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

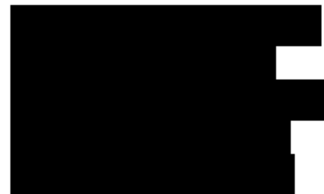
Defendants/Appellants

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE RESPONDENTS (PLAINTIFFS)

October 15, 2024

CHAMP & ASSOCIATES



Paul Champ (LSO 45305K)

Christine Johnson (LSO 62226I)

Lawyers for the Respondents (Plaintiffs)

PART I – OVERVIEW

1. This is an appeal from an order dismissing an anti-SLAPP motion brought by the Appellants pursuant to s. 137.1 of the *Courts of Justice Act*.

2. As the Supreme Court of Canada recently reaffirmed in *Hansman v. Neufeld*, a motion judge's decision on an anti-SLAPP motion is owed significant deference on appeal absent a palpable and overriding error.[1]

3. Here, the Appellants have not identified any palpable and overriding error in the motion decision. Accordingly, the Respondents respectfully submit that this appeal must be dismissed.

PART II – RESPONDENTS' STATEMENT OF FACTS

A. Litigation History

4. This is a proposed class proceeding in private nuisance and public nuisance for serious harms and losses experienced by the residents, businesses and workers in downtown Ottawa during the Freedom Convoy protest that occurred in January and February 2022.

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

[1] *Hansman v. Neufeld*, 2023 SCC 14 at para. 56

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

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

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

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

7. A few days after the issuance of the claim, an injunction Order was granted by Mr Justice McLean on February 7, 2022, prohibiting horn honking in downtown Ottawa. In granting the injunction, Justice McLean accepted that there was a serious issue to be tried with respect to the Plaintiffs’ private nuisance claim.[2]

8. On February 17, 2022, Regional Senior Justice MacLeod granted a Mareva injunction to freeze funds that were being used to support the Freedom Convoy’s illegal activities and were at risk of being dissipated. As part of the Court’s ruling,

[2] *Li v. Barber et al.*, 2022 ONSC 1513 (dated February 7, 2022 re horn injunction) at para. 63

Justice MacLeod also granted an Order to amend the pleadings. The Court permitted a Fresh as Amended Statement of Claim to be filed, [3] which added new Plaintiffs and Defendants and expanded the basis on which damages were sought, incorporating allegations about the diesel fumes and blockading of streets. The Defendants added at that time included named Defendants as well as "Jane Doe" Defendants referred to as "Donor Defendants". This amended pleading alleged that the Donor Defendants provided funds to the Freedom Convoy through various means with the knowledge that the Trucker Defendants were engaging in the tortious and other unlawful behaviour and with the intention of facilitating these unlawful acts.

9. In his Reasons granting the Mareva injunction, MacLeod RSJ held that "[t]here can be little argument that based on the statement of claim, the plaintiffs have endured a substantial interference with their rights" and that, based on the evidence before him at that time "there is an apparently strong case for establishing tort liability".[4]

10. By decision dated March 13, 2023, the Court granted leave to the Plaintiffs to file a Further Fresh as Amended Statement of Claim, and at the same time denied the bulk of the Defendants' parallel motion to strike some or all of the claim. In its decision, the Court acknowledged that the Further Fresh as Amended Claim "discloses a potential basis for liability on the part of some or all of the defendants".[5]

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[3] Fresh as Amended Statement of Claim, dated February 18, 2022 **[Appellant's Appeal Book and Compendium ("ABCO"), Tab 5, p 38]** ; *Li et al. v Barber et al.*, 2022 ONSC 1176 (dated February 17, 2022 re Mareva injunction) at paras 25, 39-44, 47

[4] *Li et al. v Barber et al.*, 2022 ONSC 1176 (re Marerva injunction) at para. 14

[5] *Li et al. v. Barber et al.*, 2023 CanLII 1679 (ON SC) (re Motion to Amend/Strike) at para. 41

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

12. Rather than serving statements of defence, the Appellants brought a motion seeking to have the proceeding dismissed pursuant to s. 137.1(3) of the *CJA*.

B. The Unsuccessful Anti-SLAPP Motion

13. On February 5, 2024, the Motions Judge, MacLeod RSJ, issued his decision (the "Motion Decision") dismissing the Appellants' anti-SLAPP motion and allowing the proposed class action to proceed.

14. In reaching his decision, the Motions Judge held that the Appellants had failed to meet every stage of the test under s. 137.1 of the *CJA*. At the outset, the Motions Judge concluded that defendants who denied involvement in the expression at issue could not avail themselves of the protection of s. 137.1.[6] The Motions Judge then turned to the public interest weighing part of the test and found that the public interest favoured allowing the action to proceed.[7]

15. The Motions Judge considered the merits-based hurdle of the test at greater length, and found there was a sufficient basis to conclude that the Respondents had a

[6] Motion Decision, para 19 **[ABCO, Tab 3, p 17]**
[7] Motion Decision, paras 20-22 **[ABCO, Tab 3, pp 17-18]**

meritorious case and that it could not be said that any of the potential defences were likely to prevail.[8] The motion was dismissed.

PART III – RESPONSE TO APPELLANTS' ISSUES

16. The issue raised on this appeal is whether the learned Motions Judge committed any error of law or palpable and overriding error of fact in his application of the test under s. 137.1 of the *CJA*.

17. The Respondents submit that the Appellants have not identified any error of law or fact that would justify interfering with the Motions Judge's decision.

A. Standard of Review on Appeal – Motion Decision Owed Significant Deference

18. As reaffirmed by the Supreme Court of Canada in *Hansman v. Neufeld*, 2023 SCC 14, a motions judge's decision on an anti-SLAPP motion is entitled to significant deference on appeal absent palpable and overriding error.[9]

19. In *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, this Court warned that parties should be mindful of this stringent standard of review when seeking to appeal an order in anti-SLAPP proceedings.[10]

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[8] Motion Decision, paras 24-29 (meritorious claim) and 30-31 (no valid defence) **[ABCO, Tab 3, pp 18-20]**
[9] *Hansman v. Neufeld*, 2023 SCC 14 at para. 56, where Court considered anti-SLAPP legislation in British Columbia that was based on and is substantially similar to Ontario's anti-SLAPP provisions at s. 137.1 of the *CJA*. See also: *Hamer v. Jane Doe*, 2024 ONCA 721 at para 31
[10] *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129 at para 42, leave to appeal refused, [2023] S.C.C.A. No. 172 ("*Park Lawn*")

20. With regards to the "merit-based hurdle" under s. 137/1(4)(a), the Motions Judge was not required to engage in a determinative adjudication of the merits of the underlying claim or a conclusive determination of the existence of a defence. Indeed, the Supreme Court of Canada has noted that "courts must be acutely aware of the limited record, the timing of the motion in the litigation process, and the potentiality of future evidence arising".[11] The anti-SLAPP regime is a screening mechanism for weeding out obviously unmeritorious claims, and it is not a trial of the issues or a "deep dive" into the merits.[12]

21. To address the objectives of the legislation, the main focus of an anti-SLAPP motion will usually be on the "crux" or "core" of the analysis, namely the weighing exercise under s. 137.1(4)(b). When conducting this weighing exercise, a technical, granular analysis is not required. Instead, the motion judge should step back and ask what is really going on.[13]

22. With both the "merits-based hurdle" and the "public interest hurdle", the motion judge's discretion is subjective and is not to be reviewed on the standard of a "reasonable trier".[14]

24. Here, the Appellants have failed to identify any error of law or palpable and overriding factual error justifying interference with the Motions Judge's analysis of

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[11] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at para. 37 ("*Pointes*")
[12] *Pointes*, 2020 SCC 22 at para. 52; and *Park Lawn* at para. 33
[13] *Pointes*, 2020 SCC 22 at paras. 81-82; and *Park Lawn*, 2023 ONCA 129 at para. 38
[14] *The Catalyst Group Inc. v. West Face Capital Inc.*, 2023 ONCA 381 at para. 99 ("*Catalyst Group*"); *Pointes* at para. 41. With regards to the public interest hurdle, the Court in *Pointes* explained at paras. 96-97: If a motion judge provides full reasons, an appeal court must defer to the motion judge's balancing of the competing interests under s. 137.1(4)(b), absent an identifiable legal error, or a palpable and overriding factual error. Deference is important, as there is no reason to think that a simple recalibration of the competing interests by an appeal court will provide a more accurate assessment [emphasis added].

either the “merits-based hurdle” or the “public interest hurdle”. Instead, the Appellants appear to dispute the Motions Judge’s factual findings and exercise of discretion, which are entitled to significant deference on appeal. The Motions Judge’s findings ought to be afforded the highest deference in this particular case, given his extensive involvement in managing this complex litigation and intimate knowledge of the case.[15]

25. The Respondents submit that the Motions Judge identified the correct test, considered the appropriate factors and ultimately arrived at a reasonable decision that was his to make. Respectfully, the Respondents submit that it is not the function of this Court to replace the Motions Judge’s findings of fact with its own or engage in a reweighing of the public interest.

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

23. For the purpose of the motion, the Respondents conceded that the proceeding arises from expressive activities (honking, blocking streets with trucks, and donating money to support those activities) relating to a matter of public interest. However, the Respondents argued in the Court below that the Appellants could not satisfy the threshold burden under s. 137.1(3) because they would not admit that they engaged in the expression that was the subject of the claim. The Motions Judge agreed that a party “cannot simultaneously claim protection for freedom of speech under anti-SLAPP legislation while denying involvement in the expression at issue.” [16]

24. Appellate Courts in Ontario and British Columbia have considered whether a moving party must admit to having made an impugned expression in order to benefit

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[15] See e.g. *Lefrancois v. Guidant Corporation*, 2009 CanLII 55311 (Div. Ct.) at paras. 16-17
[16] Motion Decision, para 19 **[ABCO, Tab 3, p 17]**

from the protections anti-SLAPP legislation.[17] In both jurisdictions, it has been found that it is impossible for a moving party to prove that the proceeding arises from an expression they made in the public interest while simultaneously denying having made the impugned expression.[18] In *Christman*, the BCCA explained that it would be illogical and irreconcilable with the legislative purpose of the anti-SLAPP protections for a defendant to benefit from the legislation while denying the expression at issue.[19]

25. The Motions Judge did not identify which specific moving parties were denying involvement in the expression at issue, but acknowledged that at least some took that impermissible position. The Respondents submit that all of the Appellants denied that the horn honking, prolonged idling and blockading of streets took place as alleged, and/or they deny their involvement in same. For example, in the draft Statement of Defence provided by all of the Appellants (except King and Janzen) they:

(a) deny streets were blockaded by vehicles or that it was impossible to pass through downtown;[20]

(b) deny vehicles remained idling for 24 hours per day, emitting diesel fumes;[21]

(c) deny that the honking of horns was used as a tactic or part of any common design on the part of any Defendants;[22] and

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[17] *Zoutman v. Graham*, 2020 ONCA 767 ("*Zoutman*") at para. 18 (affirming 2019 ONSC 2834 at paras. 54-55) ("*Zoutman*") and *Christman v. Lee-Sheriff*, 2023 BCCA 363 ("*Christman*") at paras. 63-71. Also see: *Walsh v. Badin*, 2019 ONSC 689 at paras 27-30
[18] See: *Christman*, 2023 BCCA 363 at para. 66; *Zoutman*, 2020 ONCA 767at paras. 18
[19] *Christman*, 2023 BCCA 363 at para. 70
[20] Proposed Statement of Defence at paras. 92-93, attached as Exhibit A to Affidavit of Selena Bird, dated August 25, 2023 ("Bird Affidavit") **[ABCO, Tab 16, p 1195]**
[21] Proposed Statement of Defence at para. 95 **[ABCO, Tab 16, p 1196]**
[22] Proposed Statement of Defence at para. 100 **[ABCO, Tab 16, p 1197]**

(d) deny that any Defendants directed or encouraged horn honking or that horns were honking non-stop for several hours every day.[23]

26. The affidavit evidence also denied involvement in the expression at issue. For example, Harold Jonker (speaking for himself and Jonker Trucking) denied that trucks were idled for prolonged periods,[24] that streets were blocked,[25] or that horns were honking non-stop for several hours every day.[26] He stated that he "almost never honked any horns at all during the protest".[27] While Jonker then admitted on cross-examination that the "honking was trying to send a message"[28] and there was often quite a few trucks honking at the same time,[29] he nonetheless continued to deny that these activities occurred or that he was involved.

27. Other Appellants also denied that the impugned expressive activities occurred at all. The Appellants Gasior and Tiessen denied hearing any truck horns at night or seeing any trucks blocking streets or with engines idling all night.[30] The Appellants Enns, Bulford, Mihilewicz and Marazzo denied that horns were honking non-stop for several hours every day, that engines were left idling for prolonged periods or that streets in the occupation zone were blocked by trucks.[31]

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[23] Proposed Statement of Defence at para. 100 **[ABCO, Tab 16, p 1197]**
[24] Affidavit of Harold Jonker, sworn August 22, 2023 ("Jonker Affidavit") at para. 27 **[Respondents' Compendium ("RCOM"), Tab 3, p 22]**
[25] Jonker Affidavit at paras. 22 and 26 **[RCOM, Tab 3, pp 21-22]**
[26] Jonker Affidavit at para. 28 **[RCOM, Tab 3, pp 22-23]**
[27] Jonker Affidavit at para. 29 **[RCOM, Tab 3, p 23]**
[28] Transcript of the Cross-Examination of Harold Jonker, dated September 15, 2023 (the "Jonker Transcript"), Q 63 (p. 15) **[RCOM, Tab 9, p 100]**
[29] Jonker Transcript at Qs 65-66 (pp. 15-16) **[RCOM, Tab 9, pp 100-101]**
[30] Affidavit of Miranda Gasior, dated August 21, 2023 at para. 13 **[RCOM, Tab 4, pp 29-30]** Affidavit of Sean Tiessen, dated August 23, 2023 at para. 13 **[RCOM, Tab 6, p 53]**
[31] Affidavit of Dale Enns, dated August 18, 2023 at paras. 23, 25 & 28 **[RCOM, Tab 2, pp 12-13]** Affidavit of Ryan Mihilewicz, dated August 15, 2023 at paras. 23, 25 & 28 **[RCOM, Tab 5, pp 45-47]** Affidavit of Tom Marazzo, dated August 17, 2023 at paras. 26, 28 and 33 **[RCOM, Tab 7, pp 67-69]** Affidavit of Daniel Bulford, dated August 24, 2023 at paras. 14, 28, 30 and 34 **[ABCO, Tab 17, pp 1208 and 1211-1213]**

28. In parallel to denying that the horn honking, prolonged idling, or blockading of streets occurred, the Appellants who are "Organizer Defendants" also deny that they played any role in facilitating, organizing or encouraging these activities. For example, the Appellant Bulford denied that he played any logistical or coordinating role in "the tortious horn blasting and idling trucks". (This is a departure from previous evidence by Bulford in February 2022 when he swore an affidavit to resist the horn injunction. In the earlier motion, he swore that the Freedom Convoy leadership had agreed upon a schedule for honking and that Bulford played a role in communicating this schedule to truckers.[32]) In any event, his position on this motion was that he did not play such a role and therefore he cannot avail himself of the s. 137.1 mechanism.

29. For his part, the Appellant Brad Howland acknowledged donating $75,000 to the Freedom Convoy protest, but denied that his donation was made to support the impugned expressive activities of blocking streets, idling trucks or blaring horns.[33]

30. The Respondents submit that the Appellants cannot claim that this lawsuit — focused on horn honking and blockading streets — is an attempt to silence those expressive activities, while at the same time purporting to have never engaged in or facilitated those expressive activities in the first place. While the Motions Judge did not identify which parties had denied the expression at issue, the Respondents submit that as a threshold issue the appeal should be dismissed as against any Appellant who will not admit to the conduct.

[32] Affidavit of Daniel Bulford, dated February 5, 2022 at paras. 7-8, attached as Exhibit A to Affidavit of Trudy Moore dated September 1, 2023 ("Moore Affidavit") **[ABCO, Tab 8, pp 148-149]**

[33] Affidavit of Brad Howland, dated September 15, 2023 at para. 10 **[RCOM, Tab 1, p 3]**

C. Motion Judge Did Not Err in Analysis of Merits-Based Hurdle

31. The Motions Judge did not err in his analysis and findings under the "merits-based hurdle" of the s.137.1 test. As the Court correctly noted, the operative words of s. 137.1(4)(a) are "grounds to believe" that the proceeding has substantial merit and there is no valid defence.[34] The Motions Judge acknowledged that this assessment under s.137.1(4)(a) requires an evidentiary basis, but it does not require certainty.[35] Echoing the words of this Court, the Motions Judge held that the language at s. 137.1(4)(a) "must be interpreted in light of the nascent stage of the litigation when such motions will typically be brought".[36]

32. Anti-SLAPP motions are not akin to summary judgment motions and parties are limited in the evidentiary record they can put forward.[37] A judge considering an anti-SLAPP motion "should only engage in limited weighing of the evidence and should defer ultimate assessments of credibility and other questions requiring a deep dive into the evidence at a later stage".[38] The framework is intended to establish a "screening procedure" that is "efficient and economical" rather than a trial of the underlying action.[39]

33. The Appellants main arguments appear to be that the Respondents did not tender adequate evidence to show there were "grounds to believe" that (i) the proceeding has substantial merit and (ii) the Appellants have no valid defence. The Respondents submit that the Motions Judge was correct in finding there was sufficient evidence to meet the threshold.

[34] Motion Decision at para. 14 **[ABCO, Tab 3, p 16]**
[35] Motion Decision at para. 16 **[ABCO, Tab 3, p 17]**
[36] Motion Decision at para. 14 **[ABCO, Tab 3, p 16]**
[37] Motion Decision at paras 13 and 15 **[ABCO, Tab 3, p 16]**; *Pointes*, 2020 SCC 22 at para. 52; and *Bent v. Platnick*, 2020 SCC 23 ("*Bent*") at para. 51;
[38] *Pointes*, 2020 SCC 22 at para. 52
[39] *Park Lawn*, 2023 ONCA 129 at paras. 38-39; and Motion Decision at paras 9-10 **[ABCO, Tab 3, p 15]**

(i) Reasonable Grounds to Believe that Claim has Substantial Merit

39. As the Motions Judge acknowledged, an unusual aspect of this motion was that he had already ruled on a previous motion (to strike/amend the pleadings) that the statement of claim disclosed reasonable causes of action against the defendants.[40] This prior ruling was not appealed by the defendants and they conceded that it was theoretically possible to assert liability against certain defendants based on the torts of private and public nuisance.[41]

40. Two other motions in this same proceeding also found the claim had merit. In granting the horn injunction, McLean J. held there was "not much difficulty" finding a "serious issue to be tried" in the proceeding.[42] The subsequent *Mareva* injunction was granted by MacLeod RSJ based on the higher standard of an "apparently strong case", concluding, "On the facts disclosed by the affidavits, there is an apparently strong case for establishing tort liability."[43]

41. These previous rulings are persuasive on the merits-based hurdle. Nevertheless, the Respondents also provided the Motions Judge with an ample evidentiary basis on which to find that the claim has substantial merit for the purpose of the anti-SLAPP motion. It is clear from the Motion Decision that the Court carefully considered this evidence and found it sufficient to meet the Respondent's burden under s. 137.1(4)(a).

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[40] Motion Decision at pars. 23-24 **[ABCO, Tab 3, pp 18-19]**
[41] Motion Decision at para. 24 **[ABCO, Tab 3, pp 18-19]**
[42] *Li v. Barber et al.*, 2022 ONSC 1513 (re motion for horn injunction)
[43] *Li et al. v. Barber et al.*, 2022 ONSC 1176 (re Mareva injunction) at paras 8 and 14

a) Evidence of Harm to Respondents Caused by Private and Public Nuisance

42. The Respondents filed several affidavits which recounted direct observations of Convoy participants engaging in prolonged honking, idling and blockading of downtown Ottawa streets in January and February 2022. These affidavits also described how these activities interfered with the daily living of residents, the operation of businesses and the rights of employees to earn a living. The Appellants declined to cross-examine the Respondents' witnesses on their affidavits.

43. The Affidavit of Zexi Li provided evidence about her experience during the Freedom Convoy as a resident living within the occupation zone. She described being "tormented by persistent and painfully loud honking from several large trucks which were parked outside of her residence" throughout the Convoy.[44] She recounted that the horn honking felt nearly constant from January 28 to February 7, 2022 and that she recorded sound levels as high as 84 decibels within her apartment during this time.[45] She described how the constant honking caused her severe physical and emotional distress and interfered with her sleep.[46] She also recounted that parked vehicles left their engines idling for prolonged periods and that the smell of diesel fumes was overwhelming.[47]

44. The Affidavit of Sean Flynn provided his direct observations of the Freedom Convoy occupation as an Ottawa citizen who walked and cycled around the occupation zone from January 28 to February 19, 2022. He witnessed large semi

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[44] Affidavit of Zexi Li, dated September 1, 2023 ("Li Affidavit") at para. 8 **[ABCO, Tab 15, p 1001]**
[45] Li Affidavit at paras. 10-11 **[ABCO, Tab 15, pp 1001-1002]**
[46] Li Affidavit at paras. 12-15 and 28 **[ABCO, Tab 15, pp 1002-1003 and 1006]**
[47] Li Affidavit at para. 7 **[ABCO, Tab 15, p 1001]**

trucks blocking city streets while idling and emitting heavy diesel fumes throughout the Convoy occupation. He provided videos that he took of the honking and sound level measurements from his Smart Watch which registered over 100 decibels on several occasions.[48]

45. The Appellants argue that Mr Flynn's evidence is unhelpful because he did not see any of the parties in this proceeding in downtown Ottawa during the protest.[49] The Respondents submit that Mr Flynn's evidence is highly probative as it demonstrated the serious and widespread nature of the tortious activities throughout the occupation zone. The Motions Judge could certainly draw reasonable inferences from Mr Flynn's evidence that anyone residing in the occupation zone during the Convoy protest would have experienced a substantial and unreasonable interference with the enjoyment of their homes and daily lives.

46. Ivan Gedz provided evidence about his experience during the Freedom Convoy as the owner of a restaurant located within the occupation zone. He state that his restaurant's revenues during the Convoy decreased approximately 45% from what they expected. They had nights where no customers came in[50] and je saw a substantial number of reservations cancelled as disturbances from the Convoy went unresolved.[51] Some customers expressly cited the Convoy as the reason for cancelling their reservations[52] and the loud honking and created an unwelcoming atmosphere for

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[48] Affidavit of Sean Flynn, dated August 31, 2023 at paras. 2-28 **[ABCO, Tab 9, pp 635-642]**
[49] Appellants' Factum, paras 42-43 **[Factum of the Appellants ("FAP")]**
[50] Affidavit of Ivan Gedz, dated August 31, 2023 ("Gedz Affidavit") at para. 7 **[ABCO, Tab 12, pp 758-759]**
[51] Gedz Affidavit at para. 8 **[ABCO, Tab 12, p 759]**
[52] Gedz Affidavit at para. 9 **[ABCO, Tab 12, p 759]**

prospective diners.[53] Combined with other evidence about the honking and idling trucks, this evidence is unsurprising and highly credible.

47. Further, as the head of the Somerset Street Business Improvement Area ("BIA"), Gedz was also in regular communications with the members of their BIA as well as the Ottawa Association of BIAs. He heard that the Convoy drastically affected the revenues of other businesses and that businesses closer to the heart of the Convoy occupation were closed entirely.[54] Again, when combined with the evidence of Mr Flynn, the Motions Judge could draw a reasonable inference that businesses across the occupation zone, as well their employees, were impacted by the tortious activities.

48. In addition to the direct accounts of Li, Flynn and Gedz, the Respondents relied on an affidavit from Debbie Owusu-Akyeeah, one of the Commissioners from the Ottawa People's Commission ("OPC") on the Convoy Occupation in Ottawa. Ms Owusu-Akyeeah's affidavit attached a copy of Part I of the OPC's report – *What we heard* – which contains quotes from stories shared with the OPC Commissioners through video-recorded public hearings, community consultations and written submissions. At paragraph 12 of her affidavit, Ms Owusu-Akyeeah highlighted some of the accounts that she heard from community members regarding harm caused by the incessant honking of horns, prolonged exposure to diesel fumes and blockading of downtown streets.[55]

[53] Gedz Affidavit at paras. 10 and 13 **[ABCO, Tab 12, pp 759-760]**
[54] Gedz Affidavit at para. 15 **[ABCO, Tab 12, pp 760-761]**
[55] Affidavit of Debbie Owusu-Akyeeah Gedz, dated September 1, 2023 at para. 12 **[ABCO, Tab 11, pp 678-681]**

49. The Respondents also filed excerpts from Commissioner Rouleau's report and exhibits filed in connection with the Public Order Emergency Commission ("POEC").[56] In his report, Commissioner Rouleau found that Freedom Convoy protestors engaged in unlawful conduct[57] and that residents, businesses and workers suffered harm as a result of this conduct.[58] Exhibits filed in the course of the POEC included a Health Canada Report regarding the Human Health Risk for Diesel Exhaust[59] and a Message from Ottawa Public Health regarding convoy-related air quality concerns.[60] This evidence supported the Respondents' allegations that the idling trucks emitted harmful diesel fumes.

50. While the Respondents acknowledged that the findings of the OPC and POEC were not admissible for the purpose of this Court making material findings of fact, these reports can be relied upon to assess whether there were "grounds to believe" that the claim has substantial merit. The existence of the OPC and POEC reports provided reasonable grounds to believe that the Respondents will be able to adduce similar evidence in the course of this action.

51. The Respondents also relied on opinions by two experts – an audiologist and an chartered professional accountant – which also went unchallenged by the Appellants.

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[56] Moore Affidavit at paras. 6-7 **[ABCO, Tab 8, pp 139-140]**

[57] POEC Report Volume I, attached as Exhibit B to Moore Affidavit **[ABCO, Tab 8, p 153-425]** . Based on the evidence presented during the POEC, Commissioner Rouleau concluded (at p. 138): "I do not accept the organizers' descriptions of the protests in Ottawa as lawful, calm, peaceful or something resembling a celebration" **[ABCO, Tab 8, p 291]**

[58] POEC Report Volume III, attached as Exhibit C to Moore Affidavit **[ABCO, Tab 8, pp 427-434]** . At pp. 193-194, Commissioner Rouleau discusses how community members were negatively impacted by noise, fumes and disruption of traffic and city services (as a result of blockaded streets) **[ABCO, Tab 8, pp 428-429]**. At pp. 198-199, Commissioner Rouleau discuses the negative impact of the Convoy's unlawful activities on businesses and workers **[ABCO, Tab 8, pp 433-434]**.

[59] Exhibit D to Moore Affidavit **[ABCO, Tab 8, pp 436-480]**

[60] Exhibit E to Moore Affidavit **[ABCO, Tab 8, pp 482-483]**

The Appellants arguments seem to be that the experts ought to have examined the health and business records of class members. The Respondents submit that this position is inconsistent with the law on the standard of evidence required for an anti-SLAPP motion. Courts must be "acutely aware of the limited record" available at any early stage and "the potentiality of future evidence arising".[61]

52. Chantal Laroche is a professor emeritus of Audiology/Speech-Language Pathology. She reviewed a variety of evidence about noise levels across the occupation zone during the Convoy protest. She provided her expert assessment that:

> During the Freedom Convoy, indoor noise levels were sufficiently high as to interfere with residents' daily activities of life including work and rest, and outdoor noise levels were sufficiently high as to cause temporary hearing loss, permanent hearing damage and/or tinnitus.[62]

53. Larry Andrade, a Chartered Professional Accountant and Partner in Deloitte LLP, provided a preliminary estimate of the economic damages suffered by the Business and Employee Sub-Classes in this proceeding. Based on various data available, he estimated a range of losses for the Business and Employee Sub-Classes of $150.0 million to $210.0 million.[63]

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

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[61] *Pointes*, 2020 SCC 22 at paras 37 and 52
[62] Affidavit of Chantal Laroche, dated August 31, 2023 at para. 12(d) **[ABCO, Tab 13, p 774]**
[63] Affidavit of Larry Andrade, dated August 30, 2023 at paras. 10 and 27-64 **[ABCO, Tab 14, p 970-971 and 976-986]**

b) Evidence of Appellants' Concerted Action Liability

55. As the Motions Judge acknowledged, the Respondents do not assert that all of the Appellants were directly engaged in tortious activity. Instead, they rely on the principle of concerted action in which parties who knowingly assist or encourage others to engage in tortious activity may be held jointly and liable for the damage.[64] The Motions Judge correctly noted that the caselaw does not necessarily require all parties to be aware that the proposed action is tortious so long as they acted in concert in furtherance of the wrong.[65]

56. The Respondents allege that the Organizer and Donor Defendants knowingly planned, coordinated, assisted, encouraged and incited the Trucker Defendants to engage in the specific activities alleged to constitute private and/or public nuisance. Evidence was provided on the motion demonstrating that:

(a) Harold Jonker, proposed representative for the Trucker Class Defendants, stated that the parked trucks "were an important symbol of the protest"[66] and the honking was "trying to send a message" to government;

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[64] Motion Decision at para. 25 **[ABCO, Tab 3, p 19]**

[65] Motion Decision at para. 25 **[ABCO, Tab 3, p 19]**. See also *Anmore Development Corp v The City of Burnaby et al*, 2005 BCSC 1477 at paras 120-122; *Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5 at para. 154; and *ICBC v Stanley Cup Rioters*, 2016 BCSC 1108 at paras 21-30 and paras 31-39 where court distinguishes spontaneous events that are not planned or deliberate, in contrast to the events in this claim.

[66] Jonker Transcript, Q 52 (p. 13) and Q 63 (p. 15) **[RCOM, Tab 9, pp. 98 and 100]**

(b) Convoy organizers facilitated and encouraged tortious activities including by scheduling and directing horn honking,[67] encouraging the use of horn honking as a "war" tactic to harm community members,[68] and discussing a strategy to "gridlock" the city;[69]

(c) Convoy organizers <u>opposed</u> the horn injunction and later failed to communicate the injunction to truckers in accordance with the court order[70] and actively encouraged the honking to continue;[71]

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[67] Affidavit of Daniel Bulford, dated February 5, 2022, at paras. 7-8, attached as Exhibit A to Moore Affidavit **[ABCO, Tab 8, pp 148-149]**; Affidavit of Jeremy King, dated September 1, 2023 ("Jeremy King Affidavit") at paras. 8 and 10-11 **[ABCO, Tab 10, p 671-673]** (discussing social media posts made by Chris Barber and Patrick King, respectively, directing truckers as to how and when to honk their horns); Li Affidavit at paras 21-25 **[ABCO, Tab 15, pp 1004-1006]** (describing how the horn honking died down after the injunction in conjunction with Patrick King's directive on social media to lay off the horns)

[68] See "Freedom Convoy 2022 Official Daily Event and Safety Reports" dated February 12-23, 2022 at Exhibits K and L to Moore Affidavit **[ABCO, Tab 8, pp 572-576]** . At the bottom of each daily report, there is a "Daily Humour and Meme Warfare" section commenting on the use of honking as a protest tactic. The February 12th report contains a meme describing characteristics of "The Honker", including: "Creates a schedule for the hoonk for maximum freedom enhancing effects", "Disrupts the status quo by not letting people sleep in tyranny"; "Just straight up says to the crying soy jack 'The honking will continue until freedom improves'". The February 13th report contains a quote attributed in jest to Sun Tzu: "The supreme art of war is to tire the enemy with honking".

[69] See CityNews article dated July 9, 2022 at Exhibit J to Moore Affidavit **[ABCO, Tab 8, pp 566-570]**. This article contains a quote from a text message sent by Lich to Barber on January 30, 2023 stating that she had received a call from the "command centre" that had a "strategy to gridlock the city" **[quote at ABCO, Tab 8, p 569]**

[70] Jeremey King Affidavit at paras. 4-7 and 12 **[ABCO, Tab 10, pp 670-671 and 673]** . See also Volume I of POEC Report, attached as Exhibit B to Moore Affidavit at p. 140 (where Commissioner Rouleau states that Lich and Barber "took no meaningful steps to stop [the honking]") **[ABCO, Tab 8, p 293]**

[71] Jeremy King Affidavit at paras. 8 and 11 **[ABCO, Tab 10, pp 671 and 673]** (discussing social media posts made by Chris Barber and Patrick King, respectively, encouraging truckers to blare their horns in defiance of the injunction). See also OPP Intelligence Report dated February 14, 2022 attached as Exhibit F to Moore affidavit **[ABCO, Tab 8, pp 485-528]** . This OPP report states (at p. 16) that "The Truck horns are going off all day long with short lulls of silence. The horns continue to go off even during support speeches throughout the day" **[ABCO, Tab 8, p 500]**. This report also states (at p. 35) "There were many trucks that below their air horns today despite the injuction not to do so **[ABCO, Tab 8, p 519]** and (at p. 38) "Speakers were also promoting truckers to honk their horns" **[ABCO, Tab 8, p 522]**.

(d) Convoy organizers encouraged participants to “hold the line” [72] and to stay in place until their demands were met;

(e) GoFundMe released a statement on February 4, 2022 stating that the Freedom Convoy 2022 fundraiser had been shut down as “[w]e now have evidence from law enforcement that the previously peaceful demonstration has become an occupation, with police reports of violence and other unlawful activity”;[73]

(f) Following GoFundMe’s decision to end the Convoy fundraiser due to unlawful activity, the Appellant Lich released a video statement on Facebook announcing that donations in support of Freedom Convoy 2022 could instead be made on GiveSendGo, and that these donations would support the Convoy’s plan to “be here for the long haul as long as it takes to ensure that your rights, and freedoms, are restored”;[74]

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[72] A phrase frequently uttered by Convoy organizers, as reflected also in the title of the Defendant Lich’s book published about her Convoy experience (“Hold the Line: My Story From the Heart of the Freedom Convoy”)—see Moore Affidavit at para. 8(a) **[ABCO, Tab 8, pp 140-141]**. See also the Affidavit of Christopher Rhone (sworn in support of the AG’s Restraint Order), attached as Exhibit H to Moore Affidavit **[ABCO, Tab 8, pp 535-560]**. At para. 23 of his Affidavit, Rhone describes a press conference held by Convoy organizers on January 30, 2022 where they communicate they are in this for the “long haul” **[ABCO, Tab 8, p. 543]**.
[73] Affidavit of Christopher Rhone at para. 40, attached as Exhibit H to Moore Affidavit **[ABCO, Tab 8, p 551]**
[74] Affidavit of Christopher Rhone at para. 44, attached as Exhibit H to Moore Affidavit **[ABCO, Tab 8, p 552]**

(g) Convoy organizers used social media to advise people that the GoFundMe campaign had been shut down and to encourage people to donate to the GiveSendGo fundraising campaign instead;[75]

(h) The Defendants Lich, Dichter and St. Louis gave media interviews stating that some donors planned to double their donations following the GoFundMe campaign shutdown and that a Bitcoin fundraiser had also been setup to receive "donations without obstruction" and which "police cannot stop";[76]

(i) Brad Howland, proposed representative for the Donor Class Defendants, admits that he donated $75,000 for the purpose of supporting the trucks to stay on the streets of Ottawa[77] and that he was aware that GoFundMe had suspended their fundraising campaign by that point;[78]

(j) A Restraint Order was obtained by the Attorney General on February 10, 2022 with regards to the GiveSendGo donations, on the basis that these funds were offence-related proceeds as (donations made in support of criminal mischief);[79] and

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[75] Transcript of the Cross-Examination of Miranda Gasior, dated September 15, 2023 (the "Gasior Transcript"), Qs 24-27 (pp. 6-7) **[RCOM, Tab 11, pp 129-130]**
[76] Affidavit of Christopher Rhone at para. 24, attached as Exhibit H to the Moore Affidavit **[ABCO, Tab 8, p 543-544]**
[77] Transcript of the Cross-Examination of Brad Howland, dated September 15, 2023 (the "Howland Transcript"), Q 2 (p. 3) **[RCOM, Tab 10, p 110]**
[78] Howland Transcript, Q. 9 (p. 5) **[RCOM, Tab 10, p 112]**
[79] Exhibit G to Moore Affidavit **[ABCO, Tab 8, pp 530-533]**. See also paragraphs 58-60 of the Affidavit of Christopher Rhone attached as Exhibit H to the Moore Affidavit **[ABCO, Tab 8, p 556]** where Detective Rhone sets out his grounds for belief that donations made to the Convoy constitute property intended to be used to commit criminal mischief.

(k) Donations provided material and moral support to the Trucker Class Defendants to continue in their tortious activities — as admitted by the Appellant Tiessen during cross-examination when he stated that the large amount of money raised was a symbol of how much support they had to keep going: "You know, it's not the money. It was a symbol."[80]

57. The Respondents maintain that it was the collective activities of the Appellants, acting with a common design, that caused the harm alleged. The Motions Judge carefully considered the above record and found that this evidence provided a reasonable basis on 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".[81] He took particular note of the existence of videos and text messages which urged protesters to "hold the line", to "stay for as long as necessary" and to donate funds in a way that "cannot be obstructed".[82]

58. The Motions Judge accepted that the Appellants' argument that its possible not every individual donor may be impressed with the necessary knowledge of the lawful activities and there may be policy reasons that weigh against finding "minor donors" are jointly liable. The Motions Judge noted these issues would no doubt be considered in a certification motion, but correctly concluded that it was premature to consider

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[80] Transcript of the Cross-Examination of Sean Tiessen, dated September 15, 2023 (the "Tiessen Transcript"), Qs 45-47 (pp. 10-11) **[RCOM, Tab 8, pp 82-83].** See also the Affidavit of Christopher Rhone para. 24, attached as Exhibit H to Moore Affidavit **[ABCO, Tab 8, pp 543-544]** where Rhone describes a media interview given by Convoy organizers on February 9, 2022 and posted to Facebook. In this interview, Convoy organizers promoted the success of the GiveSendGo campaign and stated that these donations are intended "to provide a legal war chest (defensive and offensive)".
[81] Motion Decision at para. 27 **[ABCO Tab 3, p 19]**
[82] Motion Decision at para. 28 **[ABCO Tab 3, pp 19-20]**

these sorts of issues on an anti-SLAPP motion. The Court was satisfied that there was "evidence by which a court could conclude that the named defendants share liability with the organizers and protesters."[83]

59. The Motions Judge's weighing of evidence and findings of fact are deserving of significant deference. Given that an anti-SLAPP mechanism is only a screening mechanism, it was entirely reasonable for the Motions Judge to avoid a "deep-dive" into the complicated legal issue of concerted action liability at this stage.

c) Respondents' Evidence was Sufficient to Satisfy Merits-Based Hurdle

60. Notwithstanding the extensive affidavit evidence tendered by the Respondents, the Appellants assert that this evidence was insufficient to satisfy the merits-based test. For the reasons that follow, the Appellants' arguments in this regard ought to be rejected.

61. First, the Appellants suggest that the Respondents' evidence was largely inadmissible as hearsay evidence. However, a motions judge is indeed permitted to consider both direct and indirect evidence — including hearsay evidence — in considering whether there are grounds to believe that the claim has substantial merit on an anti-SLAPP motion.[84] In assessing whether there are grounds to believe that a claim has substantial merit, a judge may also draw logical or common-sense inferences if those inferences are grounded in the evidence.[85]

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[83] Motion Decision at para 29 **[ABCO, Tab 3 p 20]**
[84] *Christman*, at para. 77. See also R. 39.01(4) of the *Rules of Civil Procedure*, RRO 1990, Reg 194
[85] *Christman*, at para. 75

62. Second, the Appellants contend that the Respondents were required to establish that a class proceeding is viable. This is clearly not what the legislature has contemplated. Just as an anti-SLAPP motion is not akin to a summary judgment motion, it is certainly not a certification motion where the parties would be required to address the variability of a class proceeding.

63. Furthermore, the Respondents were not required to submit evidence on behalf of each proposed representative plaintiff in order to satisfy the merits-based hurdle, as the Appellants suggest. The affidavits by Flynn, Gedz and the expert Andrade were sufficient to establish the widespread harm caused to members of the business and employee classes. Moreover, it is well-established that a representative plaintiff can be replaced during a class proceeding where it is found just and convenient to do so.[86] This can be for various reasons, including for "personal reasons".[87] Given that representative plaintiffs can be easily substituted, it is unnecessary at this stage to provide affidavit evidence describing each representative plaintiffs experience where sufficient evidence has otherwise been provided establishing there are harms common to the class. Anti-SLAPP motions are rare in the class action context and the Appellants certainly did not provide any authority for their position.[88]

64. Similarly, the Respondents were also not required to submit evidence on behalf of each member of the proposed class(es), as the Appellants further suggest. Indeed, this would create a more onerous evidentiary burden than what is even required on a certification motion,[89] which would be contrary to the statutory purpose of s. 137.1 of the *CJA*. In a certification motion for a proposed class action based on nuisance, the

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[86] See e.g. *Fairhurst v. Anglo American PLC*, 2014 BCSC 2270 at para. 90
[87] *Coburn and Watson's Metropolitan Home v. Bank of Montreal*, 2021 BCSC 2398 at para. 15
[88] *Hudspeth v Whatcott*, 2017 ONSC 1708 is one of the only other cases.
[89] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para 119

BC Court of Appeal in *Gautam v Canada Line Rapid Transit* rejected arguments by the defendants that damage to the interests of each individual class member must be established as an element of nuisance rather than simply damages. The BC Court of Appeal observed, in the context of a certification motion, that "it is not necessary for the court to consider the effect on each owner or business proprietor in order to ascertain whether there is substantial interference that is unreasonable."[90]

65. Third, the Appellants contend that for the tort of public nuisance, economic losses cannot meet the requirement of "special damages". The jurisprudence suggests otherwise.[91] The entire community of greater Ottawa experienced inconvenience from blocked roads and the concentrated emission of diesel fumes. But while most of Ottawa could not easily access or use the streets of downtown Ottawa during the Convoy, those who operated businesses located in the occupation zone, or worked in those businesses, experienced special damages over and above the rest of the Ottawa public.

(ii) Reasonable Grounds to Find that Appellants Have No Valid Defence

66. Under s. 137.1(4)(a)(ii) of the *CJA*, the Motions Judge was required to consider whether there were grounds to believe that the Appellants have no valid defence.

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[90] *Gautam v. Canada Line Rapid Transit Inc.*, 2011 BCCA 275 at paras 32-33, 33 for quote

[91] See, e.g., *O'Neil v. Harper*, [1913] O.J. No. 91 (ONCA) at paras 72, 75, 80, 85-88 and 94 (member of public who resides proximate to an obstructed road can sue for nuisance) **[Respondents' Book of Authorities ("AOR"), Tab 2]** ; *Rainy River Navigation Co. v Watrous Island Boom Co.*, [1914] O.J. No. 420 (ONCA) (piers blocking a steamer from its regular route on a navigable river**) [AOR, Tab 3]**; and *McKie v. K.V.P. Company Ltd*, [1948] O.J. No. 471 (OntHC) (tourist camp business on a river able to sue company polluting that river) **[AOR, Tab 1]**. Also see quote from *Halsbury's Laws of England* at para 88 of *O'Neil*: "Substantial pecuniary loss occasioned to an individual by the fact that he or his servants cannot carry on his business, or can only do so by a circuitous or more costly journey, may be sufficient."

The Motions Judge correctly stated the applicable test in noting that "no valid defence" at such a preliminary stage of the litigation cannot mean that the court should determine definitively that there are no defences. The plaintiff just needs to show that it is reasonably possible that none of the available defences will succeed.

67. Here, the Motions Judge correctly noted that at the time of the motion hearing the Appellants had not yet filed statements of defence.[92] However, the Court went on to consider the defences put in play by the Appellants in their evidence on the motion, which included a draft Statement of Defence.[93]

68. In fairness to the Motions Judge, it is somewhat difficult to decipher the particulars of the defences that the Appellants purport to rely on. The Motions Judge fairly summarized the Appellants' defences at paragraph 30 of the Motion Decision.[94]

69. To the extent that some of the Appellants deny that the honking, idling and blockading of streets occurred or that they played a role in these activities as alleged, the Appellants' version of the facts was not supported by the evidence on the motion.

70. The Appellants argue that the Motions Judge did not consider one of their defences, which was that the Ottawa Police Service was to blame for any damages and losses suffered by the Respondents.[95] The Respondents submit that the Ottawa Police cannot reasonably be held responsible for the Appellants' tortious conduct. Blaming the police for not stopping you from breaking the law is a rather audacious

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[92] Motion Decision at para. 30 **[ABCO, Tab 3, p 20]**
[93] Proposed Statement of Defence, Exhibit A to Bird Affidavit **[ABCO, Tab 16, pp 1175-1202]**
[94] Motion Decision at para. 30 **[ABCO, Tab 3, p 20]**
[95] Proposed Statement of Defence at para. 109, Exhibit A to Bird Affidavit **[ABCO, Tab 16, p 1199]**; Appellants' Factum at para. 88 **[FAP]**

argument, but in any event enforcement of the law can be a sensitive exercise for police where there are risks to public order and public safety.[96]

71. The Motions Judge carefully considered the evidence before him and concluded that "[i]t cannot be said on the limited evidentiary record available on this motion that any of the potential defences are likely to prevail".[97] This was a reasonable finding based on the evidence before him and a finding that is owed significant deference.

D. Motions Judge Did Not Err in Treatment of the "Public Interest Hurdle"

72. To succeed on the balancing exercise under subsection 137.1(4)(b) a plaintiff is required to prove on a balance of probabilities that they have suffered or are likely to suffer harm as a result of the moving party's expression that is sufficiently serious such that the public interest in allowing the proceeding to continue outweighs the public interest in protecting that expression.[98] Either monetary harm or non-monetary harm can be relevant, and it need not be quantified.[99]

73. Here, the Motions Judge engaged in an entirely reasonable analysis of the public interest hurdle at s. 137.1(4)(b). His findings are supported by the evidence and, once again, are highly discretionary and entitled to significant deference.[100]

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[96] *Henco Industries Limited v. Haudenosaunee Six Nations Confederacy Council*, 2006 CanLII 41649 (ON CA) at para 118
[97] Motion Decision at para. 31 **[ABCO, Tab 3, p 20]**
[98] *Pointes* at para. 82
[99] *Pointes* at paras. 68-69
[100] *Catalyst* at para. 101

74. The Motions Judge accepted that the Respondents had provided sufficient evidence of serious harm caused by the incessant horn honking, emission of diesel fumes and blockading of streets. The Respondents also provided sufficient evidence to support the merit of their theory of concerted action liability.

75. On the other side of the weighing exercise, the Motions Judge appropriately considered and weighed the public interest in protecting the Appellants' expression with the significant disruption experienced by the Respondents. [101]

76. The Respondents submit that there was no intention to prevent or silence the Appellants from expressing their opinions on COVID public health mandates. The proposed class proceeding concerns only those Freedom Convoy activities that were alleged to have constituted private and public nuisance . It has been recognized that there is little, if any, public interest in protecting activity that amounts to nuisance or obstruction of property.[102] As well, the horn honking was at such extreme levels that it may have constituted criminal assault.[103] Activity which conveys meaning through a violent form of expression is not conduct protected under the *Charter*.[104]

77. The claim does not have any of the hallmarks of a SLAPP action. The Respondents are Ottawa residents, businesses and employees who came together to seek redress for the harm that they suffered a result of the Defendants' conduct. Indeed, it was commenced while the Convoy protest was ongoing in order to prevent continuing harm by claiming injunctive relief.

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[101] Motion Decision at paras. 20-22 **[ABCO, Tab 3, pp 17-18]**
[102] *SWA Vancouver Limited v. Unite Here, Local 40*, 2019 BCSC 1806 at paras. 18-20, 119
[103] In *R. v. Cheadle (D.)*, 1992 CanLII 13051 (MB KB), blowing a whistle loudly close to another person's ear was found to be an application of force and a conviction was entered.
[104] *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 92 at 978

78. The Appellants argue that the Court should consider the impact on other protest activities but failed to adduce any evidence regarding any chilling effect if the action proceeds. The evidence filed by the Respondents revealed that there were a number of demonstrations and protests of a similar nature in Ottawa following the Freedom Convoy's departure.[105] In addition, several Appellants used their Convoy experiences to amplify their expression, publishing books such as: "Hold the Line: My story from the heart of the Freedom Convoy" (written by the Defendant Lich);[106] "HONKING FOR FREEDOM: The Trucker Convoy That Gave Us Hope" (written by the Defendant Dichter);[107] and "The People's Emergency Act: Freedom Convoy 2022" (written by the Defendant Marazzo).[108] The Appellant Lich has also gone on a cross-Canada book tour.[109]

79. It has also been widely recognized that the Appellants' protest certainly went far beyond what has been experienced in Canada in recent memory. Blocking the streets of a large portion of downtown Ottawa continually for over three weeks caused significant disruption and harm to the people of Ottawa. Protests are certainly expected to cause inconvenience and disruption, but the Freedom Convoy represented a dangerous breakdown in public order and by any measure was a substantial interference with the lives of residents, workers and business owners. It resulted in the laying of criminal charges, freezing of bank accounts (pursuant to the Emergency Economic Measures Order) and a Restraint Order obtained by the Attorney

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[105] Moore Affidavit at para. 9 **[ABCO, Tab 8, pp 142-143]** and Exhibits T & U **[ABCO, Tab 8, pp 625-632]**
[106] Moore Affidavit at para. 8(a) **[ABCO, Tab 8, pp 140-141]** and Exhibits M-O **[ABCO, Tab 8, pp 578-600]**
[107] Moore Affidavit at para. 8(b) **[ABCO, Tab 8, p 141]** and Exhibit P **[ABCO, Tab 8, p 602]**
[108] Moore Affidavit at para. 8(d) **[ABCO, Tab 8, p 142]** and Exhibits R and S **[ABCO, Tab 8, pp 608-623]**
[109] Moore Affidavit at para. 8(a) **[ABCO, Tab 8, p 140-141]** and Exhibit O **[ABCO, Tab 8, pp 591-600]**

General with respect to donations. All of these state actions would have carried an even greater potential chilling effect than this litigation.

80. The Motions Judge was clearly alive to the "serious question" raised by this litigation and the competing rights and interests of the parties on either side.[110] He carefully weighed the evidence and arguments on both sides of the public interest hurdle. Ultimately, he concluded that the public interest in permitting the proceeding outweighed the public interest in protecting the Appellants' expression.[111]

81. The Appellants appear to take issue with the structure of the Motion Judge's analysis under the public interest hurdle and the fact that his reasons are woven throughout the decision. The jurisprudence is clear, however, that it is not necessary to compartmentalize the steps under s. 137.1 or to examine them in formulaic order.[112] In *Park Lawn*, this Court rejected a similar argument raised on appeal.[113]

82. In conclusion, the Respondents submit that the Appellants have been unable to identify any errors of law or palpable and overriding error of fact committed by the Motions Judge in his application of the test under s. 137.1 of the *CJA*. Accordingly, his findings should not be disturbed.

PART IV – ADDITIONAL ISSUES

83. The Respondents raise no additional issues.

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[110] Motion Decision at paras. 20 and 22 **[ABCO, Tab 3, pp 17-18]**
[111] Motion Decision at para. 20 **[ABCO, Tab 3, p 17-18]**
[112] *Hansman v. Neufeld* at para. 53. See also *Park Lawn* at paras. 56-57; and Motion Decision at para 17 **[ABCO, Tab 3]**
[113] *Park Lawn* at para. 56

PART V – ORDER REQUESTED

84. The Respondents respectfully request that this appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of October, 2024.

CHAMP & ASSOCIATES

Paul Champ (LSO 45305K)

Christine Johnson (LSO 62226I)

Lawyers for the Respondents (Plaintiffs)

RESPONDENTS' CERTIFICATE

Pursuant to Rule 61.12(3) of the *Rules of Civil Procedure*, the Respondents certify that:

(a) an order under subrule 61.09(2) is not required;

(b) counsel for the Respondents estimates that 2 hours will be required for oral argument;

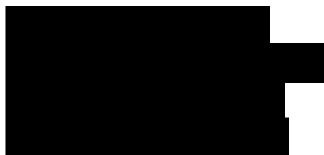
(c) the Respondents' factum complies with subrule 61.12(3);

(d) the number of words contained in Parts I to V of the Respondents' factum is 9,187; and

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

Dated this 15th day of October, 2024.

CHAMP & ASSOCIATES



Paul Champ (LSO 45305K)

Christine Johnson (LSO 62226I)

Lawyers for the Respondents (Plaintiffs)

SCHEDULE A – LIST OF AUTHORITIES

	CASELAW
1	*1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22
2	*Anmore Development Corp v The City of Burnaby et al*, 2005 BCSC 1477
3	*Bent v. Platnick*, 2020 SCC 23
4	*Christman v. Lee-Sheriff*, 2023 BCCA 363
5	*Coburn and Watson's Metropolitan Home v. Bank of Montreal*, 2021 BCSC 2398
6	*Fairhurst v. Anglo American PLC*, 2014 BCSC 2270
7	*Fullowka v Pinkerton's of Canada Ltd*, 2010 SCC 5
8	*Gautam v. Canada Line Rapid Transit Inc.*, 2011 BCCA 275
9	*Hamer v. Jane Doe*, 2024 ONCA 721
10	*Hansman v. Neufeld*, 2023 SCC 14
11	*Henco Industries Limited v. Haudenosaunee Six Nations Confederacy Council*, 2006 CanLII 41649 (ON CA)
12	*Hudspeth v Whatcott*, 2017 ONSC 1708
13	*ICBC v Stanley Cup Rioters*, 2016 BCSC 1108

14	*Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 92
15	*Lefrancois v. Guidant Corporation*, 2009 CanLII 55311 (Div. Ct.)
16	*Li v. Barber et al.*, 2022 ONSC 1513
17	*Li et al. v Barber et al.*, 2022 ONSC 1176
18	*Li et al. v. Barber et al.*, 2023 CanLII 1679 (ON SC)
19	*McKie v. K.V.P. Company Ltd*, [1948] O.J. No. 471 (OntHC)
20	*O'Neil v. Harper*, [1913] O.J. No. 91 (ONCA)
21	*Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129
22	*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57
23	*R. v. Cheadle (D.)*, 1992 CanLII 13051 (MB KB)
24	*Rainy River Navigation Co. v Watrous Island Boom Co.*, [1914] O.J. No. 420 (ONCA)
25	*SWA Vancouver Limited v. Unite Here, Local 40*, 2019 BCSC 1806
26	*The Catalyst Group Inc. v. West Face Capital Inc.*, 2023 ONCA 381
27	*Walsh v. Badin*, 2019 ONSC 689

28	*Zoutman v. Graham*, 2020 ONCA 767

SCHEDULE B – LIST OF STATUTES, REGULATIONS AND BY-LAWS

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

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

Dismissal of proceeding that limits debate

Purposes

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,
(a) to encourage individuals to express themselves on matters of public interest;
(b) to promote broad participation in debates on matters of public interest;
(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

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

Definition, "expression"

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

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

No dismissal

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

(a) there are grounds to believe that,
(i) the proceeding has substantial merit, and
(ii) the moving party has no valid defence in the proceeding; and
(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. 2015, c. 23, s. 3.

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

No amendment to pleadings

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

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

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

Costs on dismissal

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

Costs if motion to dismiss denied

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

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

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.

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***Rules of Civil Procedure*, R.R.O.1990, Reg. 194**

RULE 39 EVIDENCE ON MOTIONS AND APPLICATIONS

Evidence by Affidavit

Generally

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

Service and Filing

(2) Where a motion or application is made on notice, the affidavits on which the motion or application is founded shall be served with the notice of motion or notice of application and shall be filed with proof of service in the court office where the motion or application is to be heard at least seven days before the hearing. R.R.O. 1990, Reg. 194, r. 39.01 (2); O. Reg. 171/98, s. 18 (1); O. Reg. 394/09, s. 17 (1).

(3) All affidavits to be used at the hearing in opposition to a motion or application or in reply shall be served and filed with proof of service in the court office where the motion or application is to be

heard at least four days before the hearing. R.R.O. 1990, Reg. 194, r. 39.01 (3); O. Reg. 171/98, s. 18 (2); O. Reg. 394/09, s. 17 (2).

Contents — Motions

(4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (4).

Contents — Applications

(5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (5).

Full and Fair Disclosure on Motion or Application Without Notice

(6) Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application. R.R.O. 1990, Reg. 194, r. 39.01 (6).

Expert Witness Evidence

(7) Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03 (2.1). O. Reg. 259/14, s. 8.

Court File No. COA-24-CV-0207

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

Respondents (Plaintiffs) Appellants (Defendants)

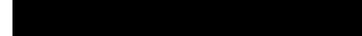
COURT OF APPEAL FOR ONTARIO

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE RESPONDENTS (PLAINTIFFS)

CHAMP & ASSOCIATES

Per: Paul Champ
LSO#: 45305K



Lawyers for the for the Respondents (Plaintiffs)