

**CITATION:** Canadian Frontline Nurses v. Canadian Nurses Association, 2022 ONSC 7280  
**COURT FILE NO.:** CV-21-00673636-0000  
**DATE:** 20221223

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** CANADIAN FRONTLINE NURSES, SARAH CHOUJOUNIAN, KRISTEN NAGLE and KRISTAL PITTEr, Plaintiffs

**AND:**

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

**BEFORE:** VERMETTE J.

**COUNSEL:** *Alexander Boissonneau-Lehner*, for the Plaintiffs

*Richard G. Dearden, Marco S. Romeo and Alexandra Psellas*, for the Defendants  
Canadian Nurses Association, Tim Guest and Michael Villeneuve

*Paul Champ and Christine Johnson*, for the Defendants Together News Inc. and  
John Doe (a.k.a. William Horter)

**HEARD:** August 24, 2022

**ENDORSEMENT**

[1] The Defendants move under subsection 137.1(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (“*CJA*”) for an order dismissing this action.

[2] In my view, this action meets the criteria under subsection 137.1(3) as this proceeding arises from expressions made by the Defendants that relate to a matter of public interest, and the Plaintiffs have failed to discharge their burden under subsection 137.1(4). As a result, this action is dismissed.

**A. FACTUAL BACKGROUND**

**1. The parties**

[3] The Plaintiff Canadian Frontline Nurses (“*CFN*”) is a not-for-profit corporation incorporated under the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23. *CFN*’s registered office is located in Mississauga, Ontario.

[4] The Plaintiffs Sarah Choujounian, Kristen Nagle and Kristal Pitter are registered nurses. All three individual Plaintiffs reside in Ontario.

[5] CFN was founded by Ms. Choujounian and Ms. Nagle in January 2021, but it was incorporated on April 6, 2021. CFN's Articles of Incorporation state that the purpose of the corporation is "[t]o unite nurses across Canada and bring the ethics back into healthcare." Ms. Choujounian and Ms. Nagle are both directors of CFN. Ms. Pitter joined CFN in March 2021 and was a member of CFN's board.

[6] The Defendant Canadian Nurses Association ("CNA") is a not-for-profit corporation incorporated under the *Canada Not-for-profit Corporations Act*. CNA's registered office is located in Ottawa, Ontario. CNA is the national and global professional voice of Canadian nursing.

[7] At the relevant time, the Defendant Tim Guest was CNA's President and the Defendant Michael Villeneuve was CNA's Chief Executive Officer. I refer to CNA, Mr. Guest and Mr. Villeneuve below as the "**CNA Defendants**".

[8] The Defendant Together News Inc. operating as comoxvalley.news and vanisle.news ("**TNI**") is a corporation incorporated under the laws of British Columbia, with its head office located in Campbell River, British Columbia. TNI was founded in April 2021. It carries on business as an independent regional media outlet.

[9] William Horter is the editor of the websites operated by TNI. He wrote the TNI Article (defined below). As such, he is the "John Doe" referred to in the title of proceeding and the Statement of Claim. I refer to TNI and Mr. Horter below as the "**TNI Defendants**".

## **2. The September 1, 2021 Protests**

[10] During the COVID-19 pandemic, CFN organized more than 15 rallies/protests that took place on September 1, 2021 outside hospitals across Canada ("**September 1, 2021 Protests**").

[11] In her affidavit, Ms. Nagle explains CFN's decision to organize the September 1, 2021 Protests as follows:<sup>1</sup>

Canadian Frontline Nurses decided to organize protests on September 1, 2021 as we had become aware that hospitals across Canada were in the process of implementing – or had already implemented – policies requiring its healthcare workers to provide proof of COVID-19 vaccination if they wished to maintain active employment at the hospital.

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<sup>1</sup> Ms. Choujounian provides an identical explanation in her affidavit.

Canadian Frontline Nurses stands for medical and nursing ethics and the principles of medical freedom and informed and uncoerced consent.

Most of our membership, myself included, do not believe that the evidence supports that COVID-19 vaccines are effective in preventing transmission.

Canadian Frontline Nurses and I felt that it was appropriate to protest in the vicinity of hospitals for several reasons. First, we understood that the policies that were being instituted by many hospitals across the country forced fellow nurses and healthcare workers who were not willing to voluntarily received [sic] a COVID-19 vaccine to “choose” between continuing their important work and receiving a COVID-19 vaccine that they did not want to receive. It was our belief that protesting in the vicinity of the hospitals would bring awareness to the difficult position that the hospital policies created for nurses who did not want to receive a COVID-19 vaccine yet wished to continue their work. Second, we wished to express our solidarity with the nurses who worked in the hospitals that found themselves in this difficult position.

[12] CFN prepared a digital flyer for the September 1, 2021 Protests which was broadcasted by CFN on various social media channels. This is the digital flyer:

**CANADA WIDE PROTEST**

**HEALTH FREEDOM**

**09.01.21 • 1PM**

**STAND UP FOR FREEDOM NOW OR LOSE EVERYTHING**

**LOCATIONS**

**BC**  
Victoria - Victoria Hospitals Foundation  
Vancouver - Vancouver General Hospital  
Kamloops - 311 Columbia St.

**Alberta**  
Calgary - Foothills Medical Centre  
Edmonton - Royal Alexandra Hospital

**Saskatchewan**  
Saskatoon - City Hospital

**Manitoba**  
Winnipeg - Health Sciences Centre

**Ontario**  
Toronto - UHN  
London - LHSC Victoria Campus  
Barrie - RVH  
Ottawa - The Ottawa Hospital  
Sudbury - Health Sciences Centre North

**Quebec**  
Montreal - Centre Hospitalier de l'Université de Montréal (CHUM)  
Quebec City - Hôtel-Dieu de Québec

**New Brunswick**  
Moncton - George Dumont

**PEI**  
Charlottetown - The Queen Elizabeth Hospital

**Nova Scotia**  
Halifax - Queen Elizabeth II Health Sciences Centre

**Newfoundland**  
Saint John - Regional Hospital

**VAXXED OR UNVAXXED  
MASKED OR UNMASKED**

**ALL ARE WELCOME**

**IT'S TIME!!  
STAND TOGETHER  
REJECT THE  
TYRANNY OF  
MANDATORY  
VACCINES**

[13] While a protest also took place in front of a hospital in Nanaimo (British Columbia) on September 1, 2021, that protest was not organized by CFN.

[14] On September 1, 2021 and in the following days, numerous articles were published regarding the September 1, 2021 Protests by various media organizations, including CBC News, CTV News, Canadian Press, CityNews, Global News, Globe and Mail, Vancouver Sun, Winnipeg Sun, Calgary Herald and London Free Press. Many articles referred to the fact that the protests were organized by CFN. Some referred to Ms. Nagle. A few articles included a link to a prior article published in January 2021 which reported that Ms. Nagle and Ms. Choujounian had spoken at a rally in Washington, D.C. on January 6, 2021.

[15] The media reported that some protesters at the September 1, 2021 Protests had harassed, threatened and/or assaulted healthcare workers, and inhibited their access to the hospitals. They also reported that some protesters made anti-mask and anti-vaccination statements.

[16] The following statements appeared in some of the articles:

- a. “Hundreds of people protesting vaccine mandates swarmed Winnipeg’s largest hospital Wednesday afternoon, slowing traffic and some confronting people as they tried to enter. [...] The protest created traffic congestion that obstructed the arrival of ambulances, with sirens blaring, to the emergency department.”
- b. Island Health says multiple members of their teams were verbally abused as they came to and left work during the protests, with only one case so far where a healthcare team member was physically assaulted.
- c. A spokesperson said patients had difficulty getting in, were “aggressively harassed” for wearing masks, and some cancelled their appointments rather than approach the protesters standing near entrances.

[17] A number of associations also reacted to the September 1, 2021 Protests and released press statements, including the Ontario Hospital Association (“OHA Disheartened by Anti-Vaccine Demonstrations in Midst of a 4<sup>th</sup> Wave” dated September 3, 2021), and the Canadian Medical Association and the Ontario Medical Association (“Statement by the Canadian Medical Association and the Ontario Medical Association on bullying, attacks and violence against health workers” dated September 3, 2021).

[18] The media reports regarding harassment, threats and assaults at the September 1, 2021 Protests are challenged by the Plaintiffs. Ms. Nagle and Ms. Pitter participated in the protest that took place in London, Ontario on September 1, 2021. Ms. Nagle states the following about that protest and the other September 1, 2021 Protests in her affidavit:

On September 1, 2021, I participated in the London Rally. Kristal Pitter also participated in the London Rally that day.

London Police was present at the London Rally. To the best of my knowledge, no individuals were detained, arrested, or charged as a result of their participation in the London Rally.

During the London Rally, I personally observed and spoke with nurses and other healthcare workers who emerged from the hospital to either join the rally or express gratitude for us being there. I also observed and heard other healthcare workers who were affiliated with the hospital express that they were not in favour of the London Rally and its goals.

I did not harass, threaten, assault, or impede anyone at the London Rally.

Throughout my participation in the London Rally, I did not observe any patients, healthcare workers, or any other individuals being impeded from accessing the hospital.

I did not observe anyone being assaulted at the London Rally.

I did not observe anyone who formed part of the London Rally harass, threaten, or scream insults at healthcare workers.

I coordinated with Canadian Frontline Nurses representatives and individuals who had partnered with Canadian Frontline Nurses after the September 1, 2021 protests. Based on my discussions with these individuals who reported their observations of the protest to me, I verily believe that none of the September 1, 2021 protests organized by Canadian Frontline Nurses impeded healthcare workers from performing their jobs or made it more difficult for sick people to obtain the care they needed at the hospitals.

[19] Ms. Pitter's affidavit evidence regarding the London protest is largely the same as Ms. Nagle's.

[20] Ms. Choujounian participated in the protest that took place in Montreal on September 1, 2021. Her evidence regarding the Montreal protest is largely the same as Ms. Nagle's and Ms. Pitter's evidence regarding the London protest.

[21] Danielle Pistilli, a person who assisted CFN with the organization of the protest that took place in Vancouver on September 1, 2021, provided affidavit evidence regarding the Vancouver protest. Her evidence regarding the Vancouver protest is largely the same as the individual Plaintiffs' evidence regarding the London and Montreal protests.

[22] Some photographs and video footage were produced by the Plaintiffs in answers to undertakings with respect to all of the September 1, 2021 Protests except for the protests held in Quebec City, Charlottetown and St. John's. The video recordings do not cover the entirety – both geographically and in duration – of the protests.

### 3. The CNA Statement

[23] On September 9, 2021, the CNA posted the following statement entitled “Enough is enough: professional nurses stand for science-based health care” (“**CNA Statement**”) on its website and social media accounts (Twitter, LinkedIn and Facebook):

The Canadian Nurses Association (CNA) and Canadian nurses stand strongly united behind science and the best available evidence as the basis for professional nursing practice and decision-making. Nursing is a rigorously educated, regulated and autonomous profession, and it is first a discipline based in science – not a random gathering of personal opinions and ideologies.

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

The media used to be filled with images of the public cheering nurses around the world; **now the focus is on images of surly mobs happy to stand in front of health-care settings and harass, threaten, and even assault health-care workers coming and going in the business of saving lives. These protests have stunned and saddened exhausted health-care workers. They are demoralizing, infuriating and dangerous.** The situation is completely unacceptable, and it must stop immediately.

All opinions are not equal when it comes to public safety. Nurses have worked for more than a century to build the regulatory, education, common competencies, professional and union structures that have generated one of the workforces most respected and trusted by the public. And the Canadian nursing workforce is admired around the world for its high levels of education and standards of practice. CNA is proud of these world-leading achievements. Some are willing to put all that at risk; we are not.

**Anti-public health disinformation threatens to confuse a tired and bewildered public by deliberately misrepresenting personal ideology as facts, and science as conspiracy. The public should be assured that the vast majority of Canada’s 448,000 regulated nurses are united in their commitment to operate from a stringent code of ethics, and they are duty-bound to use science, evidence, and facts in assessing, planning, and evaluating the care they deliver to people across Canada. This scientific approach is a fundamental ideology of modern nursing.**

We will continue to monitor this situation and do all we can to maintain the trust and ensure the safety of people everywhere in Canada. [Emphasis added.]

[24] The passages in bold above are the statements that the Plaintiffs allege are defamatory.

#### 4. **TNI Article**

[25] On September 11, 2021, TNI published an article on its websites entitled “Quack Quack! These Pro-Virus Nurses Have Dangerous Ideas” (“**TNI Article**”). The TNI Article was posted in the opinion section (“The Take”) of the news websites. The TNI Article reads as follows:

Quack Quack! These Pro-Virus Nurses Have Dangerous Ideas

They call themselves Canadian Frontline Nurses, but the founders are stoking fear, division, and conspiracy

While Canadian health care workers are fighting to keep people safe, a small group of disgraced nurses is putting us in danger

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

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

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

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

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

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

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

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

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

They certainly had a busy January.

Do you remember what else happened in January?

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

And guess who was there?

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

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

Interesting way to spend your vacation days.

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

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

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

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

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

Do you think we're making this stuff up?

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

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

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

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

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

Hmmmm ...

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

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

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

"The reckless views of a handful of discredited people who identify as nurses have aligned in some cases with angry crowds who are putting public health and safety at risk. They have drawn in anti-science, anti-mask, anti-vaccine, anti-public health followers whose beliefs align with theirs ... Their outlandish assertions about science would be laughable were they not so dangerous."

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

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

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

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

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

Their ME-FIRST ideas have real-world impacts.

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

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

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

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

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

Why should you? [Emphasis in the original.]

## **5. The action**

[26] The Plaintiffs commenced this action on December 13, 2021. Among other relief, they seek general damages for defamation in the amount of \$750,000 and aggravated, exemplary or punitive damages in the amount of \$250,000.

[27] The CNA Defendants and the TNI Defendants served their respective Statements of Defence in February 2022. In addition to pleading that the CNA Statement does not refer to the Plaintiffs and is not defamatory, the CNA Defendants raise the following defences: qualified privilege, fair comment, responsible communication on matters of public interest, and truth/justification. The TNI Defendants rely on the following defences in their Statement of Defence: fair comment, responsible communication on matters of public interest, and truth/justification.

## **B. DISCUSSION**

### **1. Test under section 137.1 of the CJA**

[28] Sections 137.1 to 137.5 of the *CJA* came into force in November 2015. These provisions were enacted to mitigate the harmful effects of strategic lawsuits against public participation (also known as “SLAPPs”). SLAPPs are lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest. They are generally initiated by plaintiffs who engage the court process and use litigation not as a direct tool to vindicate a *bona fide* claim, but as an indirect tool to limit the effectiveness of the opposing party's speech and deter that party, or other potential interested parties, from participating in public affairs. See *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at paras. 2-4 (“*Pointes*”).

[29] Subsections 137.1(1), (3) and (4) of the *CJA* provide as follows:

#### **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.

[...]

### **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.

### **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.

[30] The Supreme Court of Canada explained the framework set out in section 137.1 as follows in *Pointes* (at paras. 31, 49, 54, 60, 82):

- a. **Threshold burden on the moving party.** Subsection 137.1(3) places a threshold burden on the moving party to show on a balance of probabilities that: (i) the underlying proceeding does, in fact, arise from its expression, regardless of the nature of the proceeding, and (ii) such expression relates to a matter of public interest, defined broadly. To the extent that this burden is met by the moving party, then s. 137.1(4) is triggered and the burden shifts to the responding party to show that its underlying proceeding should not be dismissed.
- b. **Substantial merit.** To discharge its burden under s. 137.1(4)(a)(i), the plaintiff must satisfy the motion judge that there are grounds to believe that its underlying

claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success. A real prospect of success is a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff.

- c. **No valid defence.** Under s. 137.1(4)(a)(ii), the moving party (i.e. defendant) must put potential defences in play, and the responding party (i.e. plaintiff) must show that *none* of those defences are valid in order to meet its burden. Mirroring the “substantial merit” prong, the “no valid defence” prong requires the plaintiff to show that there are grounds to believe that the defences have no real prospect of success.
- d. **Weighing of the public interest.** Under s. 137.1(4)(b), the burden is on the plaintiff to show on a balance of probabilities that it likely has suffered or will suffer harm, that such harm is a result of the expression established under s. 137.1(3), and that the corresponding public interest in allowing the underlying proceeding to continue outweighs the deleterious effects on expression and public participation. This weighing exercise is the crux or core of the s. 137.1 analysis, as it captures the overarching concern of the legislation, as evidenced by the legislative history. It accordingly should be given due importance by the motion judge in assessing a motion under section 137.1.

[31] The “grounds to believe” standard in subsection 137.1(4)(a) requires a basis in the record and the law – taking into account the stage of the litigation – for finding that the underlying proceeding has substantial merit and that there is no valid defence: see *Pointes* at para. 39. In *Bent v. Platnick*, 2020 SCC 23 at para. 88 (“*Bent*”), the majority of the Supreme Court of Canada stated the following with respect to this standard:

I elaborate here that, in effect, this means that *any* basis in the record and the law will be sufficient. By definition, “a basis” will exist if there is a single basis in the record and the law to support a finding of substantial merit and the absence of a valid defence. That basis must of course be legally tenable and reasonably capable of belief. But the “crux of the inquiry” is found, after all, in s. 137.1(4)(b), which also serves as a “robust backdrop” for protecting freedom of expression: *Pointes Protection*, at paras. 48 and 53. [Emphasis in the original.]

[32] Thus, with respect to the no valid defence prong: (a) the plaintiff must show that there are grounds to believe that the defendant’s defences have no real prospect of success; (b) this requires a showing that there are grounds to believe that the defences do not tend to weigh more in favour of the defendant; (c) in light of the definition of “grounds to believe”, this means that there must be a basis in the record and the law – taking into account the stage of the proceeding – to support a finding that the defences do not tend to weigh more in favour of the defendant. See *Bent* at para. 103.

[33] Given the early stage at which motions under section 137.1 are brought, a motion judge deciding such a motion should engage in only limited weighing of the evidence. The Supreme Court of Canada stated the following on this point in *Pointes* at para. 52:

It is therefore important to recognize how s. 137.1 motions differ from summary judgment motions, as briefly touched on in the preceding section. Section 137.1 motions are made at an earlier stage in the litigation process, with much more limited evidence and corresponding procedural limitations (see s. 137.2). As a result, a motion judge deciding a s. 137.1 motion should engage in only limited weighing of the evidence and should defer ultimate assessments of credibility and other questions requiring a deep dive into the evidence to a later stage, where judicial powers of inquiry are broader and pleadings more fully developed. This is not to say that the motion judge should take the motion evidence at face value or that bald allegations are sufficient; again, the judge should engage in limited weighing and assessment of the evidence adduced. This might also include a preliminary assessment of credibility – indeed, the legislative scheme allows limited cross-examination of affiants, which suggests that the legislature contemplated the potential for conflicts in the evidence that would have to be resolved by the motion judge. However, s. 137.1(4)(a)(i) is not an adjudication of the merits of the underlying proceeding; the motion judge should be acutely conscious of the stage in the litigation process at which a s. 137.1 motion is brought and, in assessing the motion, should be wary of turning his or her assessment into a *de facto* summary judgment motion, which would be insurmountable at this stage of the proceedings.

[34] I now turn to the application of the test to the facts of this case.

**2. Whether the proceeding arises from expressions made by the Defendants that relate to a matter of public interest**

[35] The Plaintiffs concede that the Defendants have met their threshold burden under subsection 137.1(3), i.e. that the CNA Statement and the TNI Article are expressions of the Defendants that relate to a matter of public interest. I agree. Therefore, the burden shifts to the Plaintiffs to show that the three elements in subsection 137.1(4) are met in this case.

**3. Whether there are grounds to believe that the proceeding has substantial merit**

[36] The test for defamation requires that three criteria be met (see *Bent* at para. 92):

- a. the words complained of were published, meaning that they were communicated to at least one person other than the plaintiff;
- b. the words complained of referred to the plaintiff; and
- c. 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.

[37] The TNI Defendants concede that there are grounds to believe that, absent a valid defence, the proceeding has substantial merit.

[38] While the CNA Statement does not explicitly refer to the Plaintiffs by name, the CNA Defendants have decided, for the purpose of this motion, not to put in issue the element of whether the words complained of in the CNA Statement refer to the Plaintiffs.

[39] However, the CNA Defendants argue that the words complained of are not defamatory. They state that the CNA Statement does not say that the Plaintiffs harassed, threatened and assaulted healthcare workers or engaged in criminal activities towards them. While that may be the case, these are not the only defamatory meanings pleaded by the Plaintiffs. The Plaintiffs also allege that the CNA Statement meant and was understood to mean that, among other things: the Plaintiffs were not professional; 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. According to the Plaintiffs, the CNA Statement implies that the Plaintiffs are unprofessional by contrasting them against “professional nurses” who stand for science-based healthcare. The CNA Statement describes the Plaintiffs as “discredited people who identify as nurses”.

[40] Comments that question or impugn 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. See *Peterson v. Deck*, 2021 BCSC 1670 at paras. 47-48.

[41] In my view, when looking at the CNA Statement as a whole, there are grounds to believe that the CNA Statement would tend to lower the Plaintiffs’ reputation in the eyes of a reasonable person. Thus, I conclude that there are grounds to believe that the Plaintiffs’ claim as against the CNA Defendants has a real prospect of success.

**4. Whether there are grounds to believe that the Defendants have no valid defence in the proceeding**

[42] I discuss below the various defences raised by the Defendants and the parties’ respective positions with respect to each of them.

***a. Qualified privilege***

[43] The CNA Defendants have raised the defence of qualified privilege.

[44] An occasion of qualified privilege exists if a person making a communication has an interest or duty – legal, social, moral or personal – to publish the information in issue to the person to whom it is published and the recipient has a corresponding interest or duty to receive it. Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. Where the occasion is shown to be privileged, the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. However, the privilege is qualified in the sense that it can be defeated. This can occur

particularly in two situations: where the dominant motive behind the words was malice, such as where the speaker was reckless as to the truth of the words spoken; or where the scope of the occasion of privilege was exceeded. See *Bent* at para. 121.

[45] The threshold for privilege remains high and the criteria for reciprocal duty and interest required to establish it remain unclear: see *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 37 (“*Torstar*”). However, qualified privilege is rarely available for widely circulated publications. This is because by publishing to the world at large (in print and/or online), a defendant may be unable to establish the requisite and essential reciprocity necessary to attract the protection of the qualified privilege defence. See *Lascaris v. B’nai Brith Canada*, 2019 ONCA 163 at para. 36; *Ferreira v. Da Costa*, 2019 ONSC 1853 at para. 42; and *Canadian Standards Association v. P.S. Knight Co. Ltd.*, 2019 ONSC 1730 at para. 58.

[46] The CNA Defendants plead that they were under a legal, moral and social duty to publish the CNA Statement and that, in the circumstances existing at the time, the persons reading the CNA Statement had a corresponding interest in receiving it. The CNA Defendants argue that the purposes of the CNA Statement include the advancement of positive health outcomes in the public interest and acting in the public interest for Canadian nursing and nurses. They state that the CNA Statement was drafted and published in furtherance of the CNA’s purposes, beliefs and responsibilities.

[47] Based on e-mails that were sent by the CNA Defendants at the time of the preparation of the CNA Statement, the Plaintiffs dispute how the CNA characterizes the occasion on which the statement was made. Further, the Plaintiffs argue that if an occasion of privilege existed, it was exceeded. They point out that the CNA Statement was published to the world. They also submit that the CNA Statement went beyond advancing positive health outcomes, acting in the public interest for Canadian nursing and nurses and critiquing the views of the Plaintiffs. The Plaintiffs’ position is that the CNA Statement vilified them by accusing them of aligning with surly mobs who harassed, threatened and assaulted healthcare workers. The Plaintiffs state that it was neither necessary nor appropriate to defame them in order to promote positive health outcomes and act in the public interest of the nursing profession.

***b. Truth or justification***

[48] This defence is raised by both sets of Defendants.

[49] To succeed on the defence of justification, a defendant must adduce evidence showing that the statement was substantially true: see *Torstar* at para. 33. The burden on the defendant is to prove the substantial truth of the “sting” or main thrust of the defamation. If the sting of the words is justified on the evidence, minor inaccuracies will not prevent the defendant from establishing a defence of justification. Conversely, the defence of justification will fail if the publication in issue is shown to have contained only accurate facts but the sting of the libel is not shown to be true. See *Bent* at para. 107.

[50] While a defendant would have to lead evidence that the impugned statements are substantially true in order for their defence of justification to succeed at trial, on a motion under section 137.1 of the *CJA*, the plaintiff must show that there are grounds to believe that the defendant has no real prospect of success in making that showing. See *Bent* at para. 109.

[51] The Plaintiffs submit that, on the whole, the evidence filed on this motion provides a basis to find that the allegations in the CNA Statement and the TNI Article are not true. They state that both the CNA Statement and the TNI Article assert that the Plaintiffs organized protests that prevented healthcare workers from doing their jobs and where healthcare workers were harassed and assaulted. The Plaintiffs point out that, contrary to the Plaintiffs, the Defendants have not proffered a single affidavit from any nurse or any other individual who has direct knowledge of what occurred at the protests. The Plaintiffs argue that the “reports of reports” contained in the mainstream media on which the Defendants rely do no amount to sufficient proof to justify the assertions of fact made in the CNA Statement and TNI Article.

[52] With respect to the TNI Article, the Plaintiffs argue that the statements that Ms. Nagle and Ms. Choujounian: (a) travelled to Washington, D.C. to be part of the Trump-inspired protests that occurred on January 6, 2021, and (b) “were fired from their jobs for going against the non-essential travel ban to join the MAGA mob at the White House”, are not true. They point to Ms. Nagle’s and Ms. Choujounian’s evidence on these points and submit that the TNI Defendants are relying on speculation only to support their defence of justification, which is insufficient according to the Plaintiffs.

[53] The CNA Defendants plead that a number of facts are true, including the following:

- a. prior to the date of the CNA Statement, the mainstream media and social media published images of unfriendly crowds protesting in front of healthcare settings;
- b. healthcare workers were threatened by some of the protesters; and
- c. protests held outside healthcare settings have stunned and saddened healthcare workers.

[54] The CNA Defendants submit that the CNA Statement does not have the meaning that the Plaintiffs are attributing to it and complaining about. According to the CNA Defendants, the CNA Statement does not say that the Plaintiffs themselves did what the mobs and crowds are said to have done, including harassing, threatening and assaulting healthcare workers. The CNA Defendants argue that the Plaintiffs’ arguments regarding the defence of justification relate more to the meaning that should be given to the alleged defamatory statements than to the truth of the statements.

[55] The TNI Defendants submit that all of the statements of fact in the TNI Article were substantially true. Among other things, the TNI Defendants rely on section 22 of the *Libel and Slander Act*, R.S.O. 1990, c. L.12, which provides that “[i]n 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.”

[56] With respect to facts that were widely reported by the media and on which the TNI Defendants relied, the TNI Defendants stress that the Plaintiffs have not pointed to any evidence that indicates that these stories were untrue. With respect to some of the statements in the TNI Article that may not be accurate, the TNI Defendants argue that the statements were substantially true in light of the main thrust or “sting” of the statements. This applies, for instance, to the statements regarding the protest in front of the hospital in Nanaimo (which the Plaintiffs did not organize) and the statement that Ms. Nagle and Ms. Choujounian “were fired for going against the non-essential travel ban to join the MAGA mob at the White House”. However, the TNI Defendants’ position, based on the evidence before this Court, is that the reference to “Trump-inspired protests” is accurate.

*c. Fair comment*

[57] This defence is raised by both sets of Defendants.

[58] A defendant claiming fair comment must satisfy the following test (see *Torstar* at para. 31):

- a. the comment must be on a matter of public interest;
- b. the comment must be based on fact;
- c. the comment, though it can include inferences of fact, must be recognisable as comment;
- d. the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?; and
- e. even though the comment satisfies the objective test, the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice.

[59] The Plaintiffs argue that the defence of fair comments fails. They point out that not all of the CNA Statement and the TNI Article are recognisable as comment. To the extent that some of the statements in the publications are recognisable as comment, the Plaintiffs rely on the principle that if the factual foundation for the comment is unstated or unknown, or turns out to be false, then the fair comment defence is not available. See *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 31. The Plaintiffs submit that the factual foundations in the CNA Statement and the TNI Article are unstated or unknown and that the facts are not true, as argued with respect to the defence of justification.

[60] The Plaintiffs also submit that there is a basis at law to find that the TNI Article and the CNA Statement were actuated by malice.<sup>2</sup> Since malice can be established if the publications were made with reckless disregard for the truth, the Plaintiffs argue that it is open to a finder of facts to conclude that there is evidence of malice in this case given that the Defendants did not take any steps to verify the reports of reports in the mainstream media before they published the CNA Statement and the TNI Article. In addition, the Plaintiffs state that the invective-laced mode, style, tenor, tone and language of the TNI Article smacks of malice.

[61] The CNA Defendants submit that the words complained of in the CNA Statement that constitute opinion are fair comment, made in good faith and without malice, on matters of public interest. Their position is that the CNA Statement expresses opinions that a reasonable person could honestly hold. The facts on which the CNA Defendants rely are listed in their Amended Statement of Defence. While these facts are not all set out in the CNA Statement, the CNA Defendants argue that the September 1, 2021 Protests (and presumably other facts on which they rely) were notorious and publicly known at the time the CNA Statement was published.

[62] The TNI Defendants submit that the opinions expressed in the TNI Article were recognisable as comment. They point out that the TNI Article was published as a piece of opinion journalism and that it contained many rhetorical or hyperbolic statements that amount to commentary. According to the TNI Defendants, the opinions expressed in the TNI Article were ones that any person could honestly express on the proven facts. The TNI Defendants state that their predominant motive in publishing the TNI Article was to ensure that the public was not swayed by misinformation during a public health crisis. They note that Mr. Horter's evidence that he did not act out of any malice or ill-will towards the Plaintiffs and that he did not know them personally in any way is unchallenged.

***d. Responsible communication on matters of public interest***

[63] This defence is raised by both sets of Defendants.

[64] The defence of responsible communication on matters of public interest has two essential elements: (1) the publication must be on a matter of public interest; and (2) the defendant must show that publication was responsible, in that they were diligent in trying to verify the allegation(s), having regard to all the relevant circumstances. The second element, i.e. the diligence of the defendant, will be assessed having regard to the following factors:

- a. the seriousness of the allegation;
- b. the public importance of the matter;

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<sup>2</sup> In addition to the defence of fair comment, the presence of malice would also defeat the defences of qualified privilege and responsible communication on matters of public interest.

- 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 that it was made rather than its truth ("reportage"); and
- h. any other relevant circumstances.

See *Torstar* at paras. 98, 126.

[65] The Plaintiffs concede that the Defendants have satisfied the first element of the test, i.e. that the publication was on a matter of public interest. Therefore, I turn to the second element of the test.

[66] In order to prepare the CNA Statement, the CNA Defendants reviewed social media posts and news articles about the Plaintiffs, as well as statements issued by other organizations. They also had internal discussions. They did not attempt to contact the Plaintiffs. The CNA Defendants argue that they were diligent in their research and that the CNA Statement was published responsibly. They submit that the news articles should be considered as part of the circumstances that existed at the time.

[67] The research done by the TNI Defendants prior to the publication of the TNI Article was similar to the research done by the CNA Defendants. The TNI Defendants reviewed articles and reports about the September 1, 2021 Protests and the Plaintiffs in the mainstream media and on social media. In addition, they reviewed the CNA Statement and statements of other organizations, CFN's website and information posted by the Plaintiffs on their respective social media accounts. Mr. Horter was also advised by a friend that her mother with cancer had been harassed while trying to attend her appointment at the Nanaimo hospital during a protest. Mr. Horter considered the facts reported by established media organizations to be credible, particularly since the facts were repeated in multiple articles published by many different media organizations across the country and retractions had not been issued.

[68] Mr. Horter states the following in his affidavit regarding the fact that he did not contact the Plaintiffs prior to the publication of the TNI Article:

I did not make any attempts to contact the Plaintiffs prior to publishing the TNI Article. I believed that the facts underlying the opinions expressed in the TNI Article were accurate as they were based on publicly available information reported on by mainstream media and published by the Plaintiffs themselves on the CFN website, on social media, and in public interviews.

I did not believe that the Plaintiffs would be responsive to any request for comment, had I attempted to contact them. I was aware that when CBC News attempted to contact the Plaintiff Pitter for comment prior to publishing a story about her in July 2020, she declined to comment and contacted the Ontario Provincial Police, who then told the CBC reporter that he would be charged with harassment if he made further attempts to contact Pitter for comment. That information was included in the CBC story dated July 23, 2020 (“Ontario nurse under investigation after anti-vax, COVID conspiracy social media posts” [...]) attached at Exhibit “C”.

[69] The TNI Defendants submit that they were diligent in trying to verify the allegations contained within the TNI Article, to the best of their ability considering that this was a piece of opinion journalism and TNI is an independent regional media initiative with a small team and few resources. It is the position of the TNI Defendants that these factors ought to be taken into account by the Court when applying the responsible journalism test.

[70] The Plaintiffs’ position is that neither the CNA Defendants nor the TNI Defendants made diligent efforts to verify the truth of the allegations that they published. The Plaintiffs submit that relying on reports of reports (or reports of reports of reports) from mainstream media sources and adopting them wholesale does not amount to the diligent efforts that are required to satisfy the second element of the test. They argue that there is a difference between publishing the alleged feelings and observations of individuals as reports, as was done in some of the mainstream media articles, and making a publication which amounts to an assertion that the contents of such reports are true. The Plaintiffs state that the evidence before this Court supports the conclusion that the allegations that the September 1, 2021 Protests led to the harassment, threatening and assault of healthcare workers and the interference with patients seeking healthcare are not true. According to the Plaintiffs, the fact that such allegations were made by individuals who were quoted in other media stories does not give the Defendants a licence to adopt or repeat their defamatory statements.

*e. Conclusion on the defences*

[71] In my view, the Plaintiffs have raised valid arguments, with some basis in the record and in the law, in response to each of the defences raised by the Defendants. Among other things:

- a. **Qualified privilege:** It is arguable that any occasion of privilege was exceeded because the CNA Statement was published to the world.
- b. **Truth or justification:** The meaning or “sting” put forward by the Plaintiffs with respect to both the CNA Statement and the TNI Article – i.e. that the Plaintiffs organized protests that prevented healthcare workers from doing their jobs and where healthcare workers were harassed and assaulted – could reasonably be accepted, and parts of this “sting” are contradicted by the Plaintiffs’ evidence and not supported by direct evidence in the record before this Court.
- c. **Fair comment:** If the justification defence fails and the factual foundations in the CNA Statement and the TNI Article are not proven to be true, then the defence of fair comment is not available.

- d. **Responsible communication on matters of public interest:** The Defendants did not seek the Plaintiffs' side of the story and, with respect to what happened at the September 1, 2021 Protests, they did not do any due diligence beyond reviewing media reports.

[72] Finding that the Plaintiffs have raised valid arguments is not sufficient to meet the test under subsection 137.1(4)(a)(ii) as the Plaintiffs are required to show that the defences do not tend to weigh more in favour of the Defendants. However, since I have concluded that the Plaintiffs have failed to discharge their burden under the last element of the test under subsection 137.1(4), I find it unnecessary at this early stage of the proceeding to do a deeper dive into the merits of the defences in order to determine whether the defences tend to weigh more in favour of the Defendants or not.

**5. Whether the harm outweighs the public interest in protecting the expression**

[73] As stated above, subsection 137.1(4)(b) of the *CJA* is the crux or core of the s. 137.1 analysis. The open-ended nature of s. 137.1(4)(b) provides courts with the ability to scrutinize what is really going on in the particular case before them. This provision effectively allows motion judges to assess how allowing individuals or organizations to vindicate their rights through a lawsuit – a fundamental value in its own right in a democracy – affects, in turn, freedom of expression and its corresponding influence on public discourse and participation in a pluralistic democracy. Subsection 137.1(4)(b) 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. See *Pointes* at paras. 61-62, 81 and *Bent* at para. 139.

**a. *Evidence of harm***

[74] Harm is principally important in order for a plaintiff to meet their burden under subsection 137.1(4)(b). The statutory language requires two showings: (i) the existence of harm and (ii) causation – the harm was suffered *as a result* of the moving party's expression. Either monetary harm or non-monetary harm can be relevant. See *Pointes* at paras. 68-69.

[75] Evidence 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. Causation is not, however, an all-or-nothing proposition, in the sense that while the causal chain between the defendant's expression and the harm suffered by the plaintiff may be weaker for some elements of the harm suffered, it might nonetheless be strong for other elements. This is a case-by-case inquiry undertaken by the motion judge. See *Pointes* at para. 72.

[76] Ms. Nagle's evidence regarding the harm that she suffered is set out in her affidavit as follows:

Canadian Frontline Nurses and I received hateful messages and threats of physical harm in the wake of the September 1, 2021 protests and the Canadian Nurses Association and Together News publications.

I verily believe that my personal and professional reputation have been adversely affected by the Canadian Nurses Association and the Together News publications that are set out in the Statement of Claim. The Canadian Nurses Association and Together News publications falsely characterize me as a discredited, dangerous, and unprofessional person. These publications falsely associate me and Canadian Frontline Nurses with protests where healthcare workers were being harassed and assaulted. The Together News publication falsely associates me with protests that impeded healthcare workers from doing their jobs and interfered with patients receiving the care that they needed. The Together News article suggests that I was part of a right-wing mob who attacked the US Capitol Building.

In addition to Together News's publication concerning me and Canadian Frontline Nurses, numerous other articles relating to Canadian Frontline Nurses refer to the Canadian Nurses Association's September 9, 2021 publication. Such articles include:

[...]

Canadian Frontline Nurses organized another Canada-wide "silent vigil" protest across Canada, which were [sic] to take place in proximity of hospitals on September 13, 2021. [...]

I observed that the reaction to the silent vigil protest on September 13, 2021 from the public and government officials was far more hostile than the reaction to the September 1, 2021 rallies spearheaded by Canadian Frontline Nurses. I verily believe that the significant hostility towards the protests that were organized by Canadian Frontline Nurses on September 13, 2021 were [sic] motivated in large part by: the false reports of healthcare workers being harassed, assaulted, and impeded from doing their jobs on account of the September 1, 2021 protests organized by Canadian Frontline Nurses; the false reports that these September 1, 2021 rallies interfered with patients receiving the care that they needed; and the demonization of Canadian Frontline Nurses and its membership in these false reports.

As a result of the hostile reaction to our September 13, 2021 protests, it became clear to me that Canadian Frontline Nurses and its membership could no longer express its peaceful dissent against COVID-19 related mandates near hospitals. [...]

The Canadian Nurses Association and Together News publications, and the damage that these publications have caused to my reputation, have caused me significant mental distress.<sup>3</sup>

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

[78] The following evidence is also relevant in assessing the harm allegedly suffered by the Plaintiffs and in determining whether any such harm is a result of the CNA Statement and/or the TNI Article.

[79] Ms. Nagle, Ms. Choujounian and Ms. Pitter are not currently employed as nurses. They have not been employed as nurses since they were terminated from their respective positions in early 2021, many months before the CNA Statement and the TNI Article were published: (a) Ms. Nagle was terminated from her position with the London Health Sciences Centre – Children's Hospital of Western Ontario on January 15, 2021; (b) Ms. Choujounian was terminated from her position with S.R.T. MedStaff on January 14, 2021; and (c) Ms. Pitter was terminated from her position with the Ministry of Long-Term Care on March 10, 2021.

[80] The registry of the College of Nurses of Ontario ("CNO"), which is available online, states that in October 2021, Ms. Nagle and Ms. Pitter were directed by the CNO's Inquiries, Complaints and Reports Committee to attend before the Committee to be cautioned with respect to the following standards and educational tools: Professional Standards, Code of Conduct, Ethics and Social Media: Reflect Before You Post. Ms. Nagle and Ms. Pitter were also directed by the Committee to complete remedial activities with respect to the same standards and education tools.

[81] The CNO Registry also indicates that a complaint regarding Ms. Choujounian was referred to the CNO's Discipline Committee on October 6, 2021, and that the hearing is pending. The CNO Registry contains the following details regarding the pending hearing:

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<sup>3</sup> Ms. Nagle, Ms. Choujounian and Ms. Pitter also make reference in their respective affidavits to investigations by the College of Nurses of Ontario ("CNO") and to the contents of confidential disclosure packages that they received from the CNO. They each state that through their review of the confidential disclosure packages, they became aware that the CNA Statement "formed part of the basis of some of the complaints made to the CNO concerning me." The confidential disclosure packages in issue have not been produced, based on alleged irrelevance and subsection 36(3) of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18. As a result, I do not give any weight to this evidence as it is not possible to assess the role, if any, that the CNA Statement played in the CNO's investigation or decision to commence an investigation.

It is alleged that the member committed professional misconduct between October 2020 and February 2021 in that she:

contravened the standards of practice of the profession and engaged in disgraceful, dishonourable or unprofessional conduct when she publicly made or shared statements, or caused others to make such statements on her behalf, which contained information which she knew or ought to have known was inaccurate, false and/or misleading in relation to the COVID-19 pandemic and/or the public health response to the COVID-19 pandemic, and/or which encouraged non-compliance of public health orders in relation to the COVID-19 pandemic.

[82] Further, the Plaintiffs have been referred to in numerous news articles, both before and after the September 1, 2021 Protests. In addition to the articles referred to above in relation to the September 1, 2021 Protests, Ms. Pitter was mentioned in an article published by CBC News in July 2020. The article reported that she was under investigation by her employer after using “social media to spread health misinformation, including the myth vaccines cause autism and claims the coronavirus pandemic is a conspiracy whose threat to public health has been exaggerated.”

[83] Ms. Nagle was mentioned in a number of news articles in November 2020 as one of the organizers of a “Freedom Rally” held in London, Ontario, which exceeded the provincial gathering limits applicable at that time. Charges were laid against Ms. Nagle in connection with this event. Ms. Nagle was charged again in April 2021 for failing to comply with an order made under the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9.

[84] News articles published in January 2021 reported that Ms. Nagle and Ms. Choujounian were under investigation by the CNO after traveling to Washington, D.C. to participate in a rally organized by Global Frontline Nurses.

[85] On January 10, 2022, CBC News reported that “3 Ontario nurses disciplined for social media posts related to pandemic launch \$1M libel suit.” The names and pictures of all three individual Plaintiffs appeared in the article. In addition to referring to investigations and discipline by the CNO, the article mentioned the fact that the individual Plaintiffs were no longer working for their former employers and that Ms. Nagle was charged by law enforcement for failing to comply with Ontario’s emergency pandemic health restrictions in November 2020 and April 2021.

[86] Finally, I note that many postings made by the Plaintiffs on social media have been marked as false or partly false by independent third-party fact-checkers.

***b. Factors to consider in weighing the public interest***

[87] In *Pointes*, at para. 80, the Supreme Court stated that the following factors may be relevant to consider when weighing the public interest: the importance of the expression, the history of litigation between the parties, broader or collateral effects on other expressions on matters of public interest, the potential chilling effect on future expression either by a party or by others, the defendant’s history of activism or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and the

possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under section 15 of the *Canadian Charter of Rights and Freedoms* or human rights legislation.

[88] The traditional four indicia of a SLAPP suit may also bear on the analysis. These indicia are: (1) a history of the plaintiff using litigation or the threat of litigation to silence critics; (2) a financial or power imbalance that strongly favours the plaintiff; (3) a punitive or retributory purpose animating the plaintiff's bringing of the claim; and (4) minimal or nominal damages suffered by the plaintiff. See *Pointes* at para. 78. However, the Supreme Court has stated that these factors/indicia may only bear on the analysis to the extent that they are tethered to the text of the statute and the considerations explicitly contemplated by the legislature: see *Pointes* at para. 79. Thus, the fact that this action may not have the traditional indicia of a SLAPP suit is not determinative.

[89] The CNA Defendants have adduced evidence regarding the chilling effect of this action. Mr. Guest describes the impact of this action on CNA and on him as follows in his affidavit:

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.

The Canadian Medical Association, for example, published six separate media releases from January - June 2022 [...]. The CNA, by contrast, only published one news release during this period on April 11, 2022 titled "CNA urges caution as COVID-19 cases rise across the country" [...].

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. For example, CNA was approached by David York, a film producer and director, who was creating a documentary about healthcare workers' experiences during the pandemic. While the CNA would usually have engaged with this production without hesitation, the CNA did not do so because of this litigation and its concern that its advocacy could result in further libel actions. [...]

To my knowledge, the CNA has never been sued for libel prior to this Libel Action. 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.

The Libel Action's impact on me personally has been similarly severe. 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.

[90] The following is Mr. Villeneuve's evidence on this issue:

I have never been sued for libel prior to the Plaintiffs' Libel Action. The Plaintiffs' Libel Action has had a major effect on my willingness to comment publicly and engage in discussions about COVID-19 and Pandemic measures.

Since learning of the Plaintiffs' Statement of Claim against me, I have made limited statements about COVID-19, masking, vaccinations, or social distancing. For example, I would normally have commented publicly about some of the Plaintiffs' actions and statements regarding the "Freedom Convoy" that occupied Ottawa from January 22, 2022 - February 23, 2022. Because the Plaintiffs have sued me, I was fearful that if I commented on the Plaintiffs' involvement in the "Freedom Convoy" they would sue me again.

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.

[91] As for other factors relevant to the weighing of the public interest, there is evidence before me that both the CNA Defendants and the TNI Defendants have engaged in advocacy in relation to issues related to COVID-19. TNI has been publishing stories relating to COVID-19 since June 2021. There is a dedicated tab related to COVID-19 stories on each of the websites operated by TNI.

[92] As for the CNA Defendants, the evidence shows that in 2020, the CNA shifted almost all of its operations to focus on responding to the public health emergency resulting from the pandemic. A dedicated COVID-19 section was launched on the CNA's website to provide evidence-based practice information for nurses. In addition, the CNA contributed to Canada's policy-making in response to the COVID-19 pandemic, among other things by sending regular briefing notes to the federal Health Minister.

*c. Weighing exercise*

[93] In light of the evidence before me, I conclude that the Plaintiffs have failed to establish that they have suffered sufficiently serious harm as a result of the CNA Statement and the TNI Article which outweighs the public interest in protecting the expression in these publications.

[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.

[95] The last source of harm was recognized by Ms. Nagle in a video that she posted on social media and in which she stated that CBC had ruined her career and destroyed her life. The Plaintiffs have not sued CBC for libel.

[96] Thus, the CNA Statement and the TNI Article can be described “as a drop of vitriol in a sea of criticism”: see *Bernier v. Kinsella*, 2021 ONSC 7451 at para. 73.

[97] The Plaintiffs have been outspoken critics of prevailing public health guidance related to COVID-19, using social media platforms and attending in-person protests to disseminate their views. When a person injects themselves into public debate over a contentious topic, they must expect that they are going to be met with some measure of rebuttal, perhaps forceful rebuttal, by those who take the opposite view. This is a relevant factor to consider in assessing the level of damages that the defamatory aspect of the response may create. See *Levant v. DeMelle*, 2022 ONCA 79 at para. 70. This factor further supports the conclusion that the Plaintiffs have not established that they have suffered sufficiently serious harm as a result of the CNA Statement and the TNI Article.

[98] In my view, the public interest in protecting the expression in issue is substantial. The expression in both the CNA Statement and the TNI Article relates to matters of public interest regarding public health that are of significant importance. The COVID-19 pandemic and COVID-19 health treatments have been described as “the defining public health issue of our time”: see *Gill v. Maciver*, 2022 ONSC 1279 at paras. 189, 315 (“*Gill*”). The CNA Statement and the TNI Article contributed to the public debate on these important issues and the protection of such expression is consistent with the purposes of section 137.1 of the *CJA* which are set out in subsection 137.1(1). I find that the following statements of Justice Stewart in *Gill* at paras. 178-179 equally apply to this case:

The expressions of these Defendants in seeking to address misinformation are intimately tied to the search for truth, a core value underlying freedom of expression. The expression of these Defendants is therefore to be afforded a high weight in the s. 137.1(4)(b) weighing exercise.

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, journalist, 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. The public has a clear interest in discussion and discourse about matters of public health.

[99] In addition to the importance of the expression and the potential chilling effect on organizations like CNA and media organizations like TNI, the public interest in protecting the expression in issue is supported by the CNA’s history of advocacy in the public interest.

[100] I also note that the Plaintiffs' decision to sue the CNA Defendants and the TNI Defendants is puzzling 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 other articles published across Canada. The decision to sue the TNI Defendants is particularly surprising given that TNI is a small and regional media organization based on Vancouver Island. There appears to be some merit to the TNI Defendants' submission that the Plaintiffs have deliberately chosen to ignore similar expressions made by media giants and public figures who are better resourced and able to respond to a lawsuit than the TNI Defendants.

[101] In light of the foregoing, I conclude that the Plaintiffs have not shown on a balance of probabilities that they likely have suffered or will suffer harm as a result of the CNA Statement and the TNI Article that is sufficiently serious that the public interest in allowing this proceeding to continue outweighs the deleterious effects on expression and public participation and the public interest in protecting that expression.

**C. CONCLUSION**

[102] The Defendants' motions are granted and the action is dismissed.

[103] Subsection 137.1(7) of the *CJA* provides that if a judge dismisses a proceeding under section 137.1, 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. Thus, an unsuccessful party can argue that a full-indemnity costs award is not appropriate in the circumstances of a particular case. In addition, an unsuccessful party can make submissions on quantum (e.g. time spent).

[104] If costs cannot be agreed upon, the Defendants shall deliver submissions of not more than three pages (double-spaced), excluding the costs outline, by January 9, 2023. The Plaintiffs shall deliver their responding submissions (with the same page limit) by January 23, 2023. The submissions of all parties shall also be sent to my assistant by e-mail and uploaded onto CaseLines.

  
Vermette J.

**Date:** December 23, 2022