Court File No: CV-22-00088514-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ZEXI LI, HAPPY GOAT COFFEE COMPANY INC,
7983794 CANADA INC. (c.o.b. as UNION: LOCAL 613)
and GEOFFREY DEVANEY

Plaintiffs/Responding Parties

- and -

CHRIS BARBER, BENJAMIN DICHTER, TAMARA LICH, PATRICK KING,
JAMES BAUDER, BRIGITTE BELTON, DANIEL BULFORD, DALE ENNS,
CHAD EROS, CHRIS GARRAH, MIRANDA GASIOR, JOE JANZEN,
JASON LAFACE, TOM MARAZZO, RYAN MIHILEWICZ, SEAN TIESSEN,
NICHOLAS ST. LOUIS (a.k.a. @NOBODYCARIBOU),
FREEDOM 2022 HUMAN RIGHTS AND FREEDOMS, GIVESENDGO LLC,
JACOB WELLS, HAROLD JONKER, JONKER TRUCKING INC., and BRAD HOWLAND

Defendants/Moving Parties

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFFS (RESPONDING PARTIES)
(Motion pursuant to s. 137.1 of the *CJA*, returnable December 14-15, 2023)

December 6, 2023

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PART I – OVERVIEW

1. In this motion, the Moving Party Defendants seek an order pursuant to section 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("*CJA*"), dismissing the Plaintiffs' claim.

2. The Plaintiffs oppose this motion. The Moving Parties have not met the threshold burden under s. 137.1(3) of the *CJA* because they deny having engaged in the impugned expressive activities in the first place. There are also grounds to believe that the proceeding has substantial merit and that the Defendants have no valid defences.

3. Importantly, there is also ample evidence to suggest that the harm suffered by the Plaintiffs as a result of the Defendants' expressive activities is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest (if any) in protecting the form of expression.

PART II – FACTS

4. This proposed class proceeding arises out of several illegal and harmful activities that took place during the unprecedented "Freedom Convoy" protest that occupied downtown Ottawa for several weeks during January and February 2022. During this period, the Plaintiff subclasses — made up of residents, business-owners and employees within the downtown occupation zone — suffered significant harm caused by the Defendants.

5. In this proceeding, the Plaintiffs do not allege that they have suffered harm because of the mere fact that the Defendants chose to exercise their right to protest. Rather, the Plaintiffs allege that they have suffered harm because of the *way* in which the Defendants chose to exercise their right to protest. In particular, the Plaintiffs allege that they suffered serious harm as a result of:

(a) the honking of horns and air horns, which emitted noise in the range of 100 to 150 decibels often for 12 to 16 hours per day;

(b) the prolonged idling of truck engines, which created significant diesel fume pollution; and

(c) the parking of trucks on public streets indefinitely, which interfered with travel within the occupation zone.

6. The initial Statement of Claim was issued on February 4, 2022, while the Convoy protest and the alleged tortious activities were ongoing. At that time, the Claim focused on the incessant, prolonged horn honking that was being carried out by the "Trucker" Defendants and facilitated and supported by the "Organizer" Defendants. The Claim alleged that this horn honking constituted private nuisance, for which the Defendants were liable to Ottawa residents living in the occupation zone.

7. Following the issuance of the initial Statement of Claim, an interlocutory injunction Order was granted by Justice McLean on February 7, 2022, with an extended and varied Order following on February 16, 2022. In granting the initial interlocutory injunction Order and its extension, Justice McLean accepted that there was a serious issue to be tried with respect to the Plaintiffs' nuisance claim.[1]

8. On February 17, 2022, this Honourable Court granted a Mareva injunction to freeze funds that were being used to support the Freedom Convoy's illegal activities and were at risk of being dissipated. As part of the Court's ruling on February 17, 2022, Justice MacLeod granted an Order to amend the pleadings. The Court permitted

[1] *Li et al. v Barber et al.*, 2022 CanLII 13686 (ON SC) (dated February 7, 2022 re horn injunction) at para. 63

a Fresh as Amended Statement of Claim to be filed, [2] which added new Plaintiffs and Defendants and expanded the basis on which damages were sought, incorporating allegations about the diesel fumes and blockading of streets, as well as a claim in public nuisance. The Defendants added at that time included named Defendants as well as "Jane Doe" Defendants referred to as "Donor Defendants". This amended pleading alleged that the Donor Defendants provided funds to the Freedom Convoy through various means with the knowledge that the Trucker Defendants were engaging in the tortious and other unlawful behaviour and with the intention of facilitating these acts.

9. In his Reasons granting the Mareva injunction, Justice MacLeod held that "[t]here can be little argument that based on the statement of claim, the plaintiffs have endured a substantial interference with their rights" and that, based on the evidence before him at that time "there is an apparently strong case for establishing tort liability".[3]

10. By decision dated March 13, 2023, this Court granted leave to the Plaintiffs to file a Further Fresh as Amended Statement of Claim, and at the same time denied the bulk of the Defendants' parallel motion to strike some or all of the claim. In its decision, the Court acknowledged that the Further Fresh as Amended Claim "discloses a potential basis for liability on the part of some or all of the defendants".[4]

11. The Further Fresh as Amended Statement of Claim was issued on March 14, 2023 and subsequently served on the Defendants. In this amended pleading the Plaintiffs added further particulars to the claim, expanded the occupation zone, deleted the "John Doe" and "Jane Doe" Defendants, and added new named Defendants, including proposed representative class Defendants.

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[2] Fresh as Amended Statement of Claim, dated February 18, 2022 **[Supplementary Motion Record ("SMR"), Vol 2, Tab 18, p. 1203]** ; *Li et al. v Barber et al.*, 2022 ONSC 1176 (dated February 17, 2022 re Mareva injunction) at paras 25, 39-44, 47
[3] *Li et al. v Barber et al.*, 2022 ONSC 1176 (re Marerva injunction) at para. 14
[4] *Li et al. v. Barber et al.*, 2023 CanLII 1679 (ON SC) (re Motion to Amend/Strike) at para. 41

12. On June 5, 2023, the Moving Party Defendants served a draft Notice of Motion seeking to have this proceeding dismissed pursuant to s. 137.1(3) of the *CJA*.

13. A Motion Record was served on August 25, 2023 on behalf of Chris Barber, Tamara Lich, Daniel Bulford Dale Enns, Miranda Gasior, Tom Marazzo, Ryan Mihilewicz, Sean Tiessen, Freedom 2022 Human Rights and Freedoms, Harold Jonker, Jonker Trucking Inc. and Brad Howland. Cross-examinations of the Moving Parties' affiants took place on September 15, 2023.

14. On August 28, 2023, the affidavit of Joe Janzen was served on behalf of the Moving Parties Patrick King and Joe Janzen.

15. The Plaintiffs served their supporting affidavits on the Moving Parties on September 1, 2023.

PART III – ISSUES

16. The issue raised on this motion is whether this action should be dismissed pursuant to s. 137.1(3) of the *CJA*. In order to determine this issue, the following questions are addressed:

(i) Do the moving parties fail at the first step of the test because they deny engaging in the impugned expressive activities?
(ii) Does the action have substantial merit?
(iii) Do the Defendants have a valid defence?
(iv) Is the alleged harm suffered by the Plaintiff subclasses sufficiently serious that it outweighs the public interest in protecting the expression?

17. The Plaintiffs submit that it would be inappropriate to dismiss this action pursuant to s. 137.1(3) of the *CJA* and that it should be allowed to proceed.

PART IV – ARGUMENT

A. The Anti-SLAPP Framework

18. Section 137.1 of the *CJA* functions as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest. The relevant portions of s. 137.1 of the *CJA* are as follows:

> (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.
>
> (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.[5]

19. Section 137.1 of the *CJA* places the initial burden on the moving party (the defendant) to satisfy the judge that the proceeding arises from an expression relating to a matter of public interest. Once that has been demonstrated, the burden shifts to the responding party (the plaintiff) to satisfy the motion judge that there are grounds to believe the proceeding has substantial merit and the moving party has no valid defence, and that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression.[6]

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[5] *Courts of Justice Act*, RSO 1990 c C 43 at s. 137.1
[6] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 ("*Pointes*") at para. 18

20. The merits-based hurdle under s. 137.1(4)(a) does not require a determinative adjudication of the merits of the underlying claim or a conclusive determination of the existence of a defence. Indeed, the Supreme Court of Canada has noted that "courts must be acutely aware of the limited record, the timing of the motion in the litigation process, and the potentiality of future evidence arising".[7] The anti-SLAPP regime is a screening mechanism for weeding out obviously unmeritorious claims, and it is not a trial of the issues or a deep dive into the merits.[8]

21. To address the objectives of the legislation, the main focus of an anti-SLAPP motion will usually be on the "crux" or "core" of the analysis, namely the weighing exercise under s. 137.1(4)(b). When conducting this weighing exercise, a technical, granular analysis is not required. Instead, the motion judge should step back and ask what is really going on.[9]

B. Threshold Burden is Not Met: Defendants Do Not Admit to Engaging in Expressive Activities in Question

22. For the purpose of this motion only, the Plaintiffs would be prepared to concede that the proceeding arises from an expression – albeit an expression of low value – that relates to a matter of public interest.[10] However, to succeed in discharging the threshold burden under s. 137.1(3), the Moving Parties are also required to satisfy the Court that the proceeding arises from an expression "*made by the person*".

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[7] *Pointes*, 2020 SCC 22 at para. 37
[8] *Pointes*, 2020 SCC 22 at para. 52; and *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129 ("*Park Lawn*") at para. 33
[9] *Pointes*, 2020 SCC 22 at paras. 81-82; and *Park Lawn*, 2023 ONCA 129 at para. 38
[10] As will be discussed further in the Plaintiff's submissions on the public interest weighing exercise, the Plaintiffs submit that the honking of horns, idling of vehicles and blockading of streets are expressive activities of extremely low value. Notably, the high volume horn honking could be a criminal assault: *R. v. Cheadle (D.)*, 1992 CanLII 13051 (MB KB).

23. Appellate Courts in Ontario and British Columbia have considered whether a moving party must admit to having made an impugned expression in order to benefit from the protections anti-SLAPP legislation.[11] In both jurisdictions, it has been found that it is impossible for a moving party to prove that the proceeding arises from an expression they made in the public interest while simultaneously denying having made the impugned expression.[12] In *Christman*, the BCCA explained that it would be illogical and irreconcilable with the legislative purpose of the anti-SLAPP protections for a defendant to benefit from the legislation while denying the expression at issue.[13]

24. The Moving Parties have failed to discharge their threshold burden because they deny that the horn honking, prolonged idling and blockading of streets took place as alleged, and/or they deny the Moving Parties' involvement in same. For example, in the draft Statement of Defence provided by the Moving Parties they:

(a) deny that streets were blockaded by vehicles or that it was impossible to pass through downtown;[14]

(b) deny that vehicles remained idling for 24 hours per day, emitting diesel fumes;[15]

(c) deny that the honking of horns was used as a tactic or part of any common design on the part of any Defendants;[16] and

(d) deny that any Defendants directed or encouraged horn honking or that horns were being honked non-stop for several hours every day.[17]

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[11] *Zoutman v. Graham*, 2020 ONCA 767 ("*Zoutman*") at para. 18 (affirming 2019 ONSC 2834 at paras. 54-55); and *Christman v. Lee-Sheriff*, 2023 BCCA 363 ("*Christman*") at paras. 63-71. In *Hansman v. Neufeld*, 2023 SCC 14 ("*Hansman*"), the SCC found at para. 51 that the anti-SLAPP legislative provisions in B.C. and Ontario are nearly identical.
[12] See: *Christman*, 2023 BCCA 363 at para. 66; *Zoutman*, 2020 ONCA 767at paras. 18
[13] *Christman*, 2023 BCCA 363 at para. 70
[14] Proposed Statement of Defence at paras. 92-93, attached as Exhibit A to Affidavit of Selena Bird, dated August 25, 2023 ("Bird Affidavit") **[Motion Record of the Moving Parties ("MR"), Tab 2, p. 31]**
[15] Proposed Statement of Defence at para. 95, Exhibit A to Bird Affidavit **[MR, Tab 2, p. 32]**
[16] Proposed Statement of Defence at para. 100, Exhibit A to Bird Affidavit **[MR, Tab 2, p. 33]**
[17] Proposed Statement of Defence at para. 100, Exhibit A to Bird Affidavit **[MR, Tab 2, p. 33]**

25. In the Affidavit filed by Harold Jonker (speaking for both himself and Jonker Trucking Inc.) he denies that trucks were idled for prolonged periods,[18] that streets were blocked,[19] or that horn were honked non-stop for several hours every day.[20] He states that he "almost never honked any horns at all during the protest".[21] While Jonker then admitted on cross-examination that the "honking was trying to send a message"[22] and there was often quite a few trucks honking at the same time,[23] he nonetheless continues to deny that these activities occurred or that he was involved. For instance, in the Moving Parties' factum, they are careful not to admit that the honking actually occurred: "Accordingly, Jonker, Jonker Trucking Inc. and the so-called "Trucker Defendants" were engaging in "expression" by allegedly honking horns, and by otherwise participating in the protest".[24]

26. The Organizer Defendants similarly deny that the impugned expressive activities occurred at all. In the Affidavits filed by Miranda Gasior and Sean Tiessen, they deny hearing any truck horns being honked while they were on security detail at night, seeing any trucks with their engines idling all night or observing any gridlock or blocked streets.[25] The Affidavits filed by Dale Enns, Daniel Bulford, Ryan Mihilewicz and Tom Marazzo also deny that horns were honked non-stop for several hours every day, that engines were left idling for prolonged periods or that streets in the occupation zone were blocked by trucks.[26]

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[18] Affidavit of Harold Jonker, sworn August 22, 2023 ("Jonker Affidavit") at para. 27 **[MR, Tab 6, p. 95]**
[19] Jonker Affidavit at paras. 22 and 26 **[MR, Tab 6, pp. 94-95]**
[20] Jonker Affidavit at para. 28 **[MR, Tab 6, pp. 95-96]**
[21] Jonker Affidavit at para. 29 **[MR, Tab 6, p. 96]**
[22] Transcript of the Cross-Examination of Harold Jonker, dated September 15, 2023 (the "Jonker Transcript"), Q 63 (p. 15) **[SMR, Tab 15, p. 1163]**
[23] Jonker Transcript at Qs 65-66 (pp. 15-16) **[SMR, Vol 2, Tab 15, pp. 1163-1164]**
[24] Factum of the Moving Parties at para. 31 [emphasis added] and para. 15
[25] Affidavit of Miranda Gasior, dated August 21, 2023 at para. 13 **[MR, Tab 7, pp. 103-104]**; Affidavit of Sean Tiessen, dated August 23, 2023 at para. 13 **[MR, Tab 9, p. 129]**
[26] Affidavit of Dale Enns, dated August 18, 2023 at paras. 23, 25 & 28 **[MR, Tab 4, pp. 53-54]** Affidavit of Ryan Mihilewicz, dated August 15, 2023 at paras. 23, 25 & 28 **[MR, Tab 8, pp. 120-121];** Affidavit of Tom Marazzo, dated August 17, 2023 at paras. 26, 28 and 33 **[MR, Tab 10, pp. 144-146]**; Affidavit of Daniel Bulford, dated August 24, 2023 at paras. 14, 28, 30 and 34 **[MR, Tab 5, pp. 63 and 66-68]**

27. In parallel to denying that the horn honking, prolonged idling, or blockading of streets occurred, the Organizer Defendants also deny that they played any role in facilitating, organizing or encouraging these activities. In this regard, the Affidavit of Daniel Bulford denies that he played any logistical or coordinating role in "the tortious horn blasting and idling trucks". This is a departure from Bulford's previous evidence, provided in his February 2022 affidavit to resist the horn injunction, that the Freedom Convoy leadership had agreed upon a schedule for honking and that Bulford played a role in communicating this schedule to truckers.[27] In any event, his position on this motion is that he did not play such a role and therefore he cannot avail himself of the s. 137.1 mechanism.

28. In the Affidavit filed by Brad Howland, while he acknowledges donating to the GiveSendGo fundraiser, he denies that his donation was made to support the impugned expressive activities of blocking streets, idling trucks and blaring horns.[28]

29. In the instant case, the Moving Parties have taken positions that are analogous to the untenable positions advanced by the moving parties in *Christman* and *Zoutman*. The Plaintiffs submit that the Moving Parties cannot claim that this lawsuit — focused on the Defendants' common design tactics of horn honking, idling and blockading of streets — is an attempt to silence those expressive activities, while at the same time purporting to have never engaged in or facilitated those expressive activities in the first place.

30. The Plaintiffs submit that the motion should be denied on the basis of the Moving Parties' failure to meet the threshold burden.

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[27] Affidavit of Daniel Bulford, dated February 5, 2022 at paras. 7-8, attached as Exhibit A to Affidavit of Trudy Moore dated September 1, 2023 ("Moore Affidavit") **[SMR, Vol 1, Tab 7, pp. 377-378]**

[28] Affidavit of Brad Howland, dated September 15, 2023 at para. 10 **[MR, Tab 2, p. 43]**

31. If this Court nonetheless finds the Moving Parties to have discharged their threshold burden, the Plaintiffs submit that there are grounds to believe that the claim has substantial merit and that the Defendant have no valid defences.

C. Grounds to Believe the Claim has Substantial Merit

32. The Plaintiffs have provided sufficient evidence that is reasonably capable of belief and which demonstrates that the claim has substantial merit in the sense that it has "a real prospect of success". [29]

33. It is worth reiterating that, when considering this branch of the anti-SLAPP test, the Court is not required to determine the merits of the underlying claim. The Supreme Court of Canada has cautioned that anti-SLAPP motions are not akin to summary judgment motions and parties are limited in the evidentiary record they can put forward.[30] A judge considering an anti-SLAPP motion "should only engage in limited weighing of the evidence and should defer ultimate assessments of credibility and other questions requiring a deep dive into the evidence at a later stage".[31] The framework is intended to establish a "screening procedure" that is "efficient and economical" rather than a trial of the underlying action.[32]

34. Just as anti-SLAPP motions are not akin to summary judgment motions, they are also not similar to class action certification motions. Contrary to the Moving Parties' suggestion otherwise, the Plaintiffs should not be expected to lead evidence on behalf of all members of the proposed class(es), which is not even required in a certification motion.[33] In a class action based on nuisance, the BC Court of Appeal in *Gautam v Canada Line Rapid Transit* rejected similar arguments by defendants that damage to the interests of each individual class member must be established as an

[29] *Pointes*, 2020 SCC 22 at para. 49
[30] *Pointes*, 2020 SCC 22 at para. 52; *Bent v. Platnick*, 2020 SCC 23 ("*Bent*") at para. 51
[31] *Pointes*, 2020 SCC 22 at para. 52
[32] *Park Lawn*, 2023 ONCA 129 at paras. 38-39
[33] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para 119

element of nuisance rather than simply damages. The BC Court of Appeal observed, in the context of a certification motion, that "it is not necessary for the court to consider the effect on each owner or business proprietor in order to ascertain whether there is substantial interference that is unreasonable."[34] The standard in an anti-SLAPP motion cannot be more onerous than a certification motion as it would be contrary to the statutory purpose of s. 137.1 of the *CJA* and the court's guidance.

35. It is well-established that a judge may rely on both direct and indirect evidence, including hearsay evidence, in considering whether there are grounds to believe that the claim has substantial merit on an anti-SLAPP motion.[35] In assessing whether there are grounds to believe that a claim has substantial merit, a judge may also draw logical or common-sense inferences if those inferences are grounded in the evidence.[36]

36. Based on the evidence tendered by the Plaintiffs on this motion, there are grounds to believe that the Defendants will be found liable for private and public nuisance.

(i) Evidence of substantial and unreasonable interference with Plaintiffs' rights

37. As the Court has previously recognized in this proceeding,

> The central feature of the protest involved blocking the streets in front of Parliament and the surrounding downtown core with large tractor trailers and other vehicles. One of the tactics of the protesters, besides blocking the streets, was to make continuous noise with truck horns and other devices. Besides the truck horns, there were exhaust fumes from truck engines and other activities which disrupted the normal lives of those who live and work in Ottawa.[37]

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[34] *Gautam v. Canada Line Rapid Transit Inc.*, 2011 BCCA 275 at paras 32-33, 33 for quote
[35] *Christman*, 2023 BCCA 363 at para. 77. See also R. 39.01(4) of the *Rules of Civil Procedure*, RRO 1990, Reg 194
[36] *Christman*, 2023 BCCA 363 at para. 75
[37] *Li et al. v. Barber et al.*, 2023 ONSC 1679 (re motion to amend/strike) at para. 8

38. The Plaintiffs have filed several affidavits on this motion which recount direct observations of Convoy participants engaging in prolonged honking, idling and blockading of downtown Ottawa streets in January and February 2022. These affidavits also describe how the aforementioned activities interfered with the daily living of residents, the operation of businesses and the rights of employees to earn a living. The Moving Parties declined to cross-examine the Plaintiffs' witnesses on their affidavits.

39. The Affidavit of Zexi Li provides evidence about her experience during the Freedom Convoy as a resident living within the occupation zone. She discusses how she was "tormented by persistent and painfully loud honking from several large trucks which were parked outside of her residence" throughout the Convoy.[38] She recounts that the horn honking felt nearly constant from January 28 to February 7, 2022 and that she recorded sound levels as high as 84 decibels within her apartment during this time.[39] She described how the constant honking caused her severe physical and emotional distress, interfered with her sleep and made her fearful to leave her home.[40] She notes that while the honking subsided for a few days following the granting of the horn injunction on February 7, 2022, it ramped up again by February 11, 2022 and remained loud and persistent until the last of the Convoy vehicles were cleared out between February 18-19, 2022.[41] She also recounts that parked vehicles left their engines idling for prolonged periods and that the smell of diesel fumes was overwhelming.[42] Finally, she states that she knows that there are other community members who suffered even greater effects.[43]

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[38] Affidavit of Zexi Li, dated September 1, 2023 ("Li Affidavit") at para. 8 **[SMR, Vol 2, Tab 8, p. 865]**
[39] Li Affidavit at paras. 10-11 **[SMR, Vol 2, Tab 8, pp. 865-866]**
[40] Li Affidavit at paras. 12-15 and 28 **[SMR, Vol 2, Tab 8, pp. 866-867 and 870]**
[41] Li Affidavit at paras. 25-27 **[SMR, Vol 2, Tab 8, pp. 869-870]**
[42] Li Affidavit at para. 7 **[SMR, Vol 2, Tab 8, p. 865]**
[43] Li Affidavit at para. 29 **[SMR, Vol 2, Tab 8, pp. 870-871]**

40. The Affidavit of Sean Flynn provides his direct observations of the Freedom Convoy occupation as an Ottawa citizen who walked and cycled around the occupation zone from January 28 to February 19, 2022. He states that he witnessed extremely loud and constant horn honking and prolonged idling of trucks (emitting heavy diesel fumes) throughout the Convoy occupation. He provides videos that he took of the honking and sound level measurements from his Smart Watch which registered over 100 decibels on several occasions.[44] Mr Flynn's evidence demonstrates the serious and widespread nature of the tortious activities. The Court can draw a reasonable inference from his evidence, especially when combined with the evidence of Ms Li, that anyone residing in the occupation zone during the Convoy protest would have experienced a substantial and unreasonable interference with the enjoyment of their homes and daily lives.

41. The Affidavit of Ivan Gedz provides evidence about his experience during the Freedom Convoy as the owner of a restaurant located within the occupation zone. He states that his restaurant's revenues during the Convoy decreased approximately 45% from what they would have expected. They had nights where almost no customers came in[45] and saw a substantial number of reservations cancelled as disturbances from the Convoy went unresolved.[46] Some customers expressly cited the Convoy as the reason for cancelling their reservations[47] and the loud honking and created an unwelcoming atmosphere for prospective diners.[48]

42. As the head of the Somerset Street Business Improvement Area ("BIA"), Gedz was also in regular communications with the members of their BIA as well as the Ottawa Association of BIAs. He heard that the Convoy drastically affected the

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[44] Affidavit of Sean Flynn, dated August 31, 2023 at paras. 2-28 **[SMR, Vol 1, Tab 6, pp. 332-339]**
[45] Affidavit of Ivan Gedz, dated August 31, 2023 ("Gedz Affidavit") at para. 7 **[SMR, Vol 1, Tab 3, pp. 281-282]**
[46] Gedz Affidavit at para. 8 **[SMR, Vol 1, Tab 3, p. 282]**
[47] Gedz Affidavit at para. 9 **[SMR, Vol 1, Tab 3, Tab 282]**
[48] Gedz Affidavit at paras. 10 and 13 **[SMR, Vol 1, Tab 3, pp. 282-283]**

revenues of other businesses and that businesses closer to the heart of the Convoy occupation were closed entirely.[49] When combined with the evidence of Mr Flynn, the Court may draw a reasonable inference that businesses across the occupation zone, as well their employees, were impacted by the tortious activities.

43. In addition to the direct accounts of Li, Flynn and Gedz, the Plaintiffs rely on an affidavit from Debbie Owusu-Akyeeah, one of the Commissioners from the Ottawa People's Commission ("OPC") on the Convoy Occupation in Ottawa. Ms Owusu-Akyeeah's affidavit attaches a copy of Part I of the OPC's report – *What we heard* – which contains quotes from stories shared with the OPC Commissioners through video-recorded public hearings, community consultations and written submissions. At paragraph 12 of her affidavit, Ms Owusu-Akyeeah highlights some of the accounts that she heard from community members regarding harm caused by the incessant honking of horns, prolonged exposure to diesel fumes and blockading of downtown streets.[50]

44. The Plaintiffs have also filed excerpts from Commissioner Rouleau's report and exhibits filed in connection with the Public Order Emergency Commission ("POEC").[51] In his report, Commissioner Rouleau found that Freedom Convoy protestors engaged in unlawful conduct[52] and that residents, businesses and workers suffered harm as a result of this conduct.[53] Exhibits filed in the course of the POEC included a Health Canada Report regarding the Human Health Risk for Diesel Exhaust[54] and a Message

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[49] Gedz Affidavit at para. 15 **[SMR, Vol 1, Tab 3, pp. 283-284]**
[50] Affidavit of Debbie Owusu-Akyeeah Gedz, dated September 1, 2023 at para. 12 **[SMR, Vol 1, Tab 2, pp. 201-204]**
[51] Moore Affidavit at paras. 6-7 **[SMR, Vol 1, Tab 7, p. 368]**
[52] POEC Report Volume I, attached as Exhibit B to Moore Affidavit **[SMR, Vol 1, Tab 7, p. 520]** . Based on the evidence presented during the POEC, Commissioner Rouleau concluded (at p. 138): "I do not accept the organizers' descriptions of the protests in Ottawa as lawful, calm, peaceful or something resembling a celebration"
[53] POEC Report Volume III, attached as Exhibit C to Moore Affidavit **[SMR, Vol 1, Tab 7, pp. 657-658 and 662-663]** . At pp. 193-194, Commissioner Rouleau discusses how community members were negatively impacted by noise, fumes and disruption of traffic and city services (as a result of blockaded streets). At pp. 198-199, Commissioner Rouleau discuses the negative impact of the Convoy's unlawful activities on businesses and workers.
[54] Exhibit D to Moore Affidavit **[SMR, Vol 1, Tab 7, pp. 665-709]**

from Ottawa Public Health regarding convoy-related air quality concerns.[55] This evidence supports the Plaintiffs' allegations that the idling trucks emitted harmful diesel fumes.

45. While the Plaintiffs acknowledge that the findings of the OPC and POEC are not admissible for the purpose of this Court making material findings of fact, they submit that these reports are helpful in assessing whether there are "grounds to believe" that the claim has substantial merit. To be clear, the Plaintiffs do not seek to rely on these reports for the truth of their contents but instead for the fact that there have been two previous proceedings where evidence was presented about the activities of the Freedom Convoy and the impact of these activities on Ottawa residents, businesses and employees. The existence of the OPC and POEC reports provide reasonable grounds to believe that the Plaintiffs will be able to adduce similar evidence in the course of this action.

46. Finally, the Plaintiffs have filed expert affidavit evidence by Chantal Laroche and Larry Andrade.

47. In the Affidavit of Chantal Laroche, professor emeritus of Audiology/Speech-Language Pathology, she provides her expert assessment that:

> During the Freedom Convoy, indoor noise levels were sufficiently high as to interfere with residents' daily activities of life including work and rest, and outdoor noise levels were sufficiently high as to cause temporary hearing loss, permanent hearing damage and/or tinnitus.[56]

48. In the Affidavit of Larry Andrade, Chartered Professional Accountant and Partner in Deloitte LLP, he provides a preliminary estimate of the economic damages suffered by the Business and Employee Sub-Classes in this proceeding. He has

[55] Exhibit E to Moore Affidavit **[SMR, Vol 2, Tab 7, pp. 711-712]**
[56] Affidavit of Chantal Laroche, dated August 31, 2023 at para. 12(d) **[SMR, Vol 1, Tab 1, p 5]**

estimated a range of losses for the Business and Employee Sub-Classes of $150.0 million to $210.0 million.[57]

49. Combined with the evidence of Mr Gedz and Mr Flynn about the substantial interference caused by the tortious activities in the occupation zone, the evidence of Mr Andrade is sufficient to establish that there is evidence reasonably capable of belief showing that businesses and workers in downtown suffered damages.

50. The Moving Parties argue that, for the tort of public nuisance, economic losses cannot meet the requirement of "special damages". The jurisprudence suggests otherwise.[58] The entire community of greater Ottawa experienced inconvenience from blocked roads and the concentrated emission of diesel fumes. But while most of Ottawa could not easily access or use the streets of downtown Ottawa during the Convoy, those who operated businesses located in the occupation zone, or worked in those businesses, experienced special damages over and above the rest of the Ottawa public. In a seminal case, *O'Neal v Harper*, the Ontario Court of Appeal canvassed the British jurisprudence on this issue in detail in the case of an obstructed highway, and quoted an older British case, *Fritz v. Hobson*, 14 Ch. D., as follows:

> And accordingly, in *Benjamin v. Starr* (1874), L.R. 9 C.P. 400, Lord Justice Brett considered that if by reason of the access to his premises being obstructed for an unreasonable time, and in an unreasonable manner, the plaintiff's customers were prevented from coming to his coffee-shop, and he suffered a material diminution of trade, that might be a particular, a direct, and a substantial damage. [59]

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[57] Affidavit of Larry Andrade, dated August 30, 2023 at paras. 10 and 27-64 **[SMR, Vol 1, Tab 5, pp. 302 and 308-318]**

[58] See, e.g., *O'Neil v. Harper*, [1913] O.J. No. 91 (ONCA) at paras 72, 75, 80, 85-88 and 94 (member of public who resides proximate to an obstructed road can sue for nuisance); *Rainy River Navigation Co. v Watrous Island Boom Co.*, [1914] O.J. No. 420 (ONCA) (piers blocking a steamer from its regular route on a navigable river); and *McKie v. K.V.P. Company Ltd*, [1948] O.J. No. 471 (OntHC) (tourist camp business on a river able to sue company polluting that river).

[59] *O'Neil v. Harper*, [1913] O.J. No. 91 (ONCA) at para 86. Also see quote from *Halsbury's Laws of England* at para 88: "Substantial pecuniary loss occasioned to an individual by the fact that he or his servants cannot carry on his business, or can only do so by a circuitous or more costly journey, may be sufficient."

(ii) Evidence of Defendants' concerted action liability

51. The Plaintiffs do not assert that all of the Defendants were directly engaged in the activities that constitute a private nuisance or public nuisance. However, the courts have held that other parties may be joint tortfeasors and liable for the tortious activity where they have knowingly assisted or encouraged another to commit a tort in furtherance of a common design or end.[60]

52. The Plaintiffs allege that the organizer and donor defendants knowingly planned, coordinated, assisted, encouraged and incited the trucker defendants to engage in the specific activities alleged to constitute private and/or public nuisance. To that end, evidence has been provided on this motion demonstrating that:

(a) Harold Jonker, proposed representative for the Trucker Class Defendants, admits that "the trucks were an important symbol of the protest"[61] that the honking was "trying to send a message" to government;

(b) Convoy organizers facilitated and encouraged tortious activities including by scheduling and directing horn honking,[62] encouraging the use of horn honking as a "war" tactic to harm community members,[63]

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[60] *Anmore Development Corp v The City of Burnaby et al*, 2005 BCSC 1477 at paras 120-122; *Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5 at para. 154; and *ICBC v Stanley Cup Rioters*, 2016 BSCS 1108 at paras 21-30 and paras 31-39 where court distinguishes spontaneous events that are not planned or deliberate, in contrast to the events in this claim.
[61] Jonker Transcript, Q 52 (p. 13) and Q 63 (p. 15) **[SMR, Vol 2, Tab 15, p. 1163]**
[62] Affidavit of Daniel Bulford, dated February 5, 2022, at paras. 7-8, attached as Exhibit A to Moore Affidavit **[SMR, Vol 1, Tab 7, pp.377-378]**; Affidavit of Jeremy King, dated September 1, 2023 ("Jeremy King Affidavit") at paras. 8 and 10-11 **[SMR, Vol 1, Tab 4, pp. 295-297]** (discussing social media posts made by Chris Barber and Patrick King, respectively, directing truckers as to how and when to honk their horns); Li Affidavit at paras 21-25 **[SMR, Vol 2, Tab 8, pp. 868-870]** (describing how the horn honking died down after the injunction in conjunction with Patrick King's directive on social media to lay off the horns)
[63] See "Freedom Convoy 2022 Official Daily Event and Safety Reports" dated February 12-23, 2022 at Exhibits K and L to Moore Affidavit **[SMR, Vol 2, Tab 7, pp. 801-805]** . At the bottom

and discussing a strategy to "gridlock" the city;[64]

(c) Convoy organizers opposed the horn injunction and either did little to discourage the honking (including by failing to communicate the injunction to truckers in accordance with the court order)[65] or actively encouraged the honking to continue;[66]

(d) Convoy organizers encouraged participants to "hold the line" [67] and to stay in place until their demands were met;

(e) GoFundMe released a statement of February 4, 2022 stating that the

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of each daily report, there is a "Daily Humour and Meme Warfare" section commenting on the use of honking as a protest tactic. The February 12th report contains a meme describing characteristics of "The Honker", including: "Creates a schedule for the hoonk for maximum freedom enhancing effects", "Disrupts the status quo by not letting people sleep in tyranny"; "Just straight up says to the crying soy jack 'The honking will continue until freedom improves'". The February 13th report contains a quote attributed in jest to Sun Tzu: "The supreme art of war is to tire the enemy with honking".

[64] See CityNews article dated July 9, 2022 at Exhibit I to Moore Affidavit **[SMR, Vol 2, Tab 7, pp, 795-799].** This article contains a quote from a text message sent by Lich to Barber on January 30, 2023 stating that she had received a call from the "command centre" that had a "strategy to gridlock the city" **[quote at SMR, Vol 2, Tab 7, p. 798]**

[65] Jeremey King Affidavit at paras. 4-7 and 12 **[SMR, Vol 1, Tab 4, pp. 294-295 and 297]** . See also Volume I of POEC Report, attached as Exhibit B to Moore Affidavit **[SMR, Vol 1, Tab 7, p. 522]** at p. 140 (where Commissioner Rouleau states that Lich and Barber "took no meaningful steps to stop [the honking]")

[66] Jeremy King Affidavit at paras. 8 and 11 **[SMR, Vol 1, Tab 4, pp. 295 and 297]** (discussing social media posts made by Chris Barber and Patrick King, respectively, encouraging truckers to blare their horns in defiance of the injunction). See also OPP Intelligence Report dated February 14, 2022 attached as Exhibit F to Moore affidavit **[SMR, Vol 2, Tab 7, pp. 729, 748 and 751]** . This OPP report states (at p. 16) that "The Truck horns are going off all day long with short lulls of silence. The horns continue to go off even during support speeches throughout the day". This report also states (at p. 35) "There were many trucks that below their air horns today despite the injuction not to do so and (at p. 38) "Speakers were also promoting truckers to honk their horns".

[67] A phrase frequently uttered by Convoy organizers, as reflected also in the title of the Defendant Lich's book published about her Convoy experience ("Hold the Line: My Story From the Heart of the Freedom Convoy")—see Moore Affidavit at para. 8(a) **[SMR, Vol 1, Tab 7, pp. 369-370]**. See also the Affidavit of Christopher Rhone (sworn in support of the AG's Restraint Order), attached as Exhibit H to Moore Affidavit **[SMR, Vol 2, Tab 7, pp.764-789]**. At para. 23 of his Affidavit **[p. 772]**, Rhone describes a press conference held by Convoy organizers on January 30, 2022 where they communicate they are in this for the "long haul".

Freedom Convoy 2022 fundraiser had been shut down as "[w]e now have evidence from law enforcement that the previously peaceful demonstration has become an occupation, with police reports of violence and other unlawful activity";[68]

(f) on February 4, 2022, following GoFundMe's shutdown of the Convoy fundraiser, the Defendant Lich released a video statement on Facebook (which was also posted to the GiveSendGo campaign page) announcing that donations in support of Freedom Convoy 2022 could be made on GiveSendGo, and that these donations would support the Convoy's plan to "be here for the long haul as long as it takes to ensure that your rights, and freedoms, are restored";[69]

(g) Convoy organizers used social media to advise people that the GoFundMe campaign had been shut down and to encourage people to donate to the GiveSendGo fundraising campaign instead;[70]

(h) on February 9, 2022, the Defendants Lich, Dichter and St. Louis gave an interview to select media outlets (which was also posted to Facebook), stating that: some donors had expressed that they would double their donations following the GoFundMe campaign shutdown; and that a Bitcoin fundraiser had also been setup to receive "donations without obstruction" which would be "unconfiscatable" and which "police cannot stop";[71]

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[68] Affidavit of Christopher Rhone at para. 40, attached as Exhibit H to Moore Affidavit **[SMR, Vol 2, Tab 7, p. 780]**
[69] Affidavit of Christopher Rhone at para. 44, attached as Exhibit H to Moore Affidavit **[SMR, Vol 2, tab 7, p. 781]**
[70] Transcript of the Cross-Examination of Miranda Gasior, dated September 15, 2023 (the "Gasior Transcript"), Qs 24-27 (pp. 6-7) **[SMR, Vol 2, Tab 12, pp. 1100-1101]**
[71] Affidavit of Chrstopher Rhone at para. 24, attached as Exhibit H to the Moore Affidavit **[SMR, Vol 2, Tab 7, pp. 772-773]**

(i) Brad Howland, proposed representative for the Donor Class Defendants, admits that his donation of $75,000 on or about February 9, 2022 was for the purpose of supporting the trucks to stay on the streets of Ottawa[72] and that he was aware that GoFundMe had suspended their fundraising campaign by that point;[73]

(j) a Restraint Order was obtained by the Attorney General on February 10, 2022 with regards to the GiveSendGo donations, on the basis that these funds were offence-related proceeds as (donations made in support of criminal mischief);[74] and

(k) donations provided material moral support to the Trucker Class Defendants to continue in their tortious activities — as admitted by Sean Tiessen during cross-examination, the large amount of money raised was a symbol of how much support they had to keep going: "It was a symbol. You know, it's not the money. It was a symbol."[75]

53. The Plaintiffs maintain that it was the collective activities of the Defendants, acting with a common design, that caused the harm alleged. Indeed, the Court has previously accepted the possibility of the Plaintiffs succeeding on their theory of concerted action liability. In the Court's decision dismissing the Defendants' motion to strike, the Court acknowledged that,

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[72] Transcript of the Cross-Examination of Brad Howland, dated September 15, 2023 (the "Howland Transcript"), Q 2 (p. 3) **[SMR, Vol 2, Tab 13, p. 1117]**
[73] Howland Transcript, Q. 9 (p. 5) **[SMR, Vol 2, Tab 13, p. 1119]**
[74] Exhibits G to Moore Affidavit **[SMR, Vol 2, Tab 7, pp. 759-762]**. See also paragraphs 58-60 of the Affidavit of Christopher Rhone attached as Exhibit E to the Moore Affidavit **[SMR, Vol 2, Tab 7, p. 785]** where Detective Rhone sets out his grounds for belief that donations made to the Convoy constitute property intended to be used to commit criminal mischief.
[75] Transcript of the Cross-Examination of Sean Tiessen, dated September 15, 2023 (the "Tiessen Transcript"), Qs 45-47 (pp. 10-11) **[SMR, Vol 2, Tab 16, pp. 1180-1181].** See also the Affidavit of Christopher Rhone para. 24, attached as Exhibit H to Moore Affidavit **[SMR, Vol 2, Tab 7, pp. 772-773]** where Rhone describes a media interview given by Convoy organizers on February 9, 2022 and posted to Facebook. In this interview, Convoy organizers promoted the success of the GiveSendGo campaign and stated that these donations are intended "to provide a legal war chest (defensive and offensive)".

> …regardless of where individual trucks were located, it was the collective mass of all of the trucks and all of the protestors as well as the other activities taking place during the convoy which allegedly caused damage to the plaintiffs. No single vehicle would have had the same impact.[76]

54. In that same decision, the Court noted that "[c]oncerted action liability is a fact-sensitive and fact specific concept"[77] and that an analysis of same should not be done at a pleadings stage. The Plaintiffs submit that it would be similarly inappropriate to do a "deep dive" into the evidence to perform a detailed analysis of the Plaintiff's theory of concerted action liability on the present motion.

55. In light of the foregoing, the Plaintiffs submit that there is more than enough evidence to find that there are grounds to believe that the claim has substantial merit.

(iii) Previous judgments of the Court

56. The Plaintiffs highlight that this Court has already opined on the merits of this claim on several occasions. In granting the horn injunction, McLean J. found that there "not much difficulty" finding there was a "serious issue to be tried" in the proceeding.[78] In granting the subsequent *Mareva* injunction, the MacLeod RSJ. then found that the higher standard of an "apparently strong case" was also met: "There can be little argument that based on the statement of claim, the plaintiffs have endured a substantial interference with their rights…On the facts disclosed by the affidavits, there is an apparently strong case for establishing tort liability."[79]

57. In determining the motion to amend/motion to strike, the MacLeod RSJ. acknowledged that:

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[76] *Li et al. v. Barber et al.*, 2023 ONSC 1679 (re motion to amend/strike) at para. 33
[77] *Li et al. v. Barber et al.*, 2023 ONSC 1679 (re motion to amend/strike) at para. 35
[78] *Li v. Barber et al.*, 2022 ONSC 1513 (re motion for horn injunction)
[79] *Li et al. v. Barber et al.*, 2022 ONSC 1176 (re Mareva injunction) at paras 8 and 14

> [30] Liability for private nuisance exists where the activities of a defendant on nearby land unreasonably interfere with the plaintiff's right to use and enjoyment of their property. Intrusion of noise, vibrations, pollution, odours or other substances which interfere with enjoyment of land including leased premises such as apartments can be the basis of tort liability even if the activity of the defendant is itself reasonable and lawful. In the present instance, the plaintiffs assert that noise, odour and pollution invaded the homes and businesses in the centre of Ottawa and interfered with daily living, with operation of businesses and with the rights of employees to earn a living. This is an entirely plausible cause of action.
>
> [31] Tort liability for public nuisance is slightly more complicated. Public nuisance exists where there is unreasonable interference with a public right such as the right to use the roads or sidewalks of the city. But to sue privately for public nuisance (without the approval of the Attorney General) requires the plaintiff to demonstrate particular loss or damage not suffered by the community at large. In this case, the plaintiffs assert that those who live and work in the "occupation zone" were particularly impacted by the continuous interference with their rights of passage and rights of ingress and egress to their residences or businesses. It is not certain that the action will succeed or that it can be certified as a class proceeding, but again, on the facts as pleaded, this is a plausible cause of action. Substantial economic loss and substantial inconvenience have been recognized as special damage in this context. [80]

58. As with the earlier procedural motions in this matter, the Court is only tasked at this stage with making a preliminary assessment about the merits of the case. The Plaintiffs submit that there is no reason for the Court to depart from its earlier assessment that there is an "apparently strong case for establishing tort liability". On the contrary, based on the evidence filed on this motion, the Plaintiffs have now demonstrated even stronger grounds to believe that the claim has substantial merit.

[80] *Li et al. v. Barber et al.*, 2023 ONSC 1679 (re motion to amend/strike) at paras. 30-31 [emphasis added]

D. Grounds to Believe that the Defendants Have No Valid Defence

59. Under s. 137.1(4)(a)(ii) of the *CJA*, the Court is required to consider whether there is any evidence supporting grounds to believe that the Moving Parties have a valid defence. The Court is tasked with considering the defences put "in play" or raised by the Moving Parties.

60. Here, the defences put in play by the Moving Parties are outlined in their proposed Statement of Defence[81] and factum on this motion. The defences of the Moving Parties appear to be that:

a) they deny the fact and/or nature of the activities alleged by the Plaintiffs and the Moving Parties' involvement in these activities;

b) if the Plaintiffs did sustain damages and losses these were "caused by the failure of the Ottawa Police Services to ensure that Freedom Convoy vehicles did not park in downtown Ottawa at the protest, as originally planned";[82]

c) the proceeding cannot be certified as a class proceeding;[83] and

d) the alleged damages are excessive, remote and unforeseeable.[84]

61. To the extent that the Moving Parties deny that the honking, idling and blockading of streets occurred or that the Moving Parties played a role in these activities as alleged, the Moving Parties' version of the facts is not supported by the evidence on this motion.

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[81] Proposed Statement of Defence, Exhibit A to Bird Affidavit **[MR, Tab 2]**
[82] Proposed Statement of Defence at para. 109, Exhibit A to Bird Affidavit **[MR, Tab 2, p. 35]** ; Factum of the Moving Parties at para. 88(a)
[83] Factum of the Moving Parties at para. 88(b)
[84] Factum of the Moving Parties at para. 88(c)

62. With regards to the suggestion that the Ottawa Police Service ("OPS") is to blame for any damages and losses suffered by the Plaintiffs, the Plaintiffs submit that the OPS cannot reasonably be held responsible for the Moving Parties' tortious conduct. Blaming the police for not stopping you from breaking the law is a rather audacious argument, but in any event enforcement of the law can be a sensitive exercise for police where there are risks to public order and public safety. As the Ontario Court of Appeal observed in *Henco Industries*,

> The immediate enforcement and prosecution of violations of the law may not always be the wise course of action or the course of action that best serves the public interest. The House of Lords explained this balancing exercise in *R. v. Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.*, [1999] 1 All E.R. 129 (H.L.), at p. 137:
>
> > In a situation where there are conflicting rights and the police have a duty to uphold the law the police may, in deciding what to do, have to balance a number of factors, not the least of which is the likelihood of a serious breach of the peace being committed. That balancing involves the exercise of judgment and discretion.[85]

63. The Plaintiffs also note that the Moving Parties have not sought to commence any third-party claim against OPS.

64. The Plaintiffs dispute that it is "obvious" that the action cannot be certified as a class proceeding. On the contrary, the evidence filed on this motion provides reasonable grounds to believe that the claim could be certified as a class proceeding. The Plaintiffs were not required to put forward a full certification record at this stage as it would have been neither efficient nor economical to do so. The ultimate determination as to whether this action should be certified as a class proceeding will require a "deep dive" into the evidence and should thus be deferred until a more fulsome record is provided at the certification motion.

[85] *Henco Industries Limited v. Haudenosaunee Six Nations Confederacy Council*, 2006 CanLII 41649 (ON CA) at para 118

65. Questions about whether the damages sought by the Plaintiffs are excessive, remote or unforeseeable will similarly require a "deep dive" into the evidence and should be deferred until a later stage of this proceeding. Overall, the defences that the Moving Parties have "put in play" provide grounds to believe that the Defendants have no valid defence.

E. Public Interest Weighing – Harm Caused by Moving Parties is Sufficiently Serious and Outweighs Public Interest in Protecting Expression

66. The final stage of the analysis under s.137.1(4) is to balance the harm to the Plaintiffs against the public interest in the Moving Parties' expression. 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.

(i) Evidence of serious harm caused by Defendants' conduct

67. The statutory language of subsection 137.1(4)(b) of the *CJA* requires that the Plaintiffs demonstrate, on a balance of probabilities, the existence of harm and causation — i.e., that the harm was suffered as a result of the moving party's expression. Either monetary harm or non-monetary harm can be relevant, and it need not be quantified.[86]

68. The evidence provided by the Plaintiffs (discussed at paragraphs 39-49 above) demonstrates that the subclasses suffered serious harm as a result of the incessant horn honking, emission of diesel fumes and blockading of streets. The Plaintiffs have also provided evidence (discussed at paragraph 52 above) to support the merit of their theory of concerted action liability — that the harm was caused by the Defendants' collective activities carried out with a common design.

[86] *Pointes*, 2020 SCC 22 at paras. 68-69

(ii) Factors to consider in weighing the public interest

69. On the other side of the weighing exercise is consideration of the public interest in protecting the Moving Parties' expression. The term "public interest" is used differently in s. 137.1(4)(b) than in s. 137.1(3).[87] Under s.137.1(4)(b), "not just *any matter* of public interest will be relevant. Instead, the *quality* of the expression, and the *motivation* behind it, are relevant here.[88]

70. The Supreme Court of Canada has stated that the following factors may be relevant 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 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 the *Charter of Rights and Freedoms* or human rights legislation.[89]

(iii) Weighing of the public interest

71. As outlined above, there is compelling evidence of significant harm to the Plaintiff classes resulting from the Defendants' expression. This evidence weighs strongly in favour of allowing the action to proceed.

72. On the other side of the weighing exercise, the Plaintiffs submit that the quality of the impugned expression is on the very low end of the scale. The Plaintiffs reiterate that this action does not impugn the Freedom Convoy *at large* or the Moving

[87] *Pointes*, 2020 SCC 22 at para. 74
[88] *Pointes*, 2020 SCC 22 at para. 74 [emphasis in original]
[89] *Pointes*, 2020 SCC 22 at para. 80

Parties' right to express themselves on the issue of COVID-19 mandates or related issues. The action is instead narrowly focused on the form of the expression rather than the content. In that regard, the action concerns those Freedom Convoy activities that constituted private and public nuisance – i.e., the participation in, incitement and facilitation of and material support for the horn honking, idling of trucks and blockading of streets. The weighing exercise must involve a consideration of whether *those* expressive activities deserve protection.

73. In *40 Days for Life v. Dietrich et. al.*,[90] the Court was asked to determine an anti-SLAPP motion in an action impugning certain tortious activity that occurred in the context of broader protests on the issues of reproductive justice and abortion. In that case, the plaintiff (40 Days) was an anti-abortion non-profit that had organized rolling anti-abortion protests. The defendant was an individual with a history of engagement on social justice issues who used social media to express her opinions in protest of 40 Days and its anti-abortion protests. 40 Days commenced an action against the defendant for certain posts that she made on social media which were focused on actively disrupting and impeding 40 Days in its protest activities (e.g. by encouraging false sign-us on 40 Days' vigil calendars and causing "inventory depletion" on 40 Days' online store by encouraging online shopping cart abandonment). The defendant argued that the impugned expression was highly valuable and worthy of protection because it was part of a larger debate about reproductive justice and abortion. The court ultimately determined, however, that:

> While Ms. Dietrich's motivation for expressing herself through the impugned TikTok videos may have started out as being part of the debate on whether anti-abortion protesting should be permitted near hospitals providing abortion services, some of her efforts appear to have subsequently become more focussed on actively disrupting and impeding 40 Days in its anti-abortion activities. I do not find that there is significant public interest in protecting that kind of expression.[91]

[90] *40 Days for Life v. Dietrich et. al.*, 2022 ONSC 5588 ("*40 Days*")
[91] *40 Days*, 2022 ONSC 5588 at para. 164

74. A similar analysis ought to be applied in this case. The Moving Parties' broad right to protest or express themselves on COVID-19 mandates is not what ought to be considered as part of the weighing exercise. The Court must instead ask whether the tortious activities alleged in the claim are worthy of protection in the public interest. In this regard, it has been recognized that there is little, if any, public interest in protecting activity that amounts to nuisance or obstruction or property.[92] As well, the horn honking was at such extreme levels that it may have constituted criminal assault.[93] Activity which conveys meaning through a violent form of expression is not conduct protected under the *Charter*.[94]

75. As another consideration in the weighing exercise, the Plaintiffs submit that the claim does not have any of the hallmarks of a SLAPP action. The Plaintiffs are Ottawa residents, businesses and employees who came together to seek redress for the harm that they suffered a result of the Defendants' conduct. Indeed, it was commenced only after the Defendants' horn honking had occurred for over a week and was ongoing. The purpose of the action was to recover damages for real harm and to prevent continuing harm by claiming injunctive relief.

76. The Moving Parties have not adduced compelling evidence regarding any chilling effect on future expressions about such matters if the action proceeds. On the contrary, this action appears to have given the Moving Parties an even bigger platform to continue to express themselves on these issues. The evidence filed by the Plaintiffs reveals that there have been a number of demonstrations and protests of a similar nature organized following the Freedom Convoy's departure from Ottawa.[95] Several of the Moving Parties have also published booked about their Freedom Convoy experiences: "Hold the Line: My story from the heart of the Freedom Convoy"

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[92] *SWA Vancouver Limited v. Unite Here, Local 40*, 2019 BCSC 1806 at paras. 18-20, 119
[93] In *R. v. Cheadle (D.)*, 1992 CanLII 13051 (MB KB), blowing a whistle loudly close to another person's ear was found to be an application of force and a conviction was entered.
[94] *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 92 at 978
[95] Moore Affidavit at para. 9 **[SMR, Vol 1, Tab 7, pp. 371-372]** and Exhibits T & U **[SMR, Vol 2, Tab 7, pp. 854-861]**

(written by the Defendant Lich);[96] "HONKING FOR FREEDOM: The Trucker Convoy That Gave Us Hope" (written by the Defendant Dichter);[97] and "The People's Emergency Act: Freedom Convoy 2022" (written by the Defendant Marazzo).[98] The Defendant Lich has also gone on a cross-Canada book tour.[99]

77. Even if the Moving Parties had demonstrated the existence or likelihood of a chilling effect on similar expressions (which the Plaintiffs deny), it would be very difficult to link such a chilling effect to this action. The Plaintiffs submit that there were other measures taken against Freedom Convoy actors — including the laying of criminal charges, freezing of bank accounts (pursuant to the Emergency Economic Measures Order) and a Restraint Order obtained by the Attorney General with respect to donations — that would have carried an even greater potential chilling effect.

78. In light of the foregoing, the Plaintiffs respectfully asks this Court to find that the harm suffered as a result of the Moving Parties' expression is sufficiently serious that the public interest in permitted the Action to continue outweighs the relatively modest public interest in protecting that expression.

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[96] Moore Affidavit at para. 8(a) **[SMR, Vol 1, Tab 7, pp. 369-370]** and Exhibits M-O **[SMR, Vol 2, Tab 7, pp. 807-829]**
[97] Moore Affidavit at para. 8(b) **[SMR, Vol 1, Tab 7, p. 370]** and Exhibit P **[SMR, Vol 2, Tab 7, pp. 831-832]**
[98] Moore Affidavit at para. 8(d) **[SMR, Vol 1, Tab 7, p. 371]** and Exhibits R and S **[SMR, Vol 2, Tab 7, pp. 837-852]**
[99] Moore Affidavit at para. 8(a) **[SMR, Vol 1, Tab 7, pp. 369-370]** and Exhibit O **[SMR, Vol 2, Tab 7, pp. 820-829]**

PART V- ORDER REQUESTED

79. The Plaintiffs submit that the Moving Parties' motion should be dismissed.

80. The Plaintiffs submit that, notwithstanding subsection 137.1(8) of the CJA, costs ought to be awarded against the Moving Parties Patrick King and Joe Janzen based on their failure to file any factum in support of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of December, 2023.

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SCHEDULE A – LIST OF AUTHORITIES

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

40 Days for Life v. Dietrich et. al., 2022 ONSC 5588

Anmore Development Corp v The City of Burnaby et al, 2005 BCSC 1477

Bent v. Platnick, 2020 SCC 23

Christman v. Lee-Sheriff, 2023 BCCA 363

Fullowka v Pinkerton's of Canada Ltd, 2010 SCC 5

Gautam v. Canada Line Rapid Transit Inc., 2011 BCCA 275

Hansman v. Neufeld, 2023 SCC 14

Henco Industries Limited v. Haudenosaunee Six Nations Confederacy Council, 2006 CanLII 41649 (ON CA)

ICBC v Stanley Cup Rioters, 2016 BSCS 1108

Irwin Toy Ltd. v. Quebec (Attorney General), 1989 CanLII 87 (SCC), [1989] 1 SCR 92

Li et al. v Barber et al., 2022 CanLII 13686 (ON SC) (re horn injunction)

Li et al. v Barber et al., 2022 ONSC 1176 (re Mareva injunction)

Li et al. v. Barber et al., 2023 CanLII 1679 (ON SC) (re motion to amend/strike)

McKie v. K.V.P. Company Ltd, [1948] O.J. No. 471 (OntHC)

O'Neil v. Harper, [1913] O.J. No. 91 (ONCA)

Park Lawn Corporation v. Kahu Capital Partners Ltd., 2023 ONCA 129

Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57

R. v. Cheadle (D.), 1992 CanLII 13051 (MB KB)

Rainy River Navigation Co. v Watrous Island Boom Co., [1914] O.J. No. 420 (ONCA)

SWA Vancouver Limited v. Unite Here, Local 40, 2019 BCSC 1806

Zoutman v. Graham, 2020 ONCA 767

SCHEDULE B – STATUTES AND REGULATIONS

Courts of Justice Act, RSO 1990 c C 43

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

Dismissal of proceeding that limits debate
Purposes

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s. 3.

Definition, "expression"

(2) In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.

No dismissal

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. 2015, c. 23, s. 3.

No further steps in proceeding

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

No amendment to pleadings

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

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

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

Costs on dismissal

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

Costs if motion to dismiss denied

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

Damages

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

***Rules of Civil Procedure*, RRO 1990, Reg 194**

RULE 39 EVIDENCE ON MOTIONS AND APPLICATIONS

Evidence by Affidavit
Generally

39.01 (1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 39.01 (1).

Court File No. CV-22-00088514-00CP

ZEXI LI et al.	**- and -**	**CHRIS BARBER et al.**
Plaintiffs (Responding Parties)		Defendants (Moving Parties)

ONTARIO
SUPERIOR COURT OF JUSTICE

FACTUM OF THE PLAINTIFFS (RESPONDING PARTIES)
(Motion pursuant to s.137.1 of the *CJA*,
returnable December 14-15, 2023)

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