

Freedom of expression prevails in responses to COVID-19 protest organizers' defamation action

Anti-SLAPP | Defamation | Litigation | Litigation & Dispute Resolution | Torts

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March 2020 will live in our memories forever. It is the month that, among other things, the world panicked, that governments issued emergency orders to shutdown non-essential businesses, and that workplaces which could do so transitioned to accept work-from-home business models. As reality over the COVID-19 pandemic became entrenched and vaccines were rapidly studied and produced, debate regarding this coronavirus and its spread, and the potential side-effects of the vaccines developed. In Canada, a ground-swell of opposition to government mandates led to protests, the most notable being the Freedom Convoy protest in Ottawa. Other notable rallies or protests took place outside of hospitals. More than 15 of these rallies or protests were organized by the Canadian Frontline Nurses (the "CFN"), which had been founded by two registered nurses. In a digital flyer, the CFN promoted their rallies or protests using the following slogans:

STAND UP FOR FREEDOM NOW OR LOSE EVERYTHING

STAND TOGETHER REJECT THE TYRANNY OF MANDATORY VACCINES

Naturally, this political activism received media coverage. The Canadian Nurses Association (the "CNA") issued a statement under the title: "Enough is enough: professional nurses stand for science-based health care". The CNA statement included the following statement:

The reckless views of a handful of discredited people as nurses have aligned in some cases with angry crowds who are putting public health and safety at risk. They have drawn in anti-science, anti-mask, anti-vaccine, anti-public health followers whose beliefs align with theirs. For some reason they would have us believe that millions of the best educated health scientists, public health experts, physicians and nurses globally have all missed something they have not. Their outlandish assertions about science would be laughable were they not so dangerous.

One media source published an article in response to the rallies or protests under the title: "Quack Quack! These Pro-Virus Nurses Have Dangerous Ideas".

The CNA statement and media coverage of the hospital rallies and protests gave birth to a defamation action, and a [section 137.1\(3\)](#) motion (colloquially referred to as an anti-SLAPP motion) under the *Courts of Justice Act* to have it dismissed.

In *Canadian Frontline Nurses v. Canadian Nurses Association*, 2022 ONSC 7280, the court granted the defendants' motion.

While the defendants both conceded that the plaintiffs' action met the threshold of having substantial merit, the defendants submitted that their statements were defensible. The CNA contended that its statement did not refer to the plaintiffs and was not defamatory and that it was protected under the special defamatory defences of qualified privilege, fair comment, responsible communication on matters of public interest along with truth/justification. The media defendants relied on fair comment, responsible communication on matters of public interest and truth/justification.

The motion to dismiss, however, was granted on the grounds that the public interest in permitting the plaintiffs' action to continue did not outweigh the public interest in protecting the defendants' expressions.

To succeed in a defamation action, a plaintiff must prove on a balance of probabilities the following:

- i) that the words complained of were published to at least one person other than the plaintiff;
- ii) that the words complained of referred to the plaintiff; and
- iii) 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.

Although the CNA had taken the position that its statement did not refer to the plaintiffs, it did not advance this defence for the purposes of the motion. However, it still contended that its publicly issued statement was not defamatory. In contrast, the plaintiffs submitted that the words contained in the statement meant and were understood to mean that the plaintiffs were unprofessional, did not stand for science-based healthcare, put public health and safety at risk, were reckless, were dangerous, deliberately misrepresented personal ideology as facts, and science as conspiracy, and were unethical.

As explained in *Peterson v. Deck*, 2021 BCSC 1670 at paragraphs 47–48, the motion judge commented that attacks on a “professional’s qualifications, knowledge, skill, capacity, judgment or efficiency, or that suggest that a professional is incompetent, unqualified or guilty of discreditable conduct in their profession are defamatory.”

The court agreed that there were reasonable grounds to believe that the comments made in the CNA statement tended to lower the reputation of the plaintiffs in eyes of a reasonable person.

With respect to the special defamatory defences, the court found that none of them gave rise to a valid defence for the purposes of the motion.

The defence of qualified privilege applies to an occasion where a person making a communication has an interest or duty, legal, social, moral or personal, to publish a statement to a person who has a corresponding interest or duty to receive it. This defence can be defeated where the dominant motive that underscores the words is malice or where the publisher exceeds the scope of the occasion or privilege. The court found that the qualified privilege defence could be defeated because the defendants’ statements had been published to the world. The motion judge accepted that where a statement is circulated worldwide, there is a potential that a defendant will be unable to satisfy the mutuality that applies to the qualified privilege defence.

The defence of truth/justification requires a defendant to establish that the impugned statements are substantially true. This means that a defendant is not required to prove the truth of every fact in a statement. As well, section 22 of the Ontario *Libel and Slander Act* provides that: “In an action for libel or slander for words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff’s reputation having regard to the truth of the remaining charges.”

The plaintiffs challenged the truth of the statements made by the defendants. The plaintiffs argued that the media defendants had relied on speculation in their publication, and that statements that two of the individual plaintiffs had travelled to Washington to participate in the 6 January 2021 protest and “were fired from their jobs for going against the non-essential travel ban to join the MAGA mob at the White House” were false.

The court accepted that there was sufficient doubt that on the motion the truth/justification defence was not valid.

The fair comment defence requires a defendant to establish the following:

- a) that the comment must be on a matter of public interest;
- b) that the comment must be based on fact;
- c) that the comment, though it can include inferences of fact, must be recognizable as comment;
- d) that the comment must satisfy must meet the objective test of whether any person could honestly express the same opinion on the proved facts; and
- e) that the defendant was not actuated by express malice.

Since the court had accepted the facts underlying the impugned statements could potentially not be proven to be true, the motion judge concluded that the fair comment did not raise a valid defence for the purposes of the motion.

The responsible communication on a matter of public interest defence requires that a publication must be on a matter of public interest and that the publication was responsible. The latter element requires a defendant to make diligent efforts to verify their statements. As established in *Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII), the following factors apply to determine whether a defendant has been diligent:



- a) the seriousness of the allegation;
- b) the public importance of the matter;
- c) the urgency of the matter;
- d) the status and reliability of the source;
- e) whether the plaintiff's side of the story was sought and accurately reported;
- f) whether the inclusion of the defamatory statement was justifiable;
- g) whether the defamatory statement's public interest lay in the fact it was made rather than its truth; and
- h) any other relevant circumstances.

The defendants failed to meet this test because the evidence showed that they did not contact the plaintiffs to obtain their side of the story prior to publication.

Accordingly, the court was required to consider whether the plaintiffs' action should be dismissed under section 137.1(4)(b) of the Act.

Under the weighing exercise established by this provision, a plaintiff must establish harm and that the harm suffered was caused by the defendants' statement(s). In *1704604 Ontario Ltd. v. Pointes Protection Assoc.*, 2020 SCC 22 (CanLII), the Supreme Court of Canada explained that harm could either be monetary or non-monetary in nature.

While the plaintiffs showed that they had received threatening messages, including death threats, and that they were not currently employed as nurses, the motion judge noted that the plaintiffs had been subject to multiple media reports about their activities both before and after the hospital rallies and protests, and that their unemployment had pre-dated the CNA statement and the media defendants' publication. The plaintiffs had also been subject to directions from the College of Nurses of Ontario in connection with their activities, with one of the individual plaintiffs being subject to a complaint that had been referred to the College's Discipline Committee for alleged misconduct between October 2020 and February 2021. The hearing of the complaint was pending.

Lastly, there was evidence that independent third-party fact checkers had flagged social media posts made by the plaintiffs as being false or partly false.

Meanwhile, the defendants submitted that the lawsuit had a chilling effect on them and their COVID-19 advocacy. The CNA described that the action negatively impacted its willingness to engage in discussions about COVID-19 and in responses to the pandemic. There were negative impacts on the personal defendants expressed as well.

In the result, the motion judge concluded that the plaintiffs had failed to show that they suffered serious harm or that there was a causal link between their alleged harm and the impugned publications. On the other hand, the public interest in protecting the defendants' expression was found to be substantial. The motion judge stated:

If this proceeding were allowed to continue, its chilling effects would have an impact well beyond the parties to this case. There is a real risk that the effects of this proceeding will stifle the speech of the Defendants, and deter other physicians, journalists, scientists, and other members of the public from engaging in public discussion and discourse about potential misinformation on matters of public health in the future.

This case demonstrates that anti-SLAPP legislation will strongly protect freedom of speech in high-profile matters that are political in nature. Although defences raised on a section 137.1 motion, which essentially serves a gatekeeping function, may not be valid, the ultimately outcome of the weighing exercise under the crux of the provision, section 137.1(4)(b), will likely be the dismissal of these kinds of actions. In this case, the plaintiffs inserted themselves into the public debate about COVID-19 measures, including masking and vaccine mandates. Their political activism naturally caused a response and the expression of opposite views. In a democracy, the expression of opposite views is encouraged. Arguably this was the very policy objective behind the legislation: to encourage free and open debate on matters of public interest that is not unduly fettered by 'libel chill'. One side does not necessarily have the right to quell the expression of the other side or to stifle debate through a legal proceeding. This is the ultimate message conveyed by the motion judge's decision. A PDF version is available to download [here](#).



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