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

and

CHRIS BARBER, BENJAMIN DICHTER, TAMARA LICH, PATRICK KING,
JAMES BAUDER, BRIGITTE BELTON, DANIEL BULFORD, DALE ENNS,
CHAD EROS, CHRIS GARRAH, MIRANDA GASIOR, JOE JANSEN,
JASON LAFACE, TOM MARAZZO, RYAN MIHILEWICZ, SEAN TIESSEN,
NICHOLAS ST. LOUIS (a.k.a. @NOBODYCARIBOU),
FREEDOM 2022 HUMAN RIGHTS AND FREEDOMS,
JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, JOHN DOE 4, JOHN DOE 5,
JOHN DOE 6, JOHN DOE 7, JOHN DOE 8, JOHN DOE 9, JOHN DOE 10,
JOHN DOE 11, JOHN DOE 12, JOHN DOE 13, JOHN DOE 14, JOHN DOE 15,
JOHN DOE 16, JOHN DOE 17, JOHN DOE 18, JOHN DOE 19, JOHN DOE 20,
JOHN DOE 21, JOHN DOE 22, JOHN DOE 23, JOHN DOE 24, JOHN DOE 25,
JOHN DOE 26, JOHN DOE 27, JOHN DOE 28, JOHN DOE 29, JOHN DOE 30,
JOHN DOE 31, JOHN DOE 32, JOHN DOE 33, JOHN DOE 34, JOHN DOE 35,
JOHN DOE 36, JOHN DOE 37, JOHN DOE 38, JOHN DOE 39, JOHN DOE 40,
JOHN DOE 41, JOHN DOE 42, JOHN DOE 43, JOHN DOE 44, JOHN DOE 45,
JOHN DOE 46, JOHN DOE 47, JOHN DOE 48, JOHN DOE 49, JOHN DOE 50,
JOHN DOE 51, JOHN DOE 52, JOHN DOE 53, JOHN DOE 54, JOHN DOE 55,
JOHN DOE 56, JOHN DOE 57, JOHN DOE 58, JOHN DOE 59, JOHN DOE 60,
JANE DOE 1 and JANE DOE 2

Defendants

Proceeding under the *Class Proceedings Act, 1992*

MOVING PARTIES' FACTUM
(Motion to Strike, returnable January 24-25, 2023)

December 30, 2022

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PART I - OVERVIEW

1. This is a motion under Rule 21.01(1)(b) to strike out the plaintiffs' Further Fresh as Amended Statement of Claim, in its entirety, or alternatively in part, for failure to disclose a valid cause of action. The Moving Parties say that none of the representative plaintiffs have properly named a defendant that they say created a nuisance that caused them harm. Rather, the plaintiffs have "lumped" all of "*the truckers*" together and simply refer to them as one unit for the purposes of their claim. The plaintiffs have, in fact, improperly sued a crowd of people without identifying who was in the crowd, or which people did what things to which plaintiff(s) at what time(s). They even go so far as to attempt to establish a defendant class, in an apparent attempt to circumvent their obligation to properly plead a cause of action. This is inappropriate; it is plain and obvious that the entire claim cannot succeed unless the plaintiffs are able to name one or more discrete defendants who they can say actually committed a nuisance. The entire claim should therefore be struck, with leave to amend (to the extent that the plaintiffs are able to do so while curing the various other violations of the rules of pleading described below).

2. Further, or in the alternative, the Moving Parties say that the claim with respect to the "donor class" cannot succeed. The plaintiffs suggest that all people who donated money to the Freedom Convoy movement after February 4, 2022 knew or ought to have known that they were giving money to further the commission of the tort of nuisance, and so they are therefore liable on a theory of "common design". Such an allegation is both ridiculous and incapable of proof. Further, it is unreasonable to expand the theory of "common design" liability to thousands of random people around the world who merely donated money to a political cause. It is plain and obvious that there can be no reasonable cause of action against the "donor class". This aspect of the claim should be struck without leave to amend.

3. Alternatively, the Moving Parties ask the Court to strike out a great many of the 245 paragraphs set out in the plaintiff's claim under Rule 25.11, as they violate many of the well-known rules of pleading. In the further alternative, the Moving Parties ask the Court to strike the entire pleading under Rule 25.11 on the same basis, with leave to amend in accordance with such directions as the Court is minded to provide.

PART II - FACTS

4. The Statement of Claim in this proposed class proceeding was issued on February 4, 2022. It can be found at **Tab 2** of the Moving Parties' Motion Record on this motion.

5. A Fresh as Amended Statement of Claim was subsequently issued on February 18, 2022. It can be found at **Tab 3** of the Moving Parties' Motion Record.

6. The plaintiffs have now moved for leave to further amend the Fresh as Amended Statement of Claim. That motion is to be argued at the same time as this motion. The proposed Further Fresh as Amended Statement of Claim can be found at **Tab 4** of the Moving Parties' Motion Record.

PART III – ISSUES & ARGUMENT

ISSUES FOR CONSIDERATION

7. This motion raises the following issues for the Court's consideration:

(a) whether the Further Fresh as Amended Statement of Claim, or any part of it, fails to disclose a valid cause of action and must be struck out in its entirety, without leave to amend;

(b) alternatively, whether the Impugned Paragraphs each violate one or more rules of pleading, or seek a remedy that is unavailable to the plaintiffs, and must also be struck out, without leave to amend;

(c) in the further alternative, whether the number of Impugned Paragraphs that must be struck out for violating one or more of the rules of pleading is so extensive that the entire Further Fresh as Amended Statement of Claim should be struck out, with leave to amend in accordance with the Court's directions.

RELEVANT LEGAL PRINCIPLES

8. Before turning to the Moving Parties' substantive arguments, it will be useful to first set out and review the following various categories of legal principles and related jurisprudence: (A) the elements of the torts of private and public nuisance; (B) "common design" liability; (C) the test for striking out pleadings for failure to state a valid cause of action under Rule 21.01(1)(b); (D) the rules of pleading in general; and (E) the rules of pleading in class proceedings.

A. The Torts of Private and Public Nuisance

9. The leading case in Canada on the elements of the tort of **private** nuisance is *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*.[1] The test in *Antrim* was summarized in *Weenan v. Biadi*,[2] as follows:

> A private nuisance is made out where the defendant interferes with his neighbour's use or enjoyment of land in a way that is both substantial and unreasonable. The interference may come from either causing physical injury to property or by interfering with the use or enjoyment of the land or interest in land. […]
>
> Once the interference is found to be substantial, the interference must be found to be unreasonable by balancing the gravity of the harm against the utility of the defendant's conduct in all of the circumstances. The courts have often referred to many factors as being relevant in this unreasonableness determination. However, no factor is specifically necessary to make out unreasonableness; the court should consider the exercise of balancing the competing landowners' rights in light of the relevant factors in the particular case.

10. In *Antrim*, the Court also confirmed at paragraph 28 that the focus in nuisance is on whether the *interference suffered by the claimant* is unreasonable, not on whether *the nature of the defendant's conduct* is unreasonable.[3]

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[1] *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13 (SCC).
[2] *Weenen v. Biadi*, 2015 ONSC 6832 at paras. 8-10 (SCJ).
[3] *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13 at paragraph 28 (SCC).

11. Meanwhile, the Supreme Court discussed the doctrine of **public** nuisance in *Ryan v. Victoria (City)*,[4] at paragraphs 52 and 53. Notably, the Court commented that litigants bringing a private action for public nuisance must "*plead and prove special damage*".

12. Nuisance is a common law tort, and it is a form of strict liability that is not concerned with fault or misconduct.[5] Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance.[6]

13. Causation is a pre-requisite to a finding of nuisance.[7] For a party to prove causation, the "but for" test must be applied. In the case of a plaintiff's claim for nuisance, the plaintiff must prove that "but for" the conduct of the defendant, the nuisance would not have happened.[8]

B. <u>"Common Design" or "Concerted Action" Liability</u>

14. In *Rutman v. Rabinowitz*,[9] the Ontario Court of Appeal observed, "*Canadian authorities suggest that concerted action liability arises when a tort is committed in furtherance of a common design or plan, by one party on behalf of or in concert with another party*".

15. In *Insurance Corp. of British Columbia v. Alexander*,[10] Justice Myers confirmed at paragraph 21 that "*there is no tort of assistance or inducement to commit a tort – the question is whether the actions of the defendant are such to make him liable as a joint tortfeasor and that is normally approached through the question of having acted pursuant to a common design*."

16. "Common design" liability is predicated on a person actually committing a tort in the first place. Moreover, such a tort (and its constituent facts and elements) must be pleaded in order for

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[4] *Ryan v. Victoria (City)*, 1999 CanLII 706 at paras. 52-53 (SCC).
[5] *Freedman v. Cooper*, 2015 ONSC 1373 at paragraph 33 (SCJ).
[6] *Barrette c. Ciment du St-Laurent inc.*, 2008 SCC 64 at paragraph 77 (SCC). See also *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13 (SCC) at paragraph 28. See also *Krieser v. Garber*, 2020 ONCA 699 at paragraph 18 (ONCA).
[7] *Toronto District School Board v. City of Toronto*, 2022 ONSC 4279 at paragraph 132 (SCJ). See also *Conrad v. Jinchi*, 2011 ONSC 6985 at paragraph 14 (Div. Ct.).
[8] *Weenen v. Biadi*, 2015 ONSC 6832 at paras. 14-15 (SCJ).
[9] *Rutman v. Rabinowitz*, 2018 ONCA 80 at paragraph 33 (ONCA).
[10] *ICBC v. Alexander*, 2016 BCSC 1108 at paragraph 21 (BCSC).

joint liability to arise. In *Best v. Ranking*[11] citing the Supreme Court of Canada in *Fullowka v. Royal Oak Ventures Inc.*,[12] Justice Healey observed at paragraphs 67-68:

> In *Fullowka,* at para. 152, the Supreme Court of Canada states: "*Inciting another to commit a tort may make the person doing the incenting a joint tortfeasor with the person who actually commits it*". At para. 35 of *Ontario Industrial Loan*, the court stated: "*All persons procuring, commanding, aiding or assisting the commission of a wrongful act, are principals in the transaction*" (cases omitted). Concerted action liability is a specific form of joint liability, where those participating in the commission of the tort must have acted in furtherance of a common design: *Botiuki*, at para. 74, citing John G. Fleming, The Law of Torts, 8th ed. […], at p. 255.
>
> While there can be no argument with these legal principles, they cannot be overlaid on a fact situation to create joint liability unless a tort has been properly pleaded in the first place. Joint liability can have no application to allege tortfeasors where neither the essential elements of the tort in question nor the facts underpinning those elements have been pleaded. [Emphasis added.]

C. The Test Under Rule 21.01(1)(b)

17. Under Rule 21.01(1)(b), where a defendant submits that a pleading does not disclose a reasonable cause of action, to succeed in having the action dismissed, the defendant must show that it is plain, obvious and beyond doubt that the plaintiff cannot succeed in the claim. Matters of law that are not fully settled should not be disposed of on a motion to strike, and the court's power to strike a claim is exercised only in the clearest of cases.[13] On a motion to strike under Rule 21.01(1)(b), the court accepts the pleaded allegations of fact in the statement of claim as proven, unless they are patently ridiculous or incapable of proof.[14]

18. Failure to establish a cause of action usually arises in one of two ways: (1) the allegations in the statement of claim do not come within a recognized cause of action; or (2) the allegations in the statement of claim do not plead all the elements necessary for a recognized cause of action. If

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[11] *Best v. Ranking*, 2015 ONSC 6269 at paras. 67-68 (SCJ).
[12] *Fullowka v. Royal Oak Ventures Inc.*, 2010 SCC 5 at paragraph 152 (SCC).
[13] *Fasteners & Fittings Inc. v. Wang*, 2020 ONSC 1649 at paragraph 65 (SCJ). See also *Abbasbayil v. Fiera Foods Company*, 2021 ONCA 95 at paragraph 20.
[14] *Fasteners & Fittings Inc. v. Wang*, 2020 ONSC 1649 at paragraph 67 (SCJ).

a material fact necessary for a cause of action is omitted, the statement of claim is bad and the remedy is a motion to strike the pleadings, not a motion for particulars.[15]

D. The Rules of Pleading in General

19. **First**, the general rules governing pleadings are well-known. *Cerqueira v. Ontario*[16] and *Sachedina v. De Rose*[17] both provide helpful summaries and were themselves cited in 2020 in *Allan Etherington v. National Hockey League*.[18] Helpful guidance is also found in Master Haberman's decision in *Mudrick v. Mississauga Oakville Veterminary Emergency Professional Corp.*[19] These principles can be paraphrased as follows:

(a) the purpose of pleadings is (i) to define or clarify the issues; (ii) to give notice of the case to meet and the remedies sought; and (iii) to apprise the court as to what is in issue;

(b) while it is important to "tell the story" in a pleading, such that the material facts are related chronologically or in some rational way a pleading is intended to provide a reader with the skeleton, rather than a fully fleshed out body detailing the events;

(c) causes of action must be clearly identifiable from the facts pleaded and must be supported by facts that are material:

(d) every pleading must contain a concise statement of the material facts on which the party relies but not the evidence by which those facts are to be proved: rule 25.06; this includes pleading the material facts necessary to support the causes of action alleged;

(e) a party is entitled to plead any fact that is relevant to the issues or that can reasonably affect the determination of the issues, but it may not plead irrelevant, immaterial or argumentative facts or facts that are inserted only for colour

(f) embellishment and argument are not to be included in a pleading;

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[15] *Fasteners & Fittings Inc. v. Wang*, 2020 ONSC 1649 at paragraph 68 (SCJ).
[16] *Cerqueira v. Ontario*, 2010 ONSC 3954 at paragraph 11 (SCJ).
[17] *Sachedina v. De Rose*, 2017 ONSC 6560 at paragraphs 12-31 (SCJ).
[18] *Allan Etherington v. National Hockey League*, 2020 ONSC 5789 at paras. 101-103 (SCJ).
[19] *Mudrick v. Mississauga Oakville Veterinary Emergency Professional Corp.*, 2008 CanLII 58422 at para. 21 (Ont. Master) [*Mudrick*].

(g) allegations that are made only for the purpose of colour or to cast a party in a bad light, or that are bare allegations, are scandalous and will be struck under rule 25.11(b);

(h) the court may strike part of a pleading, with or without leave to amend, on the grounds that (a) it may prejudice or delay the trial of an action, (b) it is scandalous, frivolous or vexatious, or (c) it is an abuse of the process of the court: rule 25.11; and

(i) allegations of fraud, misrepresentation, negligence and conspiracy must be pleaded with particularity.

20. The Moving Parties also rely on the additional guidance from Justice Strathy (as he then was) in *Canadian National Railway v. Brant*[20] at paragraphs 27-30.

21. A pleading should not describe the evidence that will prove a material fact; pleadings of evidence may be struck out.[21]

22. **Second**, where multiple defendants are named, it must be clear from the statement of claim what each defendant is alleged to have done. It is not enough to assert fraud (or any other cause of action) against multiple defendants as a group. As Justice Perell observed in *EnerWorks Inc. v. Glenbarra Energy Solutions Inc.* at paragraphs 60-65:

> This observation reveals the first major problem with EnerWorks pleading of fraudulent misrepresentation. EnerWorks' Statement of Claim sets out the allegedly false and fraudulent statements, but it does not detail which defendant made the particular and when and to whom the statement was made. […]
>
> The second major problem with EmerWorks' fraudulent misrepresentation pleading is that it lumps all the defendants makes allegations against them collectively.
>
> Although stated in the context of a conspiracy claim, I agree with Justice Nordheimer's observation in J.*G. Young & Son Ltd. v. TEC Park Ltd.* [(1999), 48 CPC (4th) 67] at paras. 9-10 that the specific acts of each defendant should be identified else the defendant cannot know what he or she is alleged to have done wrong. If there cannot be culpability by association in a conspiracy claim, *a fortiori* the defendants to a negligent misrepresentation claim cannot be simply lumped together. Each individual defendant is entitled to know the alleged material facts of its misconduct.[22] [Emphasis added.]

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[20] *Canadian National Railway v. Brant*, 2009 CanLII 32911 at paragraphs 27-30 (SCJ).
[21] See *Jacobson v. Skurka*, 2015 ONSC 1699 at para. 44 (SCJ).
[22] *EnerWorks Inc. v. Glenbarra Energy Solutions Inc.*, 2012 ONSC 414 at paragraphs 60-65 (SCJ). See also *J.G. Young & Son Ltd. v. TEC Park Ltd.* (1999), 48 CPC (4th) 67 at paragraphs 9-10 (SCJ).

23. In *Dowd et al. v. Skip the Dishes Restaurant Services Inc. et al.*,[23] the Statement of Claim lumped several defendants together. The Court commented at paragraph 66:

> As noted above, this is a claim in which the plaintiffs have chosen to lump all of the defendants together with very little clarification of which defendant is alleged to have done what. Therefore, based on the law, in order for the plaintiffs to be successful in defending against this motion without amending the pleadings or providing additional particulars, they must, at a minimum, provide a reasonable basis upon which the court can conclude the role of each defendant is identical vis-à-vis the plaintiffs.

24. The Moving Parties also rely on *Lana International Ltd. V. Menasco Aerospace Ltd.*,[24] at paragraphs 25-30, *Norman v. Thunder Bay Regional Health Sciences Centre*,[25] at paragraphs 56-62, *Fibracast Ltd. v. Waterspin S.r.l.*,[26] at paragraphs 29, 35, 36 and 47, *Lysko v. Braley*,[27] at paragraphs 141-145; and *National Trust Co. v. Furbacher*[28] at paragraph 11, and *Fragomeni v. Greater Sudbury Police Service*, at paragraphs 21 and 23,[29] all to similar effect.

25. **Third**, overviews in a pleading are repetitive and are unnecessary where a claim is properly pleaded. Moreover, where a Statement of Claim contains too many violations of the rules of pleading, it should be struck out in its entirety, with leave to amend.

26. For example, in *Mudrick*, the Court struck out the entire Statement of Claim, with leave to amend. The Statement of Claim had a number of deficiencies, including a repetitive overview. The Moving parties rely in particular on Master Haberman's comments at paragraphs 37-41.

27. The Court's comments in *Mudrick* were cited with approval by McEwen J. in *Murray v. Star*.[30] There, the Court struck out many paragraphs, including the entire overview section, from the claim. The Moving Parties rely generally on the Court's comments at paragraphs 10-18.

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[23] *Dowd et al. v. Skip the Dishes Restaurant Services Inc. et al.*, 2019 MBQB 63 at paragraphs 65-66 (MB Master).
[24] *Lana International Ltd. V. Menasco Aerospace Ltd.* (1996), 28 OR (3d) 343 at paragraphs 25-30 (Gen Div.).
[25] *Norman v. Thunder Bay Regional Health Sciences Centre*, 2015 ONSC 3252 at paras 56-62 (SCJ).
[26] *Fibracast Ltd. v. Waterspin S.r.l.*, 2021 ONSC 2147 (SCJ).
[27] *Lysko v. Brayley*, 2006 CanLII 9038 at paras. 141-145 (ONCA).
[28] *National Trust Co. v. Furbacher* (1994), 50 ACWS (3d) 1196 at para. 11 (Gen. Div.).
[29] *Fragomeni v. Greater Sudbury Police Service*, 2015 ONSC 3985 at paragraph 21 (SCJ).
[30] *Murray v. Star*, 2015 ONSC 4464 at paras. 10-18 (SCJ).

28. See also *Somerleigh v. Lakehead Region Conservation Authority*,[31] where the Court struck large portions of a defence, giving several examples of how they violated the rules of pleading.

29. **Fourth**, it is not the court's function to do the editorial work of counsel.[32]

30. **Fifth**, when the commission of a crime is irrelevant to the proof of a claim or defence, pleading that an opponent was convicted of a criminal offence is a scandalous pleading that will be struck out.[33] The Moving Parties also rely on Justice Ramsay's comments in *Kawa v. 1Plus 12 Corporation*,[34] at paragraphs 55-64, on this point.

31. **Sixth**, breach of a by-law does not impose civil liability on a defendant.[35] Similarly, breach of a statute is not a cause of action and is not a stand-alone tort. In *Tataryn v. Diamond & Diamond*, the Court struck out paragraphs in a claim alleging that the defendant violated the *Solicitors Act*, R.S.O. 1990, c. 5.15 and associated regulations.[36] At paragraphs 21-23, the Court also struck out allegations that the defendant had breached several rules of professional misconduct, holding that the allegations were bald and conclusory statements of law, and thus improper and inflammatory.[37]

E. Relevant Principles Applicable to Class Proceedings

32. **First**, a motion to strike a class claim may be brought before a certification hearing.[38]

33. **Second**, the *Rules of Civil Procedure* apply to proceedings under the CPA.[39] That an action is a class proceeding does not relieve the obligation to comply with the rules of pleading.[40]

34. **Third**, in *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.*,[41] Cumming J. held that for each defendant who is named in a class action there must be a representative plaintiff who has

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[31] *Somerleigh v. Lakehead Region Conservation Authority*, 2005 ONSC 3546 (SCJ).
[32] *Sachedina v. De Rose*, 2017 ONSC 6560 at paragraph 30 (SCJ).
[33] *Noel v. Johnson et al.*, 2019 ONSC 7366 at paragraph 32 (Ont. Master).
[34] *Kawa v. 1Plus 12 Corporation*, 2022 ONSC 6527 at paras. 55-64 (SCJ).
[35] *Peterson v. Windsor (City)*, 2006 CanLII 6458 at paragraph 18 (SCJ).
[36] *Tataryn v. Diamond & Diamond*, 2021 ONSC 2624 at paragraphs 17-18 (SCJ).
[37] *Ibid.*, paras. 21-23.
[38] *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.*, 2000 CanLII 22719 at paragraph 10 (SCJ).
[39] *Class Proceedings Act*, SO 1992, c. 6, section 35.
[40] *Norman v. Thunder Bay Regional Health Sciences Centre*, 2015 ONSC 3252 at para. 39 (SCJ).
[41] *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.*, 2000 CanLII 22719 at paragraph 10 (SCJ).

a valid cause of action against that defendant. There must be a reasonable cause of action against each defendant on the face of the pleading.[42]

35. The Moving Parties also cite *Hughes v. Sunbeam Corp.*,[43] where the Court of Appeal confirmed that "*if [a] representative plaintiff does not have a cause of action against a named defendant, the claim against that defendant will be struck out.*" The plaintiff could not have a reasonable cause of action against defendant manufacturers who did not manufacture the product he had purchased and could not resist a Rule 21.01(1)(b) motion by alleging that some as-yet-unknown members of a proposed class may have a cause of action against the other manufacturers if the class action were certified.[44]

36. **Fourth**, while the CPA contemplates defendant classes, such classes must be able to be identified. For example, in *Chippewas of Sarnia Band v. Canada (Attorney General)*,[45] the Court was of the view that the proposed defendant class was sufficiently identifiable (as "*all persons claiming a legal interest in the Cameron lands*"). Similarly, in *Berry v. Pulley*, the Court was able to discern the composition of the defendant class ("*all of the Air Canada pilots who were members of CALPA [Canadian Air Line Pilots Association] on March 28, 1995.*")[46]

ARGUMENT

A. The Plaintiffs' Claim Fails to Disclose a Valid Cause of Action

37. Fundamentally, the Moving Parties submit that the plaintiffs' claim in this case, as set out in the Further Fresh as Amended Statement of Claim, ought to be struck under Rule 21.01(1)(b) for failure to disclose a valid cause of action. A plain reading of the claim reveals that none of the plaintiffs have actually named a defendant that they claim has caused them harm. Rather, the

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[42] *Ibid.*, paragraph 50, 54, 55.
[43] *Hughes v. Sunbeam Corp.*, 2002 CanLII 45051 at paragraphs 15-16 and 18 (ONCA).
[44] *Ibid.* See also *Nordik Windows v. Aviva*, 2021 ONSC 5807 at paragraph 8 (SCJ).
[45] *Chippewas of Sarnia Band v. Canada (Attorney General)*, 1996 CanLII 8015 at paragraph 32 (SCJ).
[46] *Berry v. Pulley*, 2001 CanLII 28228 at paragaphs 22-24 (SCJ).

plaintiffs have lumped all of "the truckers" together and appear to refer to them all as one collective unit for the purposes of their claim. The plaintiffs are plainly suing "a crowd of people" without identifying who was in that crowd, or which people in the crowd did what to which plaintiff(s) at what time(s). There is therefore no valid cause of action pleaded at all against anyone.

38. It is true that the plaintiffs have gone to some lengths to describe the various "organizer" defendants (i.e. Tamara Lich, Chris Barber et al.). However, the plaintiffs' claim does not allege that those particular defendants ever honked a horn or did anything directly to any of the plaintiffs. The plaintiffs' claim clearly pleads that those defendants ought to be held liable on a "common design" theory – i.e. they ought to be liable in nuisance because of their actions in facilitating and encouraging "the truckers'" tortious activities.

39. The Moving Parties accept, for the purposes of this motion, that it is theoretically possible for the "organizer" defendants to ultimately be found liable for the part(s) they may have played in the events leading to this proceeding. However, there must be more before such derivative liability can attach. Following Justice Hearey's comments in *Best v. Ranking*, however, "common design" "*cannot be overlaid on a fact situation to create joint liability unless a tort has been properly pleaded in the first place. Joint liability can have no application to allege tortfeasors where neither the essential elements of the tort in question nor the facts underpinning those elements have been pleaded*."

40. It is clear from the plaintiffs' claim that if the "organizer" defendants are to be held liable, it will be *only* because of the "common design" theory of liability. That is plainly not a cause of action; the "organizer" defendants cannot be liable unless the plaintiffs are first successful in establishing that the tort of nuisance was committed by others.

41. But – who exactly *are* those others? And what exactly did they do to each representative plaintiff to cause them harm? And when did they do it? Following the cases cited above, these are

critical pieces of information that must be provided in a proceeding. Yet, the plaintiffs' claim is entirely silent on these crucial points.

42. The *only* "trucker defendants" named in the claim are the proposed defendants, **Harold Jonker and Jonker Trucking Inc.** All of the other defendants (both existing and proposed) are classified as either "organizer defendants" or "donor defendants". To repeat, all of those other defendants are not alleged to have honked any horns or idled any engines, etc. Rather, they are only alleged to have "*furthered the common design*". Again, while these defendants' conduct may or may not be enough to attract "common design" liability, the fact remains that there are only two individual defendants named in the claim that are being called upon to defend the claim as alleged tortfeasors in their own right.

43. The Moving Parties rely on all of the cases cited above at paragraphs 22-24 standing for the proposition that it is inappropriate to "lump" defendants together and make blanket allegations against them all, without explaining what each defendant actually did to cause the plaintiff harm, and when. All defendants – even "*the truckers*" – are entitled to know the case they have to meet.

44. The Moving Parties also rely on *Ragoonanan Estate* and *Hughes*, cited above in the class proceeding context, for the proposition that each proposed representative plaintiff must plead a valid cause of action against each named defendant. As already argued, the only available named defendants are Harold Jonker and Jonker Trucking Inc.

45. In this case, however, *none* of the representative plaintiffs specifically allege that Harold Jonker or Jonker Trucking caused the alleged nuisance that they claim harmed them.

46. With respect to the plaintiff Li's claim, the very height of her claim is found at paragraph 192, where she alleges:

> The Plaintiff Li, a resident of the Centretown neighbourhood in the heart of downtown Ottawa, suffered mental distress, suffering and torment as a result of the persistent and loud honking from several large trucks positioned outside of her residence from Friday, January 28, 2022 to Sunday, February 20, 2022.

47. Li does not identify who owned or operated the "several large trucks" to which she refers. There is no attempt at providing any detail as to who exactly Li claims actually honked a horn, and when, and therefore caused her to suffer a nuisance.

48. In any event, the only possible named defendant who could conceivably be the target of Li's claim is Harold Jonker. But Mr. Jonker could not possibly be directly responsible for the honking that Li claims to have suffered. His truck was not alleged to have been parked or positioned near Li's residence.

49. At paragraph 88 of the plaintiffs' claim, the plaintiffs allege only that:

> The Defendant Jonker was one of the first truck drivers to arrive in Ottawa on January 28, 2022, and parked his semi-tractor truck on Wellington Street, close to the Parliament Buildings.

50. The plaintiffs do not allege that Mr. Jonker honked a horn. They do not allege that he was parked outside of Ms. Li's apartment, or that he was responsible for the "*several large trucks positioned outside of her residence*". They simply allege that Mr. Jonker parked his truck on Wellington St. – which is some distance away from Li's residence.

51. In short, there are no facts alleged in the plaintiffs' claim that identify a defendant responsible for Li's individual claim. Without a named defendant, Li has no tenable cause of action. Accordingly, it is plain and obvious that Ms. Li's claim, as currently drafted, cannot succeed. If Li were able to identify the owners or operators of the trucks who were allegedly "*positioned outside of her residence*", then she might have a tenable cause of action that would survive a Rule 21.01(1)(b) motion to strike. However, that is not currently the case.

52. The same argument applies for the other plaintiffs: (a) Union: Local 613; (b) Happy Goat Coffee Company; and (c) Geoffrey Devaney. These plaintiffs also fail to name a specific defendant

or defendants who they say caused the damages they allege. Their claims also fail to state a valid cause of action against a defendant.

53. Rather, the plaintiffs are content to levy their allegations against an amorphous crowd of people. It appears that the plaintiffs believe it is not necessary for them to identify any defendants, but that it is a foregone conclusion that all of "the truckers" stand in exactly the same position vis-à-vis each other and the plaintiffs. This is, of course, an untenable proposition.

54. Nonetheless, the plaintiffs appear to be so confident in their belief, they suggest that Harold Jonker should represent all of "*the truckers*" as a defendant class representative, as if this somehow relieves the plaintiffs of their obligations to name the defendants in a proceeding.

55. However, as the Court is aware, class proceedings legislation is procedural, not substantive. The *Class Proceedings Act, 1992* does not alter the rules of pleading or the requirement that a plaintiff must disclose a valid cause of action. It follows that the mechanism of creating a defendant class is also procedural, not substantive. Thus, Mr. Jonker, by virtue of being a proposed representative defendant, does not somehow cure an otherwise defective pleading that does not disclose a cause of action against any defendant at all.

56. Since the plaintiffs' claim does not properly plead a valid cause of action against a named defendant, it is plain and obvious that it cannot succeed, whether as a class proceeding or even as a regular proceeding brought by four individual plaintiffs. In order to have a chance of success, the plaintiffs must, at minimum, point to one or more discrete defendants and say "*that person (or those people) harmed me*". It is simply not enough for the plaintiff to point to a group of hundreds of truckers and say "*they know who they are, they know what they did and when, and they are all to blame equally for the harm we all suffered*".

57. Accordingly, the plaintiffs' claim should be struck in its entirety, with leave to amend, should the plaintiffs become able to identify a target defendant and otherwise plead their claim in accordance with the rules of pleading.

58. **Second**, in the alternative, the Moving Parties submit that it is plain and obvious that the plaintiffs' claim with respect to the "donor class" cannot succeed. Accordingly, the claim against Brad Howland and all allegations implicating the "donor class" should be struck, without leave to amend.

59. The essence of the plaintiffs' claim against Mr. Howland and the "donor class" is that after February 4, 2022, all those who donated money to the "Freedom Convoy" "*knew or ought to have known that Freedom Convoy participants were committing the tortious acts and unlawful behaviour described further below*": see paragraph 46 of the Further Fresh as Amended Statement of Claim.

60. This assertion is both ridiculous and incapable of proof. There is quite simply no way for the plaintiffs to ever demonstrate that all of the people who donated funds to the "Freedom Convoy" protest "knew or ought to have known" that those funds would be or were being used to facilitate tortious activity. Recall that the "donor defendants", like the "organizer defendants", are alleged to be liable on the basis of "common design" – thus, the plaintiffs would have the Court believe that each and every donor *came to an agreement* (it is unclear with whom) that the funds donated would be used to commit the tort of nuisance. That is an absurd proposition and is unable to ever be proven at trial. Recall that in the *ICBC v. Alexander* case, the Court declined to hold that the entire mob of rioters was liable simply by virtue of being present at the scene of the riot. The Court proceeded in that case to analyze each defendant's conduct with respect to each damaged vehicle. The same concept holds in this case; one would need to examine each individual donor's personal reasons for donating to the Freedom Convoy. That would be impossible.

61. Moreover, while the Moving Parties accept that the "organizer defendants" might conceivably be found liable on a "common design" theory, the same simply cannot be reasonably be said to be true of hundreds or even thousands of donors to what was, in reality, a political cause. At least the "organizer defendants" were in Ottawa at the time and are alleged to have taken concrete steps to facilitate the truckers' protest. The same cannot be said of random people from around the world who were moved for whatever reason to donate. The plaintiffs' allegations against the "donor class" and Mr. Howland are simply a bridge too far – "common design" cannot be stretched so far and maintain any utility. Again, in *ICBC v. Alexander*, the Court was unwilling to expand "common design" liability so far, preferring to examine the defendants' individual conduct.

B. <u>The Impugned Paragraphs Violate the Rules of Pleading</u>

62. In the further alternative, the Impugned Paragraphs (as described in the Notice of Motion) ought to be struck without leave to amend. Fundamentally, the Impugned Paragraphs violate one or more of the well-established rules of pleading, as follows:

(a) **Paragraphs 2-18** – the "overview" section of the claim. It is repetitive, prolix and unnecessary, since every fact alleged in the overview is repeated elsewhere. The overview also refers to facts that are not necessary for a nuisance claim (e.g. facts concerning the defendants' underlying motives; facts concerning the Covid-19 situation, etc.). It contains argument and embellishment. Following *Mudrick* and *Murray v. Star*, above, the entire overview should be struck;

(b) **Paragraphs 20 (the word "occupation", and other such instances elsewhere in the claim, 27 (the words "to occupy Ottawa" and "nuisance"), 48 (the words "occupy" and "blockade", and other such instances elsewhere in the claim), 49 (the term "Occupation Zone" and all other such instances elsewhere), 72 (the words "with their occupation" and all other such instances elsewhere), 86 (the words "blast", "blasting" and all other instances of those words elsewhere), 226 & 227 (the words "incessant blaring of the high decibel", "totally" and "and unjustified", 239 (the word "unlawful")** – these words are all inflammatory and scandalous. They are impermissible embellishments inserted for colour and meant to suggest that the defendants had launched a military assault against the City of Ottawa, and to cause the reader to be

biased against the defendants. This is clearly inappropriate, and these words and phrases ought to be struck wherever they are found in the claim and replaced with neutral language;

(c) **Paragraphs 23, 25, 26 (last sentences)** – here the plaintiffs plead that the various defendants were "*criminally charged for their roles in organizing and encouraging the illegal activities associated with the Freedom Convoy protest*". These allegations are irrelevant to the plaintiffs' claim in nuisance and seek only to add colour and cast the defendants in a bad light. They are inflammatory and scandalous. Following *Noel v. Johnson* and *Kawa*, above, these allegations must be struck;

(d) **Paragraphs 40 (third sentence), 41, 42, 43 (third sentence), 46, 58, 59, 229, 236, 237 (the words "and the Donor Class Defendants")** – these paragraphs relate to the "donor class" of defendants. As argued above, there can be no valid cause of action against these defendants, who are alleged to be liable on a theory of "common design" only; accordingly, all allegations concerning them should be struck;

(e) **Paragraph 44 (the words "and at the time of the events in question was a councillor for")** – this allegation is irrelevant; it is also scandalous, as it attempts to cast Mr. Jonker in a bad light by raising his status as a public figure in this proceeding;

(f) **Paragraph 47** – this paragraph is repetitive. It is repeated at paragraph 48;

(g) **Paragraphs 61-71, 73, 74** – these paragraphs' only function is to plead evidence and not simply the material facts necessary to establish liability on a theory of "common design". This is inappropriate. Following Master Haberman's comments in *Mudrick*, the claim should only be a skeleton, rather than a fully fleshed out body detailing the events;

(h) **Paragraphs 76-84** – these paragraphs are irrelevant. Moreover, they plead nothing but evidence;

(i) **Paragraph 85** – this paragraph is repetitive. It is repeated at paragraphs 96-97, for example;

(j) **Paragraphs 90-94, 99, 100-109, 112-119** – these paragraphs plead nothing but evidence and impermissible detail that ought not to be included in the claim. The allegations in these paragraphs are the subordinate facts that merely tend toward proving the truth of the material facts. Following Perell J. in *Skurka*, above, this is impermissible;

(k) **Paragraph 120-144** – these paragraphs plead evidence. They also implicate the "donor defendants". They are also argumentative and conclusory;

(l) **Paragraphs 145-153** – these paragraphs are irrelevant to the claim and are argumentative, scandalous and conclusory. Certain paragraphs plead

scientific evidence. Following *Noel*, *Kawa*, *Peterson v. Windsor* and *Tataryn*, above, they ought to be struck;

(m) **Paragraphs 154-175** – these paragraphs are irrelevant to the claim and seek only to add colour and cast the defendants in a bad light. They are scandalous and must be struck;

(n) **Paragraphs 176-181** – these paragraphs plead scientific evidence which is inappropriate in a pleading;

(o) **Paragraph 182 (third and fourth proposed amended sentences)** – these sentences are repetitive. They are repeated at paragraph 238

(p) **Paragraph 183 (last proposed amended sentence)** – this sentence is unnecessarily inflammatory and serves no purpose other than to cast the defendants in a bad light;

(q) **Paragraphs 187-188, 190-191** – these paragraphs only serve to elaborate on the facts alleged at paragraphs 186 and 189, respectively. Accordingly, they are pleading evidence and ought to be struck;

(r) **Paragraphs 193-199** – these paragraphs only plead evidence and impermissible detail that is not necessary in a pleading;

(s) **Paragraphs 200, 210** – repetitive. These facts are already alleged at paragraphs 20 and 21;

(t) **Paragraphs 202-204, 206-209, 211 (third, fourth, fifth and sixth sentences), 213, 214, 216, 218, 220-225** – these paragraphs all plead only evidence and add unnecessary detail. The allegations in these paragraphs are the subordinate facts that merely tend toward proving the truth of the material facts. Following Perell J. in *Skurka*, above, this is impermissible;

(u) **Paragraphs 231-234 –** these paragraphs are repetitive and plead evidence and argument. The allegation of public nuisance is repeated at 235;

(v) **Paragraph 244 (second and third sentences)** – these allegations are irrelevant, conclusory and argumentative. They are accordingly scandalous and ought to be struck.

C. <u>The Plaintiffs' Claim Should be Struck for Violating the Rules of Pleading</u>

63. When taken together as a whole, the Further Fresh as Amended Statement of Claim contains too many violations of the rules of pleading. Following *Sachedina v. Rose*, above, it is not the Court's function (nor that of the defendants' counsel) to edit the plaintiffs' claim. Rather, the more efficient way to proceed would be to strike the entire claim, with leave to amend in

accordance with whatever directions the Court considers appropriate. The Moving Parties submit that such an outcome would save judicial resources by not requiring the Court to comb through the plaintiffs 245-paragraph claim in an effort to salvage what might be salvaged.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: December 30, 2022 ”James Manson”

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SCHEDULE “A” – RELEVANT RULES OF CIVIL PROCEDURE

RRO 1990, Reg. 194

[…]

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b).

[…]

Rules of Pleading — Applicable to all Pleadings
Material Facts

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.

Pleading Law

(2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.

Condition Precedent

(3) Allegations of the performance or occurrence of all conditions precedent to the assertion of a claim or defence of a party are implied in the party's pleading and need not be set out, and an opposite party who intends to contest the performance or occurrence of a condition precedent shall specify in the opposite party's pleading the condition and its non-performance or non-occurrence.

Inconsistent Pleading

(4) A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative.

(5) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading.

Notice

(6) Where notice to a person is alleged, it is sufficient to allege notice as a fact unless the form or a precise term of the notice is material.

Documents or Conversations

(7) The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material.

Nature of Act or Condition of Mind

(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.

Claim for Relief

(9) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified and, where damages are claimed,

(a) the amount claimed for each claimant in respect of each claim shall be stated; and

(b) the amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any further amounts and particulars shall be delivered forthwith after they become known and, in any event, not less than ten days before trial.

[…]

Striking out a Pleading or Other Document

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.