Court File No.: COA-24-CV-0207

**COURT OF APPEAL FOR ONTARIO**

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/Respondents

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/Appellants

Proceeding under the *Class Proceedings Act, 1992*

# APPELLANTS' FACTUM

March 22, 2024


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## PART I – INTRODUCTION

1. The appellants (the "**Appellants**") are defendants in a proposed class proceeding, which has been brought by four proposed class plaintiffs (the "**Respondents**").

2. The Appellants appeal as of right from the order, dated February 5, 2024, of Regional Senior Justice MacLeod (the "**Motions Judge**") of the Superior Court of Justice, at Ottawa (the "**Decision**"). In the Decision, the Motions Judge dismissed the Appellants' motion to dismiss all or part of the Respondents' claim, pursuant to the "anti-SLAPP" provisions at section 137.1 of the *Courts of Justice Act*, RSO 1990, c. C.43 (the "***CJA***").

## PART II – OVERVIEW

3. The Motions Judge made a number of reviewable errors.

4. **First**, the Motions Judge erred in his treatment of the "Merits-Based Hurdle" of the applicable *Pointes* test. In particular, he misapprehended the quality of the evidence tendered by the Respondents, and failed to recognize that it did not demonstrate "grounds to believe" that Respondents' claim had "substantial merit". Furthermore, the Motions Judge misapprehended the law of public nuisance and "common design liability" and failed to realize that the Respondents' claims related to public nuisance and "common design" cannot succeed on the strength of the evidence tendered, or (with respect to public nuisance), at all, as a matter of law.

5. Further still, the Motions Judge misapplied the "no valid defence" portion of the "Merits-Based Hurdle" and failed to properly consider (or consider at all) the defences raised by the Appellants.

6. **Second**, the Motions Judge also erred in his treatment of the "Public Interest Hurdle" of the *Pointes* test. He failed to properly conduct (or conduct at all) the weighing exercise that is required at that step.

## PART III – FACTS

7. This proceeding was commenced on February 4, 2022. On March 13, 2023, the Motions Judge granted leave to issue a Further Fresh as Amended Statement of Claim ("**FFASOC**").[1]

8. The FFASOC is lengthy and repetitive. Essentially, the Respondents are advancing class proceedings on behalf of three separate classes of plaintiffs (i.e. the "**Resident Class**", "**Business Class**" and "**Employee Class**", as described in the FFASOC), arising out of alleged harms sustained by members of each class during the "Freedom Convoy" protests that took place in Ottawa in early 2022. The Respondents also seek to create two separate defence classes against the Appellants' will (i.e. the "**Donor Class**" and the "**Trucker Class**", also as described in the FFASOC). They seek to have the defendants Jonker and Jonker Trucking Inc. to serve as representatives of the Trucker Class, and the defendant Howland to serve as Donor Class representative.

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[1] Appellants' Appeal Book and Compendium ("**ABCO**"), **Tab 6**.

9. The Respondents claim the Trucker Class defendants (i.e. all those who owned and operated trucks present in downtown Ottawa during the protests) caused each of the three plaintiff classes a nuisance in connection with their participation in the "Freedom Convoy" protests, by honking their horns and emitting diesel fumes in downtown Ottawa. The Business Class and Employee Class members' claim sounds only in public nuisance, thus requiring each plaintiff to demonstrate special damages. The Resident Class members' claim, meanwhile, is framed in both public and private nuisance.

10. In addition, the plaintiffs claim that the Donor Class (i.e. all those who donated money to the Freedom Convoy protest after a certain date) *and* the named defendants (other than the defendants Jonker, Jonker Trucking Inc. and Howland), identified as the "Organizer Defendants", are liable alongside the Trucker Class defendants, solely on a theory of "common design liability". The Respondents' claim is that the Donor Class defendants and the Organizer Defendants encouraged, facilitated and directed the Trucker Class defendants to cause the alleged nuisances.

11. On June 5, 2023, the Appellants served the plaintiffs with a Notice of Motion, seeking to have all or part of this proceeding dismissed pursuant to section 137.1(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "**Anti-SLAPP Motion**").

12. The Appellants' Motion Record was served on or about August 25, 2023. Cross-examination of the affidavits of several of the Appellants was conducted by plaintiffs' counsel on September 15, 2023.

13. A joint Supplementary Motion Record was filed on or about November 29, 2023.

14. The Anti-SLAPP Motion was heard in Ottawa by the Motions Judge on December 12, 2023. On February 5, 2024, the Motions Judge released the Decision, in which he dismissed the Anti-SLAPP Motion in its entirety. No costs order was made.

**PART IV – ISSUES & ARGUMENT**

15. All the granular issues set out in the Appellants' Notice of Appeal are present in, and subsumed under, the following issues:

I. what is the appropriate standard of review on this appeal?

II. what was the appropriate legal test to be used on the Anti-SLAPP Motion?

III. did the Motions Judge err in his treatment of the "Merits-Based Hurdle" of the test under s. 137.1?

IV. did the Motions Judge err in his treatment of the "Public Interest Hurdle" of the test under s. 137.1?

## I. STANDARD OF REVIEW

16. A motion judge's determination on an anti-SLAPP motion is entitled to deference absent an error of law or palpable and overriding error.[2] If such an error has been established, it is up to this Court on appeal to consider the matter afresh.[3]

17. As the Supreme Court of Canada held in *Bent v. Platnick*, on an anti-SLAPP motion, a motions judge's decision will be entitled to no deference where the motions judge makes the following errors: (a) applying the wrong legal test; (b) misconstruing the relevant law of the tort in question and any applicable defences; or (c) misapprehending the evidence. This Court accordingly proceeds on a standard of review of correctness unless the motion judge's findings are not tainted by such errors.[4]

## II. THE TEST ON AN 'ANTI-SLAPP' MOTION

18. The Anti-SLAPP Motion, like this appeal, was/is largely governed by the principles set out in (a) sections 137.1 to 137.4 of the *CJA*, which are included in Schedule "A" to this factum; and (b) recent jurisprudence, most notably from the Supreme Court of Canada in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 (SCC) [*Pointes*].[5]

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[2] *Bent v. Platnick,* 2020 SCC 23, at para. 77; *Canadian Union of Postal Workers v. B'nai Brith Canada*, 2021 ONCA 529, at para. 21; *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129, at para. 42.
[3] *Nanda v. McEwan*, 2020 ONCA 431, at paras. 47-49.
[4] *Bent v. Platnick*, 2020 SCC 23 at paragraph 77.
[5] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 (SCC) [*Pointes*]. See also *Bent v. Platnick*, 2020 SCC 23. See also *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129 at paragraph 27 (CA).

In *Pointes*, Justice Côté, for a unanimous Court, set out at length the test to be employed on anti-SLAPP motions.

19. The Appellants will canvass steps two and three (i.e. the "Merits-Based Hurdle" and the "Public Interest Hurdle", as those steps were called by Côté J. in *Pointes*) in the following sections and paragraphs, along with their substantive arguments.

## III. THE MOTIONS JUDGE ERRED IN HIS TREATMENT OF THE "MERITS-BASED HURDLE"

20. The Motions Judge erred in declining to dismiss all or part of this proceeding at the second step of the *Pointes* test. The quality of the Respondents' evidence was insufficient to meet their burden of demonstrating that there are "grounds to believe" that (a) all aspects of their claim have "substantial merit"; and (b) the Appellants have no valid defences.

21. In *Pointes*, at paragraphs 32-60, Côté J. described the principles applicable on the second step of the test, which she described as the "Merits-Based Hurdle".[6]

22. Before turning to the Appellants' arguments on this ground of appeal, it will be useful to review the legal principles and related jurisprudence concerning: (A) the elements of the torts of private and public nuisance; and (B) "common design" liability.

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[6] *Pointes*, paras. 32-60.

## A. The Torts of Private and Public Nuisance

23. The leading case on the elements of the tort of **private** nuisance is *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*.[7] The test in *Antrim* was summarized in *Weenan v. Biadi*,[8] at paragraphs 8-10. In *Antrim*, the Court 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.[9]

24. Meanwhile, the Supreme Court discussed the doctrine of **public** nuisance in *Ryan v. Victoria (City)*,[10] at paragraphs 52 and 53. Notably, the Court commented that litigants bringing a private action for public nuisance must "*plead and prove special damage*". Such special damage must be unique to the plaintiff and "*above that sustained by the public at large*".[11] In *Stein v. Gonzalez*, McLachlin J. (as she then was) posed the question this way: "*is the damage suffered by the plaintiff different from that suffered by other members of the community?*"[12]

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[7] *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13 (SCC).
[8] *Weenen v. Biadi*, 2015 ONSC 6832 at paras. 8-10 (SCJ).
[9] *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13 at paragraph 28 (SCC).
[10] *Ryan v. Victoria (City)*, 1999 CanLII 706 at paras. 52-53 (SCC).
[11] *Grant v. St. Lawrence Seaway Authority* (1960), 23 DLR (2d) 252 at paragraph 6 (Ont. CA); *Railink Canada Ltd. v. Ontario* (2008), 165 ACWS (3d) 822 at paragraph 11, **Appellant's Book of Authorities not available Electronically ("AOA"), Tab 1**; *Manitoba (Attorney General) v. Adventure Flight Centres Ltd.* (1983), 25 CCLT 295 at paragraph 36. See also *Chiswell v. Charleswood*, [1935] WWR 217 at paragraph 9 (Man. KB), **AOA, Tab 2**; *Susan Heyes Inc. v. Vancouver (City)*, 2011 BCCA 77 at paragraph 38 (BCCA); *Stein v. Gonzales* (1984), 14 LR (4th) 263 (BCSC).
[12] *Stein v. Gonzales* (1984), 14 LR (4th) 263 at paragraph 11 (BCSC).

25. Other courts have held that it is sufficient to show "a significant *difference in degree* of damage between the plaintiff and members of the public generally" to prove special damages.[13]

26. This inconsistency was observed by the Court in *O'Connor v. Canadian Pacific Railway Limited*,[14] who noted no binding authority resolving it. However, in *O'Connor*, Chief Justice Hinkson declined to certify the proposed class action before him, which included a claim in public nuisance by the proposed class. Hinkson C.J. observed:

> […] The public nuisance claim is advanced on behalf of everyone who claims to have suffered a loss in the Wildfire. The special damage pleaded was "personal injury and/or damage to property". Not everyone in the proposed class suffered this type of damage. Also, it is not specified how [the damage claimed by the plaintiffs] would be damage above and beyond that suffered by the public generally given that the allegation is that [the Town of] Lytton was effectively destroyed. This second point is a difficulty that the plaintiff has not addressed.
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> For the purposes of public nuisance in this context, the "public" is arguably the community of Lytton. Yet the class definition is broad enough to capture all persons in Lytton. It is incongruent to argue, in effect, that everyone in Lytton suffered damage over and above suffered by the "public" since they are the "public".[15] [Emphasis added.]

27. In *O'Neil v. Harper*, a 1913 case cited by the Respondents on the Anti-SLAPP Motion and relied on by the Motions Judge in his Decision, it was found by this Court that where an obstruction to a highway had a particularly detrimental effect on one plaintiff vis-à-vis other members of the general public, the plaintiff was entitled to sue in public nuisance. The Court held:

> It is not a case of an obstruction to a highway simply, which might affect the public in general in the same way, but the case of an owner of land being cut off from the highway altogether, at the period referred to. The damage,

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[13] See, e.g. *Gagnier v. Canadian Forest Products Ltd.*, 1990 CanLII 538 (BCSC).
[14] *O'Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371 at paragraph 168 (SC)
[15] *Ibid.*, paras. 171-172.

> if any, was peculiar to the owner of land as such, and not simply as one of the public.[16]

28. The Appellants also cite *Sutherland v. Canada*, where the British Columbia Supreme Court described the law of public nuisance on an application for certification of a proposed class action, which failed, at paragraphs 37-38.[17]

29. Causation is a pre-requisite to a finding of nuisance.[18] 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.[19]

## B. "Common Design" or "Concerted Action" Liability

30. In *Rutman v. Rabinowitz*,[20] 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*".

31. In *Insurance Corp. of British Columbia v. Alexander*,[21] 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*

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[16] *O'Neil v. Harper*, 1913 CanLII 538 at page 657 (CA). See also, generally, pp. 656-657.
[17] *Sutherland v. Canada (Attorney General)*, 1997 CanLII 2147, paras. 37-38 (BCSC).
[18] *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.).
[19] *Weenen v. Biadi*, 2015 ONSC 6832 at paras. 14-15 (SCJ).
[20] *Rutman v. Rabinowitz*, 2018 ONCA 80 at paragraph 33 (ONCA).
[21] *ICBC v. Alexander*, 2016 BCSC 1108 at paragraph 21 (BCSC).

*tortfeasor and that is normally approached through the question of having acted pursuant to a common design*."

32. "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 joint liability to arise. In *Best v. Ranking*[22] citing the Supreme Court of Canada in *Fullowka v. Royal Oak Ventures Inc.*,[23] 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*"…

**Argument – The Respondents Should Have Failed the Second Step of the *Pointes* Test**

33. The Respondents ought to have failed the second step of the *Pointes* test. They did not tender sufficient evidence to demonstrate – even on the lower standard of proof required at this step – that their claim has "substantial merit" and that the Appellants have no valid defence. Accordingly, this proceeding should have been dismissed in its entirety. In the alternative, this proceeding should have been dismissed *at least* as against (a) Geoffrey Devaney; (b) Happy Goat Coffee Company; (c) the "Donor Class" defendants; and (d) the "Organizer Defendants".

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[22] *Best v. Ranking*, 2015 ONSC 6269 at paras. 67-68 (SCJ).
[23] *Fullowka v. Royal Oak Ventures Inc.*, 2010 SCC 5 at paragraph 152 (SCC).

**The Respondents' Evidence on the Anti-SLAPP Motion was Deficient**

34. Virtually none of the evidence tendered by the Respondents was probative. Much of it was inadmissible. In short, it did not provide the Motions Judge with the ability to conclude that the Respondents' proceeding – whether considered as *only* an individual proceeding brought on behalf of four plaintiffs only, *or* as a class proceeding brought on behalf of thousands of class members – has substantial merit and that the Appellants have no valid defences. Recall that in this action, which is founded only on the torts of private and public nuisance, *each plaintiff* must lead evidence demonstrating that they in fact suffered either a private or a public nuisance.

35. Where a public nuisance is alleged, each plaintiff must then demonstrate that their alleged damages were unique and suffered over and above that suffered by the public at large. This is so, whether the law requires that a plaintiff demonstrate a different *type* of damage, or a different *degree* of damage.

36. Moreover, the plaintiffs' burden on this step of the *Pointes* test is compounded by the realities that (a) the Respondents' theory of liability as against the so-called "Donor Class" and the so-called "Organizer Defendants" is based on the theory of "common design"; and (b), this is a proposed class proceeding. The Appellants thus submit that in order for this action to be considered to have "substantial merit", the Respondents were also required on the Anti-SLAPP motion to tender evidence establishing – to the requisite standard of proof on this motion – that (a) that the above classes of defendants are liable on a theory of "common design" and (b) that the Respondents' overall class proceeding is viable.

37. As discussed in the following paragraphs, the Respondents' evidence failed to establish any of these.

No Affidavits Tendered by Geoffrey Devaney or the Happy Goat Coffee Company

38. Remarkably, two Respondents did not submit any affidavit evidence on the Anti-SLAPP motion. Neither Geoffrey Devaney (the proposed representative of the Employee Class) nor the Happy Goat Coffee Company (one of the proposed representatives of the Business Class) saw fit to explain to the Motions Judge on the Anti-SLAPP Motion how they suffered a public nuisance, and by whom.

39. Since those two Respondents did not provide any evidence on this motion, they obviously could not meet the second step of the *Pointes* test. This action ought therefore to have been dismissed as against them both outright.

The Affidavit of Trudy Moore, affirmed September 1, 2023[24]

40. Ms. Moore's evidence was not probative of the central issues in this proceeding. Ms. Moore is an assistant with the Respondents' counsel's law firm, and she has no firsthand knowledge of anything relating to this proceeding. She has no knowledge of whether or not a public or private nuisance was created or suffered by any of the parties in this action.

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[24] Affidavit of Trudy Moore, affirmed September 1, 2023, **ABCO, Tab 8**. See also the **Appellants' Exhibit Book ("EXHB"), Tabs 2G and 3A – Supplementary Motion Record, Volumes 1 and 2, Tab 7**.

41. Ms. Moore's affidavit only served the purpose of attaching various documents. However, the documents she attached are not probative, irrelevant or inadmissible.[25]

The Affidavit of Sean Flynn, affirmed August 31, 2023[26]

42. Mr. Flynn's evidence was not probative of the central issues in this proceeding. Mr. Flynn's affidavit did not establish any evidentiary connections with any of the Respondents, Appellants, or any of the proposed class members. There is no evidence in Mr. Flynn's affidavit – at all – that would tend to establish whether (a) any of the Respondents in fact *suffered* a private or public nuisance; or (b) any of the Appellants in fact *caused* a private or public nuisance. Mr. Flynn clearly has no personal knowledge of anything relevant to this proceeding. He does not state that he even knows, or even ever *saw*, any of the parties while on his adventures in downtown Ottawa.

43. Mr. Flynn's videos, attached to his affidavit as exhibits, do not identify any of the parties. To the extent that any of the videos show "decibel readings" taken from his smart watch, the purported "decibel readings" were taken directly in front of a honking truck horn, which cannot be the location at which any of the Respondents or class members experienced honking from their homes – which are the material locations. Naturally, every Respondent and class member experienced the honking noises in a unique way depending

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[25] See, e.g., *Robb Estate v. St. Joseph's Health Care Centre* (1998), 31 CPC (4th) 99 (Gen. Div.), **AOA, Tab 3**. See also *Barton v. Nova Scotia (Attorney General)*, 2014 NSSC 192 at paragraph s 102-103 (NSSC).

[26] Affidavit of Sean Flynn, affirmed August 30, 2023, **ABCO, Tab 9**. See also **EXHB, Tab 2F – Supplementary Motion Record, Volume 1, Tab 6**.

on the locations of the trucks and their own residences. Mr. Flynn's testimony sheds no light on those critical issues.

The Affidavit of Jeremy King, affirmed September 1, 2023[27]

44. Mr. King's affidavit was also not probative of the issues raised in this proceeding. Like Mr. Flynn's evidence, Mr. King does not reside in downtown Ottawa; he has no first-hand knowledge of anything related to whether the Respondents or class members in fact suffered a public or private nuisance, or whether the Appellants or class members in fact caused a public or private nuisance. Mr. King's evidence was limited to discussing a few social media postings relating to the issuance of the honking injunction order by this Court on February 7, 2022. These postings are irrelevant to whether or not a public or private nuisance was created or suffered, and by whom.

The Affidavit of Debbie Owusu-Akeeyah, affirmed September 1, 2023[28]

45. Ms. Owusu-Akeeyah's evidence was similarly not probative of any of the issues raised in this proceeding. Ms. Owusu-Akeeyah does not claim to have any firsthand knowledge of whether or not a public or private nuisance was created or suffered, and by whom.

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[27] Affidavit of Jeremy King, affirmed September 1, 2023, **ABCO, Tab 10**. See also **EXHB, Tab 2D – Supplementary Motion Record, Volume 1, Tab 4.**

[28] Affidavit of Debbie Owusu-Akeeyah, affirmed September 1, 2023, **ABCO, Tab 11**. See also **EXHB, Tab 2B – Supplementary Motion Record, Volume 1, Tab 2**.

46. All that Ms. Owusu-Akeeyah's affidavit did was attach as Exhibit "A" a document entitled "What we heard", which is apparently a report prepared by the "Ottawa People's Commission". Ms. Owusu-Akeeyah went on in her affidavit to include some quotes from the "What we heard" document, which she described as "examples of what we heard" during the "hearings" conducted during the "commission". Such quotations are nothing more than unattributed, undefined and unreliable hearsay from various random people.

The Affidavit of Ivan Gedz, affirmed August 31, 2023[29]

47. Mr. Gedz's evidence should have been given no weight. He tried to explain that his restaurant, the Respondent 7983794 Canada Inc. (c.o.b. "Union: Local 613"), suffered extensive damages. However, Mr. Gedz's evidence fails to establish that the lost revenues he claimed were a result of anything done by any of the Appellants or class members.

48. Mr. Gedz's evidence was, in fact, nothing more than a collection of bald allegations, which is insufficient to clear the "Merits-Based Hurdle" of the *Pointes* test, where the law is that "*bald allegations or unsubstantiated damage claims are not enough*".[30]

49. Yet, that is all that Mr. Gedz offered in his affidavit. He simply stated, without any supporting documentation, that "there was a large drop in our expected customers". He appears to have based his restaurant's "expectations" on previous occasions during the Covid-19 situation where the restaurant was allowed to open at 50% capacity. He did not

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[29] Affidavit of Ivan Gedz, affirmed August 31, 2023, **ABCO, Tab 12**. See also **EXHB, Tab 2C – Supplementary Motion Record, Volume 1, Tab 3.**

[30] See *Pointes*, supra, paragraph 82. See also *Joshi v. Allstate Insurance Company of Canada*, 2019 ONSC 4382 at paragraph 34.

explain when those times were (i.e. which season), how many customers were "expected", or anything else that would support the reasonableness of the restaurant's "expectations".

50. Mr. Gedz then referred to "monthly revenues" from previous periods, that he purported to use to calculate a 45% decrease in the restaurant's revenue. Mr. Gedz, however, did not provide the monthly revenue figures or the comparison numbers from January and February 2022, although he could easily have done so.

51. At paragraph 8, Mr. Gedz asserted that "a substantial number of reservations made in the course of the week were cancelled", with no explanation or support for this statement.

52. Mr. Gedz then proceeded at paragraphs 9-14 to "explain" how the "presence of the Freedom Convoy" had a negative impact on the restaurant's business. However, his "explanations" were nothing more than idle speculation.

53. At several places, Mr. Gedz also gave hearsay evidence without stating the name(s) of the hearsay declarant(s). Such evidence was therefore not even properly admissible.

54. Perhaps most importantly, Mr. Gedz's affidavit was obviously silent with respect to any other restaurants or businesses. He could not speak for any of the other members of the so-called "Business Class" members. And, he also did not explain how the damages he purported to have suffered are any different (or above and beyond) the damages suffered by any other members of the so-called "Business Class".

The Affidavit of Chantal Laroche, affirmed August 31, 2023[31]

55. Dr. Laroche's evidence similarly was not probative of any of the issues raised in this proceeding. Dr. Laroche admitted in her affidavit that she does not reside in downtown Ottawa, nor did she attend downtown Ottawa in person during the protest. She did not claim to have actually examined any of the Respondents or class members to assess whether or not they developed hearing loss, whether as a result of the events taking place during the protest, or for any other reason. Dr. Laroche was therefore unable to opine on whether any Respondent actually suffered any damages, for any reason.

The Affidavit of Larry Andrade, affirmed August 30, 2023[32]

56. Mr. Andrade's evidence is totally speculative and should not have been given any weight. It is not probative of any of the issues raised in this proceeding. Mr. Andrade admitted at paragraph 6 of his affidavit that his "preliminary estimate" of the "losses" suffered by the so-called Business and Employee Classes had not changed since February 25, 2022. In other words, Mr. Andrade (and, by extension, the Respondents) have done *nothing* to substantiate their damages claim for two years.

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[31] Affidavit of Chantal Laroche, affirmed August 31, 2023, **ABCO, Tab 13**. See also **EXHB, Tab 2A – Supplementary Motion Record, Volume 1, Tab 1.**

[32] Affidavit of Larry Andrade, affirmed August 30, 2023, **ABCO, TAB 14**. See also **EXHB, Tab 2E – Supplementary Motion Record, Volume 1, Tab 5.**

57. At paragraph 7, Mr. Andrade admitted that his "preliminary estimate" is based on "limited publicly available information", and that upon receipt of addition, more detailed information, his calculations "would require revision". Thus, his calculations are worthless.

58. Incredibly, Mr. Andrade's "preliminary estimate" was based on top-level GDP information for the City of Ottawa. Mr. Andrade used 2018 GDP information, and then assumed "forecasted" growth rates of 9.7% and 8.0% for the years 2021 and 2020, which have no basis in reality.

59. Mr. Andrade then used limited survey information and other fantastical calculations to conclude that the estimated total wage losses by the so-called Employee Class range from $105.7 million to $145.6 million, and the estimated total losses by the Business Class range from $44.5 million to $61.3 million. Mr. Andrade admitted at paragraph 50 that he has relied on BIA survey results for his "preliminary estimate of damages", and that upon receipt of more detailed information, his calculations would require revision.

60. It is obvious that these figures are completely speculative; Mr. Andrade admitted as much directly in his affidavit. There is no basis in reality for any of Mr. Andrade's calculations. Moreover, there appears to have been *no attempt made whatsoever* by Mr. Andrade to speak to actual business owners and employees who operate businesses and work in the so-called "Occupation Zone" to find out first-hand what their losses actually were (if any). This is not sufficient evidence on a motion under s. 137.1(3).

61. Moreover, Mr. Andrade did not explain how any of the so-called Business and Employee Class members' losses are "special", in the sense that they were suffered over and beyond those of other members of the same classes.

The Affidavit of Zexi Li, affirmed September 1, 2023[33]

62. As presented in her affidavit, Ms. Li's evidence was really nothing more than a series of bald allegations without documentary support or other corroboration. This, again, is not enough on a motion under s. 137.1(3). Moreover, even if portions of her evidence discussing her experiences inside her apartment *could* (if properly substantiated) be considered probative, the balance of Ms. Li's affidavit is not probative at all. Ms. Li testified about her experiences walking around the protest (at paragraphs 7; 14-16); however, those experiences cannot form part of her claim in private nuisance, as they do not relate to her use and enjoyment of her own apartment.

63. Moreover, Ms. Li did not provide any evidence of "special" damages that would give her the right to advance a claim in public nuisance. As the above case law makes clear, only those damages suffered by a plaintiff over and above those suffered by the general community are actionable by way of a private action in public nuisance.

64. Finally, Ms. Li naturally had no first-hand evidence about any other plaintiffs or members of the so-called Resident Class.

**No Evidence Demonstrating Special Damages Grounding a Public Nuisance Claim**

65. As discussed above, the Respondents' affidavits did not establish special damages on the part of any of the Respondents. As the above jurisprudence establishes, in order for

[33] Affidavit of Zexi Li, affirmed September 1, 2023, **ABCO, Tab 15**. See also **EXHB, Tab 3B – Supplementary Motion Record, Volume 2, Tab 8**.

a private litigant to maintain an action in public nuisance, that litigant must suffer some substantial injury over and beyond that suffered by the rest of the affected group.

66. With respect, the Respondents failed to adduce any such evidence. Again, Mr. Devaney tendered no affidavit on the Anti-SLAPP Motion. Thus, there was no probative evidence of any kind tendered in support of any damages allegedly suffered by Mr. Devaney, and by extension the entire proposed Employee Class.

67. Moreover, paragraph 240 of the FFASOC claims that all of the members of the Employee Class suffered the very same type of damages: **loss of wages**:

> As a consequence of the public nuisance by the Defendants, many businesses in the Occupation Zone closed entirely or reduced their hours of operation and staff requirements. The Employee Class Members were laid off or experienced reduced hours of work. The Employee Class Members experienced damages in the form of loss of wages.

68. There is no evidence, *and indeed not even a claim*, that any of the members of the proposed Employee Class suffered special damages particular to each individual employee alone, and above and beyond damages suffered by other members of Employee Class (which represents "the public" for purposes of this analysis). Such a claim, along with supporting evidence, are requirements for anyone in the proposed Employee Class to individually maintain an action in public nuisance.

69. The Appellants advance the same argument with respect to the Business Class. At paragraph 239, the FFASOC pleads:

> As a consequence of the public nuisance by the Defendants, the Business Class Members suffered loss of revenues and income.

70. Again, there is *not even a claim* that any of the members of the proposed Business Class suffered damages particular to each individual business alone, and above and beyond any damage suffered by other businesses (which represents "the public" for purposes of

this analysis). Moreover, the only evidence from any of the proposed Business Class members was tendered by Mr. Gedz, whose evidence was insufficient as described above.

71. The same argument is advanced with respect to the public nuisance claims advanced by the Resident Class. Again, there was no probative evidence tendered by the Respondents on the Anti-SLAPP Motion demonstrating that any of the proposed Resident Class suffered special damages over and beyond those allegedly suffered by the other residents.

**No Evidence Demonstrating "Common Design" Liability**

72. The Respondents also failed to tender any evidence that would advance their theory of "common design" as against the so-called Donor Class and the Organizer Defendants.

73. For example, since most if not all of the donors' contributions did not actually reach the protestors to provide actual financial support, the Respondents' argument appears to be only that the *symbolic value* of the donors' contributions *encouraged* the protestors and provided them with moral support. However, there was no evidence tendered by the Respondents on the Anti-SLAPP Motion that would substantiate such an allegation. The Appellants submit that in a case such as this, worth potentially over $300 million, and given the requirements of this step of the *Pointes* analysis, it was incumbent on the Respondents to at least attempt to provide some evidence to support their allegation.

74. Moreover, with respect to the so-called Donor Class, there was no evidence on the Anti-SLAPP Motion to support the allegation that as of February 4, 2022, the donors all knew that their contributions were being or would be used to support illegal or tortious

activity. This is a necessary element of the "common design" theory of liability as against the donors, but the Respondents led no evidence in support whatsoever. There is simply no evidence of "common design", whether among the donors or between the donors and other protestors.

75. Similar issues arise with respect to the Organizer Defendants. The Respondents led no evidence on the Anti-SLAPP Motion demonstrating that any of the individually named Appellants did anything that *actually* had the effect of encouraging or directing others to honk horns or do anything else that resulted in a private or public nuisance being suffered by anyone. There is no evidence of a "common design", whether between themselves or between themselves and other protestors. This, again, is a critical element of the Respondents' case against the Organizer Defendants that cannot be assumed into existence, and yet the record is silent with respect to exactly how each and every one of them ought to be found liable based on the "common design" theory of liability.

**The Motions Judge's Errors**

76. Despite all the issues described in the above paragraphs, the Motions Judge nonetheless found the Respondents had met the "substantial merit" step.

77. The Motions Judge's entire treatment of the evidence filed on the Anti-SLAPP Motion is found at paragraphs 26-29 of his Decision.[34]

78. With respect to the Motions Judge's findings at paragraphs 26 and 27 that "*there is sufficient basis to conclude that the plaintiffs have a meritorious case*", it was impossible

[34] See the Decision, **ABCO, Tab 3**, paragraphs 26-29.

to make such a finding based on the evidence filed. The Motions Judge provides no details with respect to any of the findings he makes at paragraphs 26 and 27 of the Decision. The Motions Judge thus seriously misapprehended the evidence filed on the Anti-SLAPP Motion, which, following *Bent v. Platnick*, *supra*, amounts to a reviewable error.

79. Moreover, in making comments such as "*[t]here is evidence that plaintiffs had difficulty accessing their properties and that business was disrupted, reservations cancelled and revenue negatively impacted*", the Motions Judge overlooked the strict requirements of public nuisance and the need for a litigant to demonstrate special damages. There is no indication from the Motions Judge – anywhere in the Decision – that he was live to this critical requirement. This represents a failure on the Motions Judge's part to properly construe the law of public nuisance, which, following *Bent v. Platnick*, *supra*, amounts to an error of law.

80. Moreover, at paragraph 27, the Motions Judge's comment that "*[t]here is evidence by which a trier of fact could conclude that disrupting daily life in the city, blocking the streets indefinitely and making as much noise as possible were precisely what the organizers and participants were intending*" was in error, being unsupported by the evidence filed on the Anti-SLAPP Motion. Indeed, the Appellants denied such an intention in their affidavits filed on the Anti-SLAPP Motion, which denials were not shaken on cross-examination. This also represents a failure on the Motions Judge's part to properly construe the law concerning the theory of common design liability, which, following *Bent v. Platnick*, *supra*, amounts to an error of law

81. At paragraphs 28-29, the Motions Judge also fell into reviewable error by failing to appreciate the lack of evidence concerning the proposed Donor Class of defendants. There

was no evidence tendered demonstrating that Mr. Howland (the *only* donor individually named) ought to "*share liability with the organizers and protestors*".

82. Moreover, the Motions Judge was wrong to find that it was "premature" to consider whether the Respondents' claim against the Donor Class had "substantial merit" even though he identified serious concerns with the claim, in that (a) not every individual donor may be impressed with the necessary knowledge; and (b) there may be policy reasons that weigh against finding individual minor donors jointly liable with any principal tortfeasors. These considerations strongly militated against finding that the Respondents' claim against the Donor Class had "substantial merit". Yet, the Motions Judge failed to recognize that. This also amounts to a misapplication of the second step of the *Pointes* test, which constitute a legal error.

83. The above errors were compounded by the Motions Judge's conflation at paragraph 23 of the finding he made previously on a motion to strike brought by the Appellants[35] with the findings he needed to make on the Anti-SLAPP Motion. At paragraph 23, he observed:

> 23 The question then is whether the evidence on this motion demonstrates grounds to believe the plaintiff's claims have merit and there is unlikely to be a complete defence. An unusual aspect of this motion is the fact that I have already ruled on a previous motion that the statement of claim disclosed reasonable causes of action against the defendants. I will not repeat that analysis here. [Emphasis added.]

84. The Motions Judge erred in this paragraph by mistakenly considering that his earlier finding that the Respondents' FFASOC disclosed "reasonable causes of action" was somehow supportive or even dispositive of the "substantial merit" hurdle on the Anti-SLAPP Motion. With respect, whether a pleading discloses a reasonable cause of action

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[35] *Li et al. v. Barber et al.*, 2023 ONSC 1679 (SCJ).

has no bearing on whether that claim can be proven. Moreover, the requirements at this stage of the *Pointes* test are clear: a plaintiff cannot rest on allegations in their pleading or other bald, unsupported assertions. Thus, the Motions Judge was wrong to refer to his previous finding on the motion to strike for any reason, as it has no legal bearing on an Anti-SLAPP motion.

**The Responding Parties Cannot Demonstrate "No Valid Defence"**

85. In several places in the Appellants' evidence, and in their draft Statement of Defence (which *had* been tendered on the Anti-SLAPP Motion, despite the Motions Judge's "belief" otherwise at paragraph 30 of the Decision),[36] the Appellants raised at least three defences. However, the Respondents did not lead any evidence to refute them.

86. The Motions Judge failed to grapple with this issue. His treatment of the Appellants' proposed defences is confined to paragraphs 30 and 31 of the Decision:

> 30 There are defences which the defendants may advance. At this point I do not believe any of them have filed statements of defence. The evidence shows however that some of the defendants will deny any concerted plan or any intention to cause harm. Some will deny that they engaged in any tortious activity. They will deny that the plaintiffs suffered any significant damage and will require the plaintiffs to prove their claims. There are allegations that all activities were lawful and were in furtherance of the right of peaceful protest.

[36] See the Moving Parties' draft Statement of Defence at paragraphs 90-93 and 120, attached as Exhibit "A" to the Affidavit of Selena Bird, sworn August 25, 2023 (the "**Bird Affidavit**"), **ABCO, Tab 16**. See also **EXHB, Tab 1B - Motion Record, Volume 1, Tab 2**. See also all of the Moving Parties' Affidavits to similar effect. See also, for further evidence in support of this defence, the Affidavit of Daniel Bulford, sworn August 24, 2023, with Exhibits, at paras. 19-26, **ABCO, Tab 17**; **EXHB, Tab 1E – Motion Record, Tab 5**, Exhibits "A" and "B". See also the Request to Admit and Response to Request to Admit, both dated August 25, 2023, **ABCO, Tab 18**. See also **EXHB, Tab 1K and 1L – Motion Record, Tabs 11 and 12**.

> 31 It is plausible that some of these defences may be successful for some defendants and of course it is always possible that the plaintiffs will fail to prove their case once their evidence is tested under cross examination at a trial. Speculation about potentially successful defences is not what the analysis under s. 137.1 demands. There is no "slam dunk defence". Despite the extremely thorough arguments of Mr. Manson on behalf of his clients, I am not persuaded that this action should be halted under the anti-SLAPP provisions. It cannot be said on the limited evidentiary record available on this motion that any of the potential defences are likely to prevail.

87. With respect, the Motions Judge fell into error by mischaracterizing this step of the *Pointes* test. The issue for determination was **not** "*whether any of the potential defences are likely to prevail*", or whether the Appellants could demonstrate a "*slam dunk defence*". Rather, the issue for determination was whether the Respondents could show "grounds to believe" that the Appellants had no valid defences. This is a totally different test than the one mistakenly expressed by the Motions Judge. It was not incumbent for the Appellants to prove a "*slam dunk defence*" on the Anti-SLAPP Motion; rather, it was incumbent on the Respondents to demonstrate the absence of any defence. The Respondents did not do so. Hence, the Motions Judge misconstrued the requirements at this step of the *Pointes* test, which, following *Bent v. Platnick*, amounts to a legal error.

88. It is also clear from the Motions Judge's comment at paragraph 30 of his Decision that he failed to recognize the draft Statement of Defence filed on the Anti-SLAPP Motion, which particularizes the actual defences raised.[37] The Motions Judge completely failed to consider the three defences, as pleaded in the Statement of Defence, along with the

[37] Appellants' draft Statement of Defence, attached as Exhibit "A" to the Bird Affidavit, **ABCO, Tab 16**. See also **EXHB, Tab 1B - Motion Record, Tab 2**.

supporting evidence set out in Mr. Bulford's affidavit[38] and also the Response to Request to Admit,[39] which demonstrated the viability of the Appellants' defence described at paragraphs 82-85 and 112 of the Statement of Defence, concerning the actions taken by the Ottawa Police Service to force the protestors to park their trucks in downtown Ottawa, reneging on an earlier agreement whereby trucks *would not* be located downtown. The Motions Judge thereby misapprehended the evidence, which amounts to a reviewable error.

89. The Motions Judge also failed to deal with the Appellants' submission that the Respondents' claims in public nuisance must fail, and also that the claims of Geoffrey Devaney and Happy Goat Coffee Company must fail, as explained above.

## IV. THE MOTIONS JUDGE ERRED IN HIS TREATMENT OF THE "PUBLIC INTEREST HURDLE"

90. In *Pointes*, at paragraphs 61-82, Côté J. described the well-known principles applicable on the third step of the test, which she called the "Public Interest Hurdle".[40]

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[38] Affidavit of Daniel Bulford, sworn August 24, 2024, with Exhibits, at paragraphs 19-26, **ABCO, Tab 17**. See also **EXHB, Tab 1E, with Exhibits – Motion Record, Tab 5**.

[39] See the Request to Admit and Response to Request to Admit, both dated August 25, 2023, **ABCO, Tab 18**. See also **EXHB, Tab 1K and 1L – Motion Record, Tabs 11 and 12**.

[40] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at paragraphs 61-82 (SCC) [*Pointes*].

**Argument – The Respondents Should Have Failed Step Three of the *Pointes* Test**

91. The Respondents did not meet the third step of the *Pointes* test. **First**, they did not demonstrate that they suffered "harm" "as a result" of the expression at issue in this case. The Appellants rely on their submissions above on this point.

92. The Respondents did not tender sufficient (or *any*) evidence demonstrating that (a) all of the plaintiffs and class members suffered harm in the form of either a public or private nuisance; and (b) any such harm was a result of the various Appellants' expression.

93. First, the Respondents' evidence tendered on the Anti-SLAPP Motion failed to establish that the Respondents and plaintiff class members suffered a nuisance at all. There is no probative evidence that they all suffered damages. There is no evidence as to which plaintiff(s) suffered a nuisance, at the hands of which defendant(s), whether they were in the so-called Trucker Class or otherwise. Where public nuisance has been alleged, there is no attempt to explain how those parties suffered "special damages", which by definition cannot be suffered by an entire class of plaintiffs. These are essential elements of the torts of private/public nuisance and cannot simply be ignored or assumed.

94. Next, the Respondents failed to demonstrate "common design". For example, there was no evidence establishing that Howland and the so-called Donor Class of defendants in fact engaged in a "common design" with others in order to commit the torts of public or private nuisance. In the absence of such evidence, how can it be said that the alleged "harm" suffered by the Respondents was "as a result" of the donors' contributions (particularly since virtually no money actually made it through to actually be used by the protestors)?

95. Similarly, there was no evidence demonstrating that the activities engaged in by the Organizer Defendants were part of a "common design".

96. **Second**, the Respondents did not demonstrate on a balance of probabilities that the public interest in permitting this action to proceed outweighs the public interest in the expression at issue in this case. Whether or not one agrees with the protestors' overall message conveyed during the protest, the fact is that the protestors went to Ottawa – the nation's capital – to exercise their freedom of expression and participate in a large, peaceful demonstration. The public interest in the expression in this case is therefore of fundamental importance. Political expression is undoubtedly at the core of section 2(b) of the *Charter* and must be jealously protected by this Court.[41]

97. The Appellants submit that ***all*** of the expression in this case (i.e. donating money, honking horns, engaging in various activities to organize and otherwise support the protest, or simply being in Ottawa) qualifies as political expression, and therefore must be given great weight in the analysis at this step of the *Pointes* test.[42]

98. The public interest in this fundamentally important value of participation in a political protest and expressing one's opposition to government policies must be weighed against the public interest in permitting this action to proceed. This involved taking a step back and assessing the overall value of this proceeding. The Motions Judge failed to do so.

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[41] *Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255 at paragraph 46.

[42] *Ibid.* See also, e.g., *Libman c. Quebec (Procureur général)*, [1997] 3 SCR 569 at paragraphs 32-35; 47-50; *Harper v. Canada (Attorney General)*, 2004 SCC 33 at paragraph 66 (SCC); *Ottawa MacDonald Cartier International Airport Authority v. Madi*, 2015 ONSC 6336 (SCJ) [*Madi*].

99. First, the Appellants say that the value of the actual merits of this case is tenuous at best, particularly with respect to the so-called Donor Class and Organizer Defendants. Take the Donor Class. What is really being weighed in this instance is a donor's fundamental right to make political contributions to a cause he or she believes in, against the allegation that the symbolic value of that donor's efforts (and not the value of the money itself) is enough to attract liability in tort. That is an absurd proposition. To suggest that a donor can become liable in tort simply because he or she had *the idea* to donate money to a cause, in circumstances where that money never actually was used by anyone, would create an catastrophic chilling effect. Such a proposition has little to no public interest value and cannot be accepted by this Court. It cannot outweigh the fundamentally important public interest in encouraging political expression through monetary donations.

100. Second, take the Organizer Defendants. Again, what is being weighed is a protestor's right to attend at a protest and carry on activities designed to organize and support the protest, against the allegation that those very activities, which are needed in order for the protest to exist, are enough by themselves to attract liability in tort. That is an equally absurd proposition. In the absence of compelling evidence demonstrating either direct liability or "common design" (which does not exist in the record on this motion), it cannot amount to nuisance simply for a protestor to be at a protest. This would also create a catastrophic chilling effect on political expression, since protestors in the future could easily be dissuaded from attending at protests for fear of attracting massive liability in tort just for taking part. The public interest in protecting citizens' rights to protest without indeterminate, blanket liability on a "common design" theory, even in the absence of

supporting evidence, cannot be outweighed by the public interest in the tenuous claim being advanced against the Organizer Defendants in this case.

101. The same argument holds true for Jonker, Jonker Trucking and the so-called Trucker Defendants. *Madi* holds that "horn honking" is a protected form of political expression.[43] Accordingly, the same result ought to obtain in this analysis.

102. The Appellants recognize that the public will have an interest in protecting citizens' rights to use and enjoy their property free from undue interference. The tort of nuisance fulfils a worthwhile goal in that regard. However, the tort of nuisance cannot be misused, particularly in conjunction with the class proceedings mechanism, to operate as a "sledgehammer" that has the effect of demolishing citizens' freedom of expression.

103. Furthermore, the tort of nuisance ought not to be misused in this particular case. The Appellants submit that there is most definitely a "punitive or retributory purpose" at play in this proceeding. Moreover, were it not for the overinflated value of this claim by an improper use of the class proceedings mechanism, the damages actually suffered by the plaintiffs, if any, are minimal. It cannot be proportionate or reasonable for a peaceful three-week protest in the nation's capital to result in liability of over $300 million. That is an absurd proposition. Following *Pointes* at paragraph 78, these indicia weigh in favour of dismissing the proceeding.

104. Further, the potential chilling effect of this lawsuit on future political expression is real and devastating. So is the discrepancy between the resources that are being expended in this proceeding as compared with the realistic value of this case, given the absence of

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[43] *Ottawa MacDonald Cartier International Airport Authority v. Madi*, 2015 ONSC 6336 (SCJ).

evidence as discussed above. Following *Pointes* at paragraph 80, these considerations must not be overlooked.

105. In sum, it was the Respondents' burden to establish that the public interest in allowing this proceeding to continue outweighs the public interest in protecting all of the political expression at issue in this case. Simply put, they did not do so.

**The Motions Judge's Error**

106. Despite the above, the Motions Judge declined to find that the Respondents failed to meet this step of the *Pointes* test. In fact, the Motions Judge failed to undertake a meaningful weighing exercise *at all*, as required at this step of the test, and hence misconstrued and misapplied the requirements of the *Pointes* test at this step. Following *Bent v. Platnick*, *supra*, this amounts to a legal error.

107. The Motions Judge's *only* finding on this step of the *Pointes* test is paragraph 20:

> 20 At the other end of the analysis, (Step 3), it appears beyond doubt that the question at the heart of this litigation is a serious question. To what extent does exercise of the right to protest protect those involved from liability to residents whose lives were disrupted? To put this another way, is it reasonable for denizens of downtown Ottawa to anticipate a certain level of disruption because of their proximity to the seat of government? It is likely these rights overlap. Even *Charter* protected rights are not absolute. It may be, however legitimate the activities of the protesters may be determined to be by courts, the participants remain liable to those who suffered damage as a result of the manner those activities were carried out. It is in the public interest for those questions to be determined by the courts.

108. The Motions Judge failed to consider the arguments raised by the Appellants concerning the significant public interest in protecting the types of expression at issue in

this case, versus the much lower public interest in permitting weak claims against certain of the defendants to proceed, as described above.

109. Instead, the Motions Judge considered a completely different question. He asked, "*to what extent does the exercise of the right to protest protect those involved from liability to residents whose lives were disrupted?*"

110. This was an error; that question mischaracterizes the true "question at the heart of this litigation", as suggested by the Motions Judge. The true questions "at the heart of this litigation" are: (a) whether or not the plaintiffs can maintain an action in private and public nuisance; and (b) whether this action may be maintained as a class proceeding as framed in the FFASOC. These questions involve the consideration of many other nuanced issues. One of those issues may be the question posed by the Motions Judge. But it is not the *only* question, nor is it the *most important* question.

111. The Motions Judge focused on the wrong question for purposes of this step of the *Pointes* test. He should have asked whether the public interest in protecting the expression at issue in this case was outweighed by the public interest in allowing this action to proceed. However, he did not do so. All that he did was to conclude:

> […] It may be, however legitimate the activities of the protesters may be determined to be by courts, the participants remain liable to those who suffered damage as a result of the manner those activities were carried out. It is in the public interest for those questions to be determined by the courts.

112. It may well be "in the public interest" for such questions to be determined. But that is not the consideration at this stage of the *Pointes* test. Rather, the consideration is to determine whether that public interest is outweighed by the competing public interest in protecting the expression.

113. Thus, the Motions Judge failed to engage in the weighing exercise required of him at this stage of the test. This was an error of law, reviewable on the correctness standard, per *Bent v. Platnick*.

**PART V – ORDER REQUESTED**

114. For the above reasons, the Appellants seek the following orders:

(a) an order allowing this appeal and setting aside the Decision;

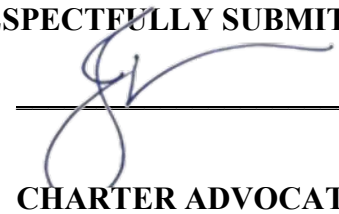
(b) an order, pursuant to section 137.1(3) of the *CJA*, dismissing the Respondents' claim as against such plaintiffs, defendants or proposed classes of defendants as the Court considers appropriate;

(c) an order directing that no costs be awarded against the Appellants; and

(d) an order granting such further relief as the Court considers appropriate.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Date: March 22, 2024



**CHARTER ADVOCATES CANADA**
[redacted]

**James Manson (LSO No. 54963K)**
**Chris Fleury (LSO No. 67485L)**

[redacted]

Counsel for the Appellants

Court File No.: COA-24-CV-0207

**COURT OF APPEAL FOR ONTARIO**

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/Respondents

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/Appellants

Proceeding under the *Class Proceedings Act, 1992*

## APPELLANTS' CERTIFICATE

Pursuant to Rule 61.11(1) of the *Rules of Civil Procedure*, the Appellants certify that:

(a) the Appellants do not require an order under subrule 61.09(2);

(b) counsel for the Appellants estimates that **2 hours** will be required for oral argument, not including reply;

(c) the Appellants' factum complies with subrule 61.11(3);

(d) the number of words contained in Parts I to V of the Appellants' factum is **9,192**; and

(e) the person signing this certificate is satisfied as to the authenticity of every authority listed in Schedule "A".

Date: March 22, 2024

**CHARTER ADVOCATES CANADA**
[redacted]

**James Manson (LSO No. 54963K)**
**Chris Fleury (LSO No. 67485L)**

[redacted]

Counsel for the Appellants

## SCHEDULE "A" – LIST OF AUTHORITIES

| | Case Law: |
|---|---|
| 1. | *Bent v. Platnick*, 2020 SCC 23 |
| 2. | *Canadian Union of Postal Workers v. B'nai Brith Canada*, 2021 ONCA 529 |
| 3. | *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129 |
| 4. | *Nanda v. McEwan*, 2020 ONCA 431 |
| 5. | *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 (SCC) [*Pointes*] |
| 6. | *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13 (SCC). |
| 7. | *Weenen v. Biadi*, 2015 ONSC 6832 |
| 8. | *Ryan v. Victoria (City)*, 1999 CanLII 706 |
| 9. | *Grant v. St. Lawrence Seaway Authority* (1960), 23 DLR (2d) 252 |
| 10. | *Railink Canada Ltd. v. Ontario* (2008), 165 ACWS (3d) 822 |
| 11. | *Manitoba (Attorney General) v. Adventure Flight Centres Ltd.* (1983), 25 CCLT 295 |
| 12. | *Chiswell v. Charleswood*, [1935] WWR 217 |
| 13. | *Susan Heyes Inc. v. Vancouver (City)*, 2011 BCCA 77 |
| 14. | *Stein v. Gonzales* (1984), 14 LR (4th) 263 (BCSC) |
| 15. | *Gagnier v. Canadian Forest Products Ltd.*, 1990 CanLII 538 |
| 16. | *O'Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371 |
| 17. | *O'Neil v. Harper*, 1913 CanLII 538 |
| 18. | *Sutherland v. Canada (Attorney General)*, 1997 CanLII 2147 |
| 19. | *Freedman v. Cooper*, 2015 ONSC 1373 |
| 20. | *Barrette c. Ciment du St-Laurent inc.*, 2008 SCC 64 |
| 21. | *Krieser v. Garber*, 2020 ONCA 699 |

## SCHEDULE "B" – LIST OF STATUES, REGULATIONS AND BY-LAWS

### *1. Courts of Justice Act*, R.S.O. 1990, c. C.43

[…]

**Court of Appeal jurisdiction**

**6** (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except,

(i) an order referred to in clause 19 (1) (a) or (a.1), or

(ii) an order from which an appeal lies to the Divisional Court under another Act;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court;

(d) an order made under section 137.1. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17); 2015, c. 23, s. 1; 2020, c. 25, Sched. 2, s. 1 (1).

[…]

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.

**Procedural matters**
**Commencement**

**137.2** (1) A motion to dismiss a proceeding under section 137.1 shall be made in accordance with the rules of court, subject to the rules set out in this section, and may be made at any time after the proceeding has commenced. 2015, c. 23, s. 3.

**Motion to be heard within 60 days**

(2) A motion under section 137.1 shall be heard no later than 60 days after notice of the motion is filed with the court. 2015, c. 23, s. 3.

**Hearing date to be obtained in advance**

(3) The moving party shall obtain the hearing date for the motion from the court before notice of the motion is served. 2015, c. 23, s. 3.

**Limit on cross-examinations**

(4) Subject to subsection (5), cross-examination on any documentary evidence filed by the parties shall not exceed a total of seven hours for all plaintiffs in the proceeding and seven hours for all defendants. 2015, c. 23, s. 3.

**Same, extension of time**

(5) A judge may extend the time permitted for cross-examination on documentary evidence if it is necessary to do so in the interests of justice. 2015, c. 23, s. 3.

**Appeal to be heard as soon as practicable**

**137.3** An appeal of an order under section 137.1 shall be heard as soon as practicable after the appellant perfects the appeal. 2015, c. 23, s. 3.

**Stay of related tribunal proceeding**

**137.4** (1) If the responding party has begun a proceeding before a tribunal, within the meaning of the *Statutory Powers Procedure Act*, and the moving party believes that the proceeding relates to the same matter of public interest that the moving party alleges is the basis of the proceeding that is the subject of his or her motion under section 137.1, the moving party may file with the tribunal a copy of the notice of the motion that was filed with the court and, on its filing, the tribunal proceeding is deemed to have been stayed by the tribunal. 2015, c. 23, s. 3.

**Notice**

(2) The tribunal shall give to each party to a tribunal proceeding stayed under subsection (1),

(a) notice of the stay; and

(b) a copy of the notice of motion that was filed with the tribunal. 2015, c. 23, s. 3.

**Duration**

(3) A stay of a tribunal proceeding under subsection (1) remains in effect until the motion, including any appeal of the motion, has been finally disposed of, subject to subsection (4). 2015, c. 23, s. 3.

**Stay may be lifted**

(4) A judge may, on motion, order that the stay is lifted at an earlier time if, in his or her opinion,

(a) the stay is causing or would likely cause undue hardship to a party to the tribunal proceeding; or

(b) the proceeding that is the subject of the motion under section 137.1 and the tribunal proceeding that was stayed under subsection (1) are not sufficiently related to warrant the stay. 2015, c. 23, s. 3.

**Same**

(5) A motion under subsection (4) shall be brought before a judge of the Superior Court of Justice or, if the decision made on the motion under section 137.1 is under appeal, a judge of the Court of Appeal. 2015, c. 23, s. 3.

***Statutory Powers Procedure Act***

(6) This section applies despite anything to the contrary in the *Statutory Powers Procedure Act*. 2015, c. 23, s. 3.

**Application**

**137.5** Sections 137.1 to 137.4 apply in respect of proceedings commenced on or after the day the *Protection of Public Participation Act, 2015* received first reading. 2015, c. 23, s. 3.

**LI et al.** -and- **BARBER et al.**

Plaintiffs/Respondents Defendants/Appellants

Court File No. COA-24-CV-0207

**COURT OF APPEAL FOR ONTARIO**
Proceeding at Ottawa

# APPELLANTS' FACTUM ("FAP")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