interest.

50. CAHN and Mr. Farber's expressions clearly meet their initial burden of being on an issue of public interest.

D. The Plaintiffs' Action Does Not Have Substantial Merit: s. 137.1(4)(a)

51. The Plaintiffs' theory of liability with respect to CAHN and Mr. Farber is opaque. Although the Plaintiffs have attempted to rely on common causes of action (such as defamation and civil conspiracy), what they complain of is far different.

52. Put at its highest, the Plaintiffs' claim appears to complain of an "interference in executive decision-making". The Plaintiffs say that because CAHN and Mr. Farber furnished what the Plaintiffs allege to be wrongful information about the Ottawa Protests to well-placed government officials, the Governor in Council decided to proclaim an unprecedented declaration of an emergency under the *Emergencies Act*.[49] The Plaintiffs then say that they suffered damages because of the decision to proclaim a declaration of an emergency. As such, they say that CAHN

[49] Statement of Claim at Paragraph 253 **[Motion Record, p. 100].**

and Mr. Farber are jointly and severally liable for $44,000,000 in damages.

53. The claim must be summarily dismissed as untenable in law. To hold otherwise would be to impose liability on any person or group that seeks to make submissions on legislation drafting or regulation enacting. Taken on its face, such a theory of liability would allow individuals charged under legislation with stricter penalties for driving under the influence of alcohol to sue an advocacy group, such as Mothers Against Drunk Driving, for attempting to influence the legislative/regulatory process.

54. The allegation that CAHN and Mr. Farber caused the Governor in Council to proclaim a declaration of an emergency is as preposterous factually as the untenable legal cause of action advanced by the Plaintiffs. The allegation is simply a reiteration of a conspiracy theory that CAHN, being a recipient of federal government funding for certain projects, engages in acts to prop-up the Liberal Government of Prime Minister Justin Trudeau. This conspiracy theory was repeated during cross-examinations.[50]

55. While it is CAHN and Mr. Farber's submission that this Court should dismiss the claim without needing to weigh into each of the causes of action pleaded against them, as it is on its face abusive, for the sake of completeness, it does so below.

a. The Plaintiffs' Statement of Claim is Deficient

56. A strong indication that this action as against CAHN and Mr. Farber is a SLAPP suit arises from the fatal deficiencies and procedural issues with this action.

57. Most importantly, the pleadings are grossly deficient. While courts have been more flexible than previously with respect to pleadings in defamation matters, the Court of Appeal has confirmed that there must be sufficient details in the claim:

> *[49] […] As this court clarified in Catalyst, in applying the modern, flexible approach*

[50] References to cross-examination transcript to be provided once available.

> *in an assessment of defamation pleadings, the real question is whether the pleadings disclose a "coherent body of fact" about the elements of a claim for defamation, such as the gist of the statement, time, place, speaker and audience. Or are the pleadings merely replete with bald allegations such that they amount to no more than "a fishing expedition" with the result that the defendant is left in the dark about the claim to be met.*[51]

58. The Statement of Claim contains no particulars that would allow the Defendants even to remotely understand what statements were made, when and where they were made, and to whom. Instead, the Plaintiffs advanced completely baseless conspiracy theories against CAHN and Mr. Farber without any basis to do so. It is the exact type of "fishing expedition" that the Court of Appeal has warned against.

59. The Plaintiffs are not allowed to take another "kick at the can". The anti-SLAPP legislation is designed to avoid giving further opportunities for claims brought with an intention to limit discussion on matters of public debate to be reframed so as to avoid the application of s. 137.1.[52] The Court of Appeal has overturned judges who allowed this:

> *[52] It is a requirement of a defamation claim that the words complained of must be identified, together with their alleged defamatory meaning and any alleged innuendo arising from them:* [Citations omitted]. *The prohibition against amending the claim once the motion is commenced arises from the strict pleading requirements of a defamation claim.*
>
> *[53] The effect of what the motion judge did by looking past the actual statement of claim to the allegations more fully set out in the factum on the motion was to circumvent the prohibition in s. 137.1(6) and allow the respondents to effectively amend their claim.*[53]

60. Even though CAHN and Mr. Farber address the expressions and the meanings suggested in the Gircys affidavit, for the benefit of this Court, it was entirely improper for the Plaintiffs to do so. They are stuck to their deficient pleading and their claim should be dismissed based on their failure to plead sufficient allegations against CAHN and Mr. Farber.

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[51] *PMC York Properties Inc. v. Siudak*, 2022 ONCA 635, at para 49.
[52] *CJA* at s. 137.1(6).
[53] *Thatcher-Craig v. Clearview (Township)*, 2023 ONCA 96, at paras 52-53.

61. A plaintiff must not be allowed to issue a $44,000,000 claim, publish it to the world on social media to fundraise and trade on its very existence, thereby also creating a chilling effect on those named in the pleading and their ability to comment on matters of public interest, and then later amend their claim (or attempt to amend their claim indirectly by providing particulars in an affidavit) to circumvent s. 137.1.

62. The Court need not proceed any further. For the sake of completeness, the absence of substantial merit and the presence of valid defences to the pleaded torts are discussed below.

b. No Tort of Defamation

63. Putting the Statement of Claim at its highest, it appears that the action against CAHN and Mr. Farber sounds primarily in defamation.

i. S. 6 of the *Libel and Slander Act* is an Absolute Bar to this Litigation

64. The *Libel and Slander Act* requires plaintiffs in defamation claims relating to a newspaper or a broadcast to provide notice in writing to defendants within six (6) weeks of the libel coming to the plaintiffs' knowledge[54] and to issue a claim within three (3) months[55].

65. The failure to comply with these sections is an absolute bar to litigation.[56] This is true of both media and non-media defendants:

> *114 The Ontario Court of Appeal has consistently ruled that s. 5(1) of the Act applies to all defendants, regardless of whether they are media or non-media defendants: Watson v. Southam Inc., [2000] O.J. No. 2555 (Ont. C.A.) at para. 53; Weiss v. Sawyer (2002), 217 D.L.R. (4th) 129 (Ont. C.A.) at para. 15; DeHeus v. Niagara Regional Police Services Board, [2001] O.J. No. 4201 (Ont. C.A.). In Watson v. Southam Inc. , supra, Abella J.A. stated at para. 53:*
>
> > *I see no principled basis for excluding any defendant from the benefit of the notice provision in s. 5(1) of the Libel and Slander Act. The purpose of the notice requirement is to give a defendant an independent opportunity to issue a retraction, correction, withdrawal or apology for allegedly defamatory statements, thereby mitigating potential damages. Whether the*

[54] *Libel and Slander Act*, s. 5(1).
[55] *Libel and Slander Act*, s. 6.
[56] *Bagci v. Niagara Regional Police Services Board*, 2023 ONSC 6296 at para 64.

> *defendant is a media defendant appears to me to be irrelevant. The opportunity to mitigate damages should be available to all defendants.*[57]

66. The Plaintiffs never served CAHN and Mr. Farber with a Notice of Libel, nor did they start an action within three months of becoming aware of the expressions.

67. The unpleaded impugned expressions were made between January 29 and February 4, 2022. Mr. Gircys is the only affiant having provided any evidence on this motion for the Plaintiffs. In his affidavit, he admits to becoming aware of the CBC News interview in or around November or December 2022 (and the other impugned expressions sometime thereafter), some ~62 weeks or ~14 months before he (and the other Plaintiffs) issued the Statement of Claim (without first serving a Notice of Libel).[58]

68. It is not even a close call. The Plaintiffs missed the deadlines imposed by the *Libel and Slander Act* and still chose to tack on this claim of defamation against CAHN and Mr. Farber to their massive piece of litigation against the government, banks and police services.

69. None of the Plaintiffs other than Mr. Gircys have provided any evidence whatsoever. An adverse inference must be drawn with respect to each of those Plaintiffs in that their evidence must be no better than his.

70. There is no doubt that the first impugned expression (the CBC News broadcast) and the second impugned expression (the Salon.com article) are covered by the *Libel and Slander Act*.

71. Therefore, the Plaintiffs' claims in defamation with respect to these unpleaded impugned expressions are time-barred. At the very least, the Plaintiffs are unable to meet their burden of showing that there are grounds to believe that a limitations defence would not apply.

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[57] *St. Elizabeth Home Society v. Hamilton (City)*, 2005 CarswellOnt 7298, [2005] O.J. No. 5369, at para 114.
[58] Gircys Affidavit at para 22.

ii. Two-Year Limitation Period was Missed

72. In addition, the claim in defamation is barred by the general two-year limitation period under the *Limitations Act*, *2002,* S.O., c. 24.

73. The impugned expressions were all made between January 29 and February 4, 2022. The Notice of Action was issued on February 14, 2024. Even if there are other impugned expressions, these must, according to the Plaintiffs' own theory, have been made prior to February 14, 2022, so as to have the impact of influencing the government's decision to invoke the *Emergencies Act*.

74. If the unpleaded impugned expressions had such a profound impact on public policy that they caused the federal government to invoke the *Emergencies Act*, as the Plaintiffs allege, it is implausible that the expressions did not come to the Plaintiffs' attention when (or very shortly after) they were made.

75. Again, apart from Mr. Gircys, none of the Plaintiffs have provided any evidence, *nor have they even pleaded discoverability.* The Plaintiffs are once again unable to meet their burden of showing that there are grounds to believe that a limitations defence would not apply.

iii. The Unpleaded Meanings Do Not Arise from the Expressions

76. The elements of the tort of defamation are well-established. Before turning to the defences, a plaintiff must prove: "*(1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff."*[59]

77. For words to be defamatory, they must have a "defamatory meaning". This is a question of law (and thus, it was inappropriate for Mr. Gircys to conclude in his affidavit that any expression

[59] *Grant* at para 28.

was "defamatory"). To determine whether words are capable of a defamatory meaning: "*the trial judge will construe the words according to the meaning they would be given by reasonable persons of ordinary intelligence, and will not consider what persons setting themselves to work to deduce some unusual meaning might succeed in extracting from them*."[60]

78. Again, it would be improper for this Court to consider the unpleaded meanings set out in the Gircys affidavit. However, even a cursory review of the meanings alleged by Mr. Gircys would lead this Court to conclude that a reasonable person would not agree that these meanings arise upon reviewing the impugned expressions. In cross-examination, the Plaintiffs focused specifically on Mr. Farber's interview on CBC News.[61]

79. It is important for this Court to consider the entirety of Mr. Farber's interview with the CBC:

> *[48] Allegedly defamatory comments must be read in context: Guergis at para. 65; Mantini v. Smith Lyons LLP (2003), 2003 CanLII 22736 (ON CA), 64 O.R. (3d) 516 (C.A.), at para. 14, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 344. Context is important in determining the meaning of words and whether they are capable of being defamatory. Reading impugned comments in isolation is unfair and is of no assistance to the court in its analysis.* […][62]

80. Upon a review of the interview, Mr. Farber does not say, nor does he suggest that people who participated in the Ottawa Protests are bullies, bigots, racists, extremists, neo-Nazis, Nazis, or possess the other undesirable attributes set out at paragraph 44 of the Gircys affidavit. What he actually said was that, in his opinion (which he made explicitly clear to the audience) those who participated in the Ottawa Protests, where people were carrying the swastika and other racist imagery, were tacitly supporting these extremist elements, even if they did not hold such views themselves. This is not only a fair opinion that one could hold (which will be dealt with below

[60] *Mantini v. Smith Lyons LLP*, 2003 CanLII 22736 (ON CA), at para 10.
[61] References to cross-examination transcript to be provided once available.
[62] *Frank v. Legate*, 2015 ONCA 631, at para 48.

under the defence of fair comment) but also entirely different from what Mr. Gircys (improperly) pleads in his affidavit.

81. It is also curious that the Plaintiffs allege (without any evidence) that not all of them participated in or even supported the Ottawa Protests.[63] If that is the case, and Mr. Farber's expressions were only targeted at protest participants, there is, by the Plaintiffs' own logic, certainly no valid claim with respect to those Plaintiffs.

iv. No Group Defamation in Canadian Law

82. The second element of the tort of defamation requires that the plaintiff be identified by the defendant. In the case at bar, only one of the Plaintiffs is ever named by CAHN. Thomas Quiggin is named in CAHN's first article on the "Freedom Convoy".[64] That article does not form part of the unpleaded impugned expressions discussed in the Gircys affidavit. In any event, Mr. Quiggin has provided no evidence on this motion.

83. Thus, given that none of the Plaintiffs are named, they cannot meet the second element of the tort of defamation (i.e. that they were identified in the impugned expressions), and the entire claim must fail.

84. Put at its highest, what the Plaintiffs are attempting to argue is that the impugned expressions referenced the participants of the Ottawa Protests and, as some of them were among the participants, they were defamed by the expressions made by CAHN and Mr. Farber.

85. The appellate courts have been clear that "group defamation" claims are difficult. Defamation of a group is not actionable.[65] Courts have imposed a high standard where a plaintiff

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[63] Statement of Claim at para 33 **[Motion Record, p. 62].**
[64] Warman Affidavit at paras 12-13 **[Motion Record, p. 390].**
[65] *Hudspeth v Whatcott*, 2017 ONSC 1708 ("*Hudspeth*"), at para 201, citing *Elliott v. Canadian Broadcasting Corp*. (1993), 1994 CanLII 10569 (ON SC), 16 O.R. (3d) 677 (Gen. Div.), affd. on different grounds (1995), 1995 CanLII 244 (ON CA), 25 O.R. (3d) 302 (C.A.) and *Knupffer v. London Express Newspaper Ltd*., [1944] A.C. 116 at p. 124, [1944] 1 All E.R. 495.

alleges harm as a member of a group: "[*w*]*ords aimed at defaming a group are only actionable by the members of the group that have severally been singled out*"[66]. Given that an action for defamation is a personal action, individuals in a group must be able to show that the words were about them in particular (which is referred to as the "singled-out principle").[67]

86. For the same reason that defamation claims "are difficult to mold as class actions"[68], they are difficult to prosecute by way of mass tort, as in this case.

87. This Court should have regard to the factors considered by the Supreme Court in *Bou Malhab v. Diffusion Métromédia CMR inc.*[69], and determine that the unpleaded impugned expressions did not refer, individually or discretely, to each person who participated or attended the Ottawa Protests in January and February 2022.

88. Given the large size of the group, the heterogeneous demographics of the group, the generality of the impugned expressions, the fact that the protestors were not identifiable or visible in the community, that all but Quiggin were unknown to the CAHN and Farber defendants, and the implausibility that the generalized statements would attach to each member of the group, there are no grounds to believe that a claim for "group defamation" in this case could be established.

v. The Defence of Fair Comment Applies

89. The burden of proof must remain front of mind when considering the defences. The burden is on the responding party/plaintiffs to show that there is some basis in the record and the law that the moving party/defendants do not have a valid defence.

90. Mr. Farber's actual statements in the CBC News article, which appear to be the focus of the Plaintiffs in their cross-examination and in the Gircys affidavit, are the essence of fair

[66] Emphasis added: *Hudspeth* at para 193.
[67] *Hudspeth* at para 197.
[68] *Hudspeth* at para 225.
[69] *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, at paras 57-79.

comment.

91. Mr. Farber stated that by participating in the same protests where people carried racist images such as swastikas, it was his opinion that the non-extremist individuals who participated in the protests tacitly supported these extremist elements. In doing so, Mr. Farber indicated that they were walking in the shoes of bullies, racists, bigots, and Nazis.

92. Of course, no person would understand that Mr. Farber meant that these non-extremist individuals were putting on physical shoes belonging to Nazis. A reasonable person would understand Mr. Farber to have meant that it was his opinion that the non-extremist individuals were tacitly supporting the extremist elements given the presence of these racist and violent symbols during the Ottawa Protests.

93. The defence of fair comment "*is premised on the idea that citizens must be able to openly declare their real opinions on matters of public interest without fear of reprisal in the form of actions for defamation*".[70]

94. There are five elements to the defence:

> *First, the "comment must be on a matter of public interest" (Grant, at para. 31). Second, it must be "based on fact" (para. 31). Third, "though it can include inferences of fact, [it] must be recognisable as comment" (para. 31). Fourth, it must satisfy an objective test: "could any person honestly express that opinion on the proved facts?" (para. 31). Finally, even if the above elements are met, "the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice" (para. 31). Consideration of the elements of the fair comment defence requires an assessment of the defamatory words used in the full context surrounding their use (WIC Radio, at paras. 55-56).*[71]

95. Here, Mr. Farber's comments clearly attract the defence. (1) He was speaking about the Ottawa Protests, a clear issue of public interest. (2) His comments were based on true facts: that the swastika and other racist imagery had been seen in Ottawa during the Protests. (3) A reasonable

[70] *Hansman v. Neufeld*, 2023 SCC 14 ("*Hansman*"), at para 95.
[71] *Hansman* at para 96, citing *WIC Radio Ltd. v. Simpson*, 2008 SCC 40.

person would understand his statements to be comment (prefaced by "In my opinion…") and not an allegation of fact (it would be impossible to "prove" scientifically that one person was tacitly supporting another through their omission to act). (4) A reasonable person could conclude that someone who participated in an event where swastikas were present, even if they are against Nazism, provided tacit support to the extremist elements of the event. (5) Although there are strained arguments to the contrary by the Plaintiffs, there is not a single shred of evidence of malice. CAHN and Mr. Farber could not have acted with malice given that they did not know any of the Plaintiffs (except Quiggin) prior to this litigation.

vi. Other Defences Apply

96. Although the defence of fair comment would clearly apply, the Plaintiffs are unable to show (as it is their burden on this motion) that the defences qualified privilege and/or responsible communication on a matter of public interest are not valid defences. For the purposes of this anti-SLAPP motion, in order to avoid the "deep dive" and given the screening nature of this motion, CAHN and Mr. Farber say that there is no need to consider these defences.

97. CAHN and Mr. Farber also put into play a defence of justification in their Notice of Motion. Based on the proposed meanings outlined (albeit improperly) in the Gircys affidavit, it does not appear as though a defence of justification should be considered at this juncture with respect to the statements that appear to be impugned by the Plaintiffs. This is because Mr. Farber and Mr. Warman have stated that they did not know Mr. Gircys (the only Plaintiff who provided any evidence) prior to this litigation. Thus, it would not be logically possible for them to prove that it would be true that Mr. Gircys held any of the qualities and attributes outlined in paragraph 44 of his affidavit at the time the impugned statements were made.

c. No Tort of Negligence

98. S. 137.1 targets all proceedings that "arise from" expressions on matters of public interest. Thus, "*proceedings arising from an expression are not limited to those directly concerned with expression, such as defamation suits*".[72] As such, in the leading case of *Pointes Protection*, the courts dismissed a breach of contract claim that arose from an expression.[73] Similarly, in *Gill v Maciver*, this Court dismissed the causes of action framed as negligence and conspiracy, in addition to the central claim of defamation.[74] In doing so, the Court did not consider each of the causes of action individually, finding that these other causes of action were "nothing but dressed-up and unsubstantiated variations of the central claims of alleged defamation".[75]

99. The specific pleas of negligence are set out in paragraph 224(b) of the Statement of Claim. Since there is no allegation that CAHN or Mr. Farber disclosed financial information and/or seized the Plaintiffs' bank accounts, it appears that the only allegation relevant to them is that they "*unlawfully and unreasonably disseminat*[ed] *false information about the Plaintiffs with malicious intent to harm or otherwise negligently*". As in *Gill*, this is but a "dressed-up" claim of defamation.

100. In any event, the Plaintiffs' claim in negligence cannot pass the burden on this motion. The test for negligence is well established.[76] In this case, there is no recognized general duty of care on the part of a non-governmental organization towards citizens-at-large. There are likely several public policy considerations that would militate against the recognition of such a duty. The causation issue is also significant here: the Plaintiffs cannot prove that CAHN and Mr. Farber's expressions caused the damages they allege to have suffered.

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[72] *Pointes* at para 24.
[73] *Pointes* at para 24.
[74] *Gill v. Maciver*, 2022 ONSC 1279 ("*Gill*"), at para 16.
[75] *Gill* at para 16.
[76] *1688782 Ontario Inc. v. Maple Leaf Foods Inc.,* 2020 SCC 35 at para 18.

d. No Civil Conspiracy

101. The claim in civil conspiracy, just like the claim in negligence, is simply a "dressed-up" unsubstantiated allegation of defamation.

102. The legal test for civil conspiracy is well-established and need not be fully considered here. Fundamentally, it requires that the alleged conspirators acted "*in combination, that is, in concert, by agreement or with a common design*".[77]

103. There is a fundamental flaw in the Plaintiffs' theory. They claim that "[e]*ach of the Defendants* ***ultimately*** *assisted one another in their unlawful actions perpetrated against the Plaintiffs*" (emphasis added)[78]. The "ultimate" consequence of an action does not matter. For there to be civil conspiracy, the defendants must have had an agreement between them (i.e. they are acting in concert) to achieve a common goal as they were committing their "unlawful actions". Thus, there must be some evidence that the Defendants had preordained injury and damage to the Plaintiffs, not that their collective activities ended up helping each other achieve an independent goal.

104. Here, there is no evidence whatsoever, only bald assertions, that CAHN and Mr. Farber conspired with the Liberal Government (and apparently the other defendants, including the financial institutions and police services named in the proceedings). It is simply a reutterance of a conspiracy theory, as has been done in the past by other individuals who disapprove of CAHN's activities.

105. In any event, CAHN and Mr. Farber have given sworn evidence that they had no agreement whatsoever with any of the named Defendants.[79]

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[77] *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, at para 26.
[78] Statement of Claim at paragraph 269.
[79] Warman Affidavit at para 55 **[Motion Record, p. 120]**; Farber Affidavit at para 26 **[Motion Record, p. 398].**

e. No Other Causes of Action

106. The Plaintiffs plead numerous other causes of action, some of which appear to be targeting other defendants. However, damages of $44,000,000 are sought on a joint and several basis against all the defendants (which is another indication of the SLAPP nature of the claim), without regard to the causes of actions alleged.

107. As outlined above, it appears that the action against CAHN and Mr. Farber sounds primarily in defamation. CAHN and Mr. Farber do not propose to review every cause of action pleaded in the Statement of Claim. The allegations with respect to other causes of action, such as harassment and intimidation[80], are simply repeating the same allegations of defamation.[81]

108. The fact that so many causes of action are pleaded, and that significant damages are sought against all the Defendants on a joint and several basis without regard for the different causes of action, is a further indication that this is a SLAPP suit. This Court has previously held that litigation naming multiple parties for outrageous sums of money are strong indications that the SLAPP provisions apply: "*The sheer variety of their targets and the magnitude of their claims set them up to be examined pursuant to s. 137.*1."[82]

E. The Harm to the Defendants in Allowing this Proceeding to Continue Far Outweighs the Harm to the Plaintiffs: s. 137.1(4)(b)

109. The final step of the 137.1 framework calls for a weighing exercise that is described by the Supreme Court as the "fundamental crux of the analysis" under the anti-SLAPP provisions:

> *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.*[83]

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[80] Statement of Claim at para 262 **[Motion Record, p. 103].**
[81] This is a common theme in SLAPP decisions: see for example *Gill* at para 16.
[82] *Gill* at para 51.
[83] *Pointes* at para 62.

110. In the case at bar, the Plaintiffs have failed to meet their burden of proving reasonably significant harm from the unpleaded impugned expressions. Instead, the public interest in protecting the expression far outweighs any concern in allowing this abusive proceeding to continue as against CAHN and Mr. Farber.

a. There is No Evidence of Any Harm to the Plaintiffs

111. Except for Mr. Gircys, who provided vague and unparticularized statements as to the harm he suffered, no other witness has tendered any evidence to describe any alleged harm. This is fatal to all their claims: they have no evidence whatsoever of harm that is then to be balanced against the significant harm to CAHN and Mr. Farber.[84]

112. Mr. Gircys' bald assertions and unsourced, unexplained damages claims contained in his pleading and affidavit are insufficient on a s. 137.1 motion.[85] As the Supreme Court set out in *Pointes*, a motion judge "*must be able to make an informed assessment, at least at a general or 'ballpark' level, about the nature and quantum of the damages suffered or likely to be suffered by the plaintiff*".[86]

113. There is nothing in the record that would justify damages even remotely close to the $44,000,000 claimed for the twenty (20) plaintiffs in this mass tort. The Plaintiffs have not met their burden of showing any credible evidence of harm.

b. Any Harm Suffered Cannot be Linked to the Defendants' Expressions

114. There is no evidence whatsoever that Mr. Gircys was identified as a Nazi or a neo-Nazi or a supporter of such groups by a single person because of CAHN and Mr. Farber.

115. There is no evidence whatsoever that Mr. Gircys' bank accounts were frozen because of

[84] See for example *Gill* at para 76.
[85] *Pointes* at para 71. *1704604 Ontario Ltd. v. Pointes Protection Association,* 2018 ONCA 685 ("*Pointes ONCA*"), at para 91.
[86] *Pointes ONCA*, at para 91.

CAHN and Mr. Farber.

116. There is no evidence whatsoever that Mr. Gircys' relationships have been lost or strained because of CAHN and Mr. Farber. It is not implausible that some people may think less of Mr. Gircys because of his involvement (and even his simple presence at) the Ottawa Protests, or because of his other controversial views, including that people died because of COVID-19 vaccinations or other "mandates"[87]. If Mr. Gircys has espoused the same views he shared widely on the internet to the world-at-large[88] to his friends and family, it is not implausible that some would think less of him.

117. In addition, there is simply no causal link between the impugned expressions of CAHN and Mr. Farber and the alleged harm. By Mr. Gircys' own admission, he only became aware of the impugned expressions in November/December 2022. It is implausible that these expressions, that he was not even aware of for many months, were the cause of any strained relationships in his life.

118. Finally, there is no compensable harm from the statement that Mr. Gircys "*feel*[s] *isolated and discouraged about the state of our country*".[89] Such a statement is again indicative of the broader political and ideological purpose underlying the Plaintiffs' bringing this claim against CAHN and Mr. Farber and not of a *bona fide* claim to seek damages for reputational or other harm.

c. The Importance to the Public Interest of Protecting the Expressions

119. Against this backdrop of the Plaintiffs having suffered no (or at the very least, insignificant and unrelated) harm, the Court should consider the strong public interest of protecting the expressions at issue:

a. Mr. Farber's comments targeted far-right extremism, specifically the swastika,

[87] Warman Affidavit at Exhibit CC, time stamp 11:30 to 12:15 **[Motion Record, p. 932].**
[88] Warman Affidavit at Exhibits BB and CC **[Motion Record, p. 390 and 392].**
[89] Gircys Affidavit at para 101.

which must be called out on all possible occasions given the history of discrimination and Holocaust denial.

b. Non-profit organizations such as CAHN should not feel pressure to limit their expressions on matters of public interest, especially given CAHN's mandate to monitor and counter hate speech and other destructive activities.

c. Forcing CAHN and/or Mr. Farber to remain in a $44,000,000 *Charter* claim is punitive. CAHN and/or Mr. Farber would be forced to spend hundreds of thousands of dollars to participate in what will, without a doubt, be a series of motions, significant productions, weeks of examinations for discovery, and months of trial, when there is no valid claim against either of them.

120. It is curious that Mr. Gircys, in his affidavit, states that this action must proceed because it "*is important to our fundamental rights and freedoms and truth seeking in our justice system*".[90] That is not a valid reason to include CAHN and/or Mr. Farber in a $44,000,000 claim against the government, banks, and police services. There has been a commission of inquiry into the issue of the invocation of the *Emergencies Act*.[91] There has been ongoing litigation at the Federal Court by some of these same plaintiffs.[92] There are mechanisms to seek production of relevant documents held by third parties in civil litigation.[93] Suing CAHN and Mr. Farber as part of a discovery fishing expedition is simply punitive and abusive.

F. Damages Should be Awarded to CAHN and Farber Under s. 137.1(9)

121. CAHN and Mr. Farber should have never been named in this proceeding.

122. S. 137.1(9) provides that, if a judge finds that the proceeding was brought in bad faith or

[90] Gircys Affidavit at para 103.
[91] Report of the Public Inquiry into the 2022 Public Order Emergency: available at https://publicorderemergencycommission.ca/final-report/.
[92] *Canadian Frontline Nurses v. Canada (Attorney General),* 2024 FC 42 at para 19.
[93] *Rules of Civil Procedure*, R. 31.10.

for an improper purpose, a judge may award damages that they consider appropriate.[94]

123. The Court of Appeal has held that this additional remedy available to a moving party (beyond having the action against them dismissed and receiving full indemnity costs) is to be used in cases where the plaintiff's motive was to punish, silence, or intimidate the defendant.[95] In other cases, this Court has awarded damages of $7,500 where the plaintiff was found to continue a desire to intimidate the defendant[96] and $20,000 where the plaintiff's purpose was to stifle "public debate around a crucially important public issue" and the defendant suffered "personal anguish" as a result of the action.[97]

124. This is a case for damages. Mr. Farber has been dealing with serious health issues. He has been forced to respond to this proceeding seeking an order against him for $44,000,0000 instead of focusing on his health.[98] While this alone would not be sufficient to award damages, combined with the fact that the Plaintiffs have used the litigation to advance conspiracy theories for collateral purposes make it clear that this claim was brought and prosecuted in an abusive manner.

125. The Plaintiffs' conduct not only in issuing a baseless claim against CAHN and Mr. Farber but also in the way the claim was prosecuted, speak to a broader improper purpose in pursuing this claim: seeking revenge against CAHN for perceived impropriety beyond the case at hand.

126. Specifically, the Plaintiffs' cross-examination of Mr. Warman show that they were "out for blood". The Plaintiffs asked Mr. Warman questions suggesting support of the "Liberal" government.[99] These are the same conspiracy theories that continue to be levelled against CAHN. The Plaintiffs did not seriously care about the litigation at hand, but were instead attempting to

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[94] *CJA* at s. 137.1(9).
[95] *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128 ("*United Soils*") at paras 34-35.
[96] *United Soils* at para 32 citing *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 4450 at para 78.
[97] *United Soils* at para 32 citing *United Soils Management Ltd. v. Barclay*, 2018 ONSC 1372, at para 136.
[98] References to cross-examination transcript to be provided once available.
[99] References to cross-examination transcript to be provided once available.

obtain disclosure of a massive number of broadly categorized documents in an apparent goal of furthering conspiracy theories against CAHN as part of their ideological opposition to the organization as a whole.[100]

127. Amplifying these conspiracy theories can have dangerous consequences. While there is no evidence that any of the Plaintiffs have made any sort of threat against CAHN and Mr. Farber directly, there is a history of violent individuals targeting CAHN officials on the basis of these same conspiracy theories.[101]

128. CAHN has submitted evidence that this is the second meritless lawsuit recently launched by self-perceived enemies of CAHN with the goal of "punish[ing], silenc[ing], or intimidat[ing] the defendant" by causing CAHN to expend substantial time and energy of staff and Board members as well as financial resources.[102] An award of damages to CAHN will help compensate some of the harm deliberately inflicted by this lawsuit and send a message of deterrence against such lawfare.

PART V – ORDER SOUGHT

129. Given the above, CAHN and Mr. Farber respectfully request an order:

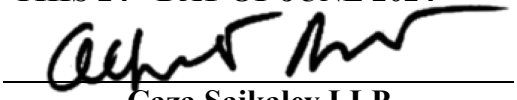
a. Dismissing the action (in both CV-24-00094733-0000 and CV-24-00095074-0000) as against the Defendants CAHN and Mr. Farber;

b. Awarding CAHN and Mr. Farber costs of this motion and the action on a full indemnity basis;

c. Awarding damages against the Plaintiffs, on a joint and several basis, in the amount of $20,000 for Mr. Farber and $10,000 for CAHN.

[100] References to cross-examination transcript to be provided once available.
[101] Warman Affidavit at paras 57-62 **[Motion Record, p. 120-121].**
[102] Warman Affidavit at paras 63-69 **[Motion Record, p. 121-122].**

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24th DAY OF JUNE 2024



Caza Saikaley LLP

EDWARD CORNELL et al. Plaintiffs	-and-	**JUSTIN TRUDEAU et al.** Defendants Court File No.: CV-24-94733

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commended at Ottawa

FACTUM OF THE MOVING PARTIES
(Anti-SLAPP Motion)

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