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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Plaintiffs

and

CHRIS BARBER, BENJAMIN DICHTER, TAMARA LICH, PATRICK KING, JAMES BAUDER, BRIGITTE BELTON, DANIEL BULFORD, DALE ENNS, CHAD EROS, CHRIS GARRAH, MIRANDA GASIOR, JOE JANZEN, JASON LAFACE, TOM MARAZZO, RYAN MIHILEWICZ, SEAN TIESSEN, NICHLOAS 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

Proceeding under *Class Proceedings Act, 1992*

FACTUM OF THE MOVING PARTIES, CHRIS BARBER, TAMARA LICH, DANIEL BULFORD, DALE ENNS, MIRANDA GASIOR, TOM MARAZZO, RYAN MIHILEWICZ, SEAN TIESSEN, FREEDOM 2022 HUMAN RIGHTS AND FREEDOMS, HAROLD JONKER, JONKER TRUCKING INC. and BRAD HOWLAND

(Motion pursuant to section 137.1(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43)

November 29, 2023

CHARTER ADVOCATES CANADA
c/o [redacted]

James Manson (LSO# 54963K)

T: [redacted]
E: [redacted]

Counsel for the Defendants, Tamara Lich, Chris Barber, Tom Marazzo, Sean Tiessen, Miranda Gasior, Daniel Bulford, Dale Enns, Ryan Mihilewicz, Brad Howland, Harold Jonker, Jonker Trucking Inc. and Freedom 2022 Human Rights and Freedoms

PART I – OVERVIEW

1. This is a motion brought by the moving parties, Tamara Lich, Chris Barber, Tom Marazzo, Sean Tiessen, Miranda Gasior, Daniel Bulford, Dale Enns, Ryan Mihilewicz, Brad Howland, Harold Jonker, Jonker Trucking Inc., Freedom 2022 Human Rights and Freedoms, Pat King and Joe Janzen (collectively, the "**Moving Parties**"), to dismiss all or part of this proceeding pursuant to section 137.1(3) of the *Courts of Justice Act*, RSO 1990, c. C.43. The Moving Parties say that they meet the first step of the operative "*Pointes* test", in that this proceeding arises from expression relating to a matter of public interest, but that the plaintiffs (the "**Responding Parties**") fail the remaining steps of the test. Accordingly, this proceeding must be dismissed in its entirety.

2. At the outset, the Moving Parties wish to advise the Court that, owing to circumstances already canvassed with the Court, the defendants Lich and Barber have been unable to tender affidavits in support of this motion. The Responding Parties, through their counsel, have agreed to stipulate that should this Court be of the view that the other moving parties in this case meet the first step of the *Pointes* test (as described below), then the defendants Lich and Barber will also be taken to have satisfied the first step of the test as well.

PART II - FACTS

3. On March 13, 2023, this Court granted the plaintiffs leave to issue a Further Fresh as Amended Statement of Claim ("**FFASOC**"). The FFASOC can be found at **Tab 19** of the Supplementary Motion Record.

4. The Moving Parties' Motion Record was served on or about August 25, 2023. A Supplementary Motion Record was served on or about November 29, 2023.

PART III – ISSUES & ARGUMENT

5. This motion raises the following issue for the Court's consideration:

   (a) whether this proceeding, or any part of it, should be dismissed pursuant to section 137.1(3) of the *CJA*.

THE TEST ON AN 'ANTI-SLAPP' MOTION

6. This motion 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*].[1] In *Pointes*, Justice Côté, writing for a unanimous Court, set out the test to be employed on motions such as this.

7. The Ontario Court of Appeal restated the *Pointes* test earlier this year as follows:

> In *Pointes Protection*, Côté J. explained the shifting burden described in s. 137.1 of the CJA: (i) the onus is on the moving party (in this case, the appellants who were the defendants by counterclaim) to satisfy the motion judge that the proceeding arises from an expression relating to a matter of public interest; and (ii) if that burden is met, the responding party (in this case, the respondent Kahu who was the plaintiff by counterclaim) must then satisfy the motion judge that (a) there are grounds to believe that the proceeding has substantial merit and the moving party has no valid defence, and (b) the harm likely to be or that has been suffered is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.[2]

8. The Moving Parties will canvass each step of the *Pointes* test in the following sections and paragraphs, along with their substantive arguments in relation to each such step.

The *Pointes* Test: Step One – Whether the Proceeding Arises from Expression Relating to a Matter of Public Interest

9. In *Pointes*, at paragraphs 23-31, Côté J. described the principles applicable on the first step of the test. They are:

(a) the moving party must be able to demonstrate on a balance of probabilities that (i) the proceeding arises from an expression made by the moving party and that (ii) the expression relates to a matter of public interest;[3]

(b) the term "arises from" implies an element of causality. Many different types of proceedings can arise from an expression, and the legislative background of s. 137.1 indicates that a broad and liberal interpretation is warranted. This

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[1] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 (SCC) [*Pointes*]
[2] *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129 at paragraph 27 (CA).
[3] *Pointes*, supra, paragraph 23.

means that proceedings arising from an expression are not limited to those *directly* concerned with expression, such as defamation suits;[4]

(c) the term "expression" is defined broadly in section 137.1(2) of the CJA. A "broad scope of protection" is preferable;[5]

(d) the words "relates to a matter of public interest" should be given a broad and liberal interpretation, consistent with the legislative purpose of s. 137.1(3). The expression should be assessed "as a whole", and it must be asked whether "some segment of the community would have a genuine interest in receiving information on the subject. While there is "no single test", the public has a genuine stake in knowing about many matters ranging across a variety of topics;[6]

(e) it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest – there is no qualitative assessment of the expression at this stage. The question is only whether the expression *pertains* to any matter of public interest, defined broadly. The legislative background confirms that this burden is purposefully not an onerous one;[7]

(f) ultimately, the inquiry is a contextual one that is fundamentally asking what the expression is really about. Section 137.1 was enacted to circumscribe proceedings that adversely affect expression made in relation to matters of public interest, in order to protect that expression and safeguard the fundamental value that is public participation in democracy. If the bar is set too high at s. 137.1(3), the motion judge will never reach the crux of the inquiry that lies in the weighing exercise at s. 137.4(b). Thus, in light of the legislative purpose and background of s. 137.1, it is important to interpret an "expression" that "relates to a matter of public interest" in a generous and expansive fashion;[8] and

(g) in conclusion, s. 137.1(3) places a threshold burden on the moving party to show on a balance of probabilities (i) that the underlying proceeding does, in fact, arise from its expression, regardless of the nature of the proceeding, and (ii) that such expression related to a matter of public interest, defined broadly. To the extent that this burden is met by the moving party, then s. 137.1(4) will be triggered and the burden will shift to the responding party to show that its underlying proceeding should not be dismissed. [9]

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[4] *Pointes*, supra, paragraph 24.
[5] *Pointes*, supra, paragraph 25.
[6] *Pointes*, supra, paragraph 26.
[7] *Pointes*, supra, paragraph 28.
[8] *Pointes*, supra, paragraph 30.
[9] *Pointes*, supra, paragraph 31.

<u>Argument</u> – The Moving Parties All Meet the First Step of the *Pointes* Test

10. The Moving Parties all meet the first step of the *Pointes* test. This proceeding clearly arises out of "*expression*" that "*relates to a matter of public interest*".

11. In addition to the principles outlined above, it must also be borne in mind that the term "expression" at section 137.1(2) is defined broadly as "*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*". It therefore cannot be seriously denied that the defendants' expressive activity relating to a matter of public interest led directly to the commencement of this proceeding. Recalling that there are in fact three categories of defendants identified in the FFASOC, the Moving Parties say that each category of defendants engaged in "expression" "relating to a matter of public interest" as defined in ss. 137.1(2) and (3).

12. **First**, there can be no doubt that the defendant Brad Howland, and the so-called "Donor Class Defendants", are involved in this proceeding solely due to having exercised their freedom of expression in donating funds to the Freedom Convoy protest. The Further Fresh as Amended Statement of Claim pleads as such, at paragraphs 46 and 227.

13. In his affidavit,[10] Howland confirms that the donation alleged in the FFASOC was in fact made. Howland further confirms, at paragraphs 5, 10 and 19:

> Neither I nor Easy Kleen ever had any intention, at any time, to "support, encourage and facilitate" anything tortious or unlawful with respect to the Freedom Convoy's activities. Rather, the intention at all times in making the donation in question was to support the peaceful goals of the Freedom Convoy protest. The goal was to express support for the protestors in Ottawa and to express strong disapproval of and opposition to the federal government's Covid-19 vaccine mandates and other related policies.
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> […]
>
> […] I deny that on or after February 4, 2022, I knew or "ought to have known" about the alleged "tortious activities" of the other defendants… I deny that the

[10] Affidavit of Brad Howland (the "**Howland Affidavit**"), sworn August 21, 2023, **Motion Record, Tab 3**.

> donation referred to above was made "expressly to provide support for the Trucker Class Defendants so they could continue with their activities of blocking the streets of Ottawa, idling their trucks, and blaring their horns"… Simply put, that was not my intention. My intention was to support the Freedom Convoy as a peaceful, lawful and constitutional protest.
>
> […]
>
> Speaking for myself personally, all of the activities described above were done in an effort to express my strong opposition to the federal government's vaccine mandates and restrictions relating to the Covid-19 situation, and my support for the other protestors.

14. On cross-examination, Howland's evidence, in relevant part, was as follows:

> Q. […] I gather, Mr. Howland, you wanted that money to go to support the protestors and their expenses they had incurred in travelling to Ottawa and staying on the streets in Ottawa.
>
> A. Yes, the truckers have truck payments to pay and they have given up time to do this so those expenses, yes.
>
> Q. Their fuel costs and coming and staying in Ottawa.
>
> A. Coming and going from Ottawa.
>
> Q. Their food.
>
> A. Whatever expenses they deem possible for the operation of their vehicles coming and going and their expenses. To look after them and their families was the objective, yes.[11]

15. **Second**, there can also be no doubt that the defendants Jonker and Jonker Trucking Inc., and the so-called "Trucker Class Defendants" are involved in this proceeding solely due to having allegedly exercised their freedom of expression during the protest. The FFASOC pleads as much, at paragraphs 44 and 45.

16. The FFASOC also alleges in numerous places that Jonker, Jonker Trucking and the Trucker Class Defendants are liable to the plaintiffs for having (a) arrived in Ottawa for the protest and

[11] Transcript of the Cross-Examination of Brad Howland, dated September 15, 2023 (the "**Howland Transcript**"), page 3, line 13 to page 4, line 2, **Supplementary Motion Record, Tab 13**.

remained there for several days, "emitting noxious diesel fumes, particulates and gases" (paragraphs 87-97); and (b) sounded their horns during the protest (paragraphs 110-118).

17. In his affidavit, Jonker (speaking both for himself and for Jonker Trucking Inc.) confirms that he drove a tractor-trailer truck to the protest, and that he gave a number of media interviews while in Ottawa.[12] Jonker also agrees that Jonker Trucking Inc. owns and operates several tractor-trailer trucks, and that 12 such trucks were driven to Ottawa to take part in the protest.[13]

18. Jonker also testifies that he almost never honked any horns at all during the protest.[14] He further testifies that his goal in participating in the protest was for someone from the federal government "*to come and listen to us and listen to the concerns that we had, about the ongoing Covid-19 vaccine mandates*." He testified, "*I had been growing increasingly alarmed with the Canadian government's Covid-19 vaccine mandates and the harm I had been seeing them inflict on Canadians. I felt that I needed to exercise my democratic rights. I felt that this was important for Canadians who had been living under lockdowns and restrictions for two years. My goal was to protest and be heard. I wanted to express my strong disagreement with the government's Covid-19 vaccine mandates and other policies, and I wanted to support my fellow protestors and other Canadians who felt the same as me. I wanted the mandates to end*".[15]

19. Jonker also testified, for Jonker Trucking Inc., "*Jonker Trucking Inc. was affected by the Covid-19 vaccine mandates that the government had recently imposed… Accordingly, Jonker Trucking Inc. decided that it was important to participate in the protest as an expression of its disapproval of the government's Covid-19 policies and its support of the other protestors*."[16]

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[12] Affidavit of Harold Jonker, sworn August 22, 2023 (the "**Jonker Affidavit**") at paragraphs 6-7, **Motion Record, Tab 6**.
[13] *Ibid.*, paragraph 10.
[14] *Ibid.*, paragraph 29.
[15] *Ibid.*, paragraph 4.
[16] *Ibid.*, paragraph 11.

20. At paragraphs 35 and 36 of his affidavit, Jonker repeats that all of the activities described in his affidavit in which he and Jonker Trucking participated during the protest were done in an effort to express strong opposition to the federal government's vaccine mandates and restrictions relating to the Covid-19 situation, and support for the other protestors.[17]

21. On cross-examination, Jonker agreed that "*the trucks were an important symbol of the protest*", and that "*it sent quite a message to the government, we believed*", as those suggestions had been put to him by opposing counsel.[18]

22. During cross-examination, opposing counsel also asked Jonker:

> Q. The horns were some kind of form of expression. Was that your understanding?
> A. Yeah, yeah.
> Q. The honking was trying to send a message.
> A. Yes, yeah.[19]

23. Third, the so-called "Organizer Defendants" are also involved in this proceeding because of their expressive activity. The FFASOC alleges at paragraph 16 that the "individual organizer Defendants were responsible for planning, calling for, promoting, inciting, coordinating and directing" the protest. At paragraph 43, the claim repeats these allegations.

24. The FFASOC also alleges in numerous places that the so-called Organizer Defendants are liable to the plaintiffs for having (a) organized the protest (paragraphs 60-86); (b) arrived in Ottawa for the protest and remained there for several days, (paragraphs 87-97); (c) participated in planning and logistical activities, including holding meetings and press conferences (paragraphs 98-109); (d) coordinated the sounded of truckers' horns during the protest (paragraphs 110-118); and (e) raised funds to encourage and support the protest (paragraphs 119-142).

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[17] *Ibid*., paragraphs 35-36.
[18] Transcript of the Cross-Examination of Harold Jonker, dated September 15, 2023 (the "**Jonker Transcript**"), page 13, QQ. 52 and 53, **Supplementary Motion Record, Tab 15**.
[19] *Ibid*., QQ. 62 and 63.

25. In their affidavits, as well as in their draft Statement of Defence,[20] the so-called "Organizer Defendants" acknowledge that they participated in various activities before and during the protest, including: (a) serving as "road captains" while the convoy was *en route* to Ottawa;[21] (b) attending meetings in Ottawa;[22] (c) assisting in delivering supplies;[23] (d) participating in press conferences;[24] (e) acting as a liaison between the protest and various law enforcement agencies;[25] (f) acting on a self-appointed security detail;[26] (g) assist with the "Adopt-A-Trucker" hotline program, to provide protestors with food, transportation and other sundry items;[27] (h) participating in social media activities;[28] (i) participating in fundraising activities;[29] (j) giving media interviews;[30] etc.

26. However, each of the so-called "Organizer Defendants" also makes it clear in his or her affidavit that they participated in the protest, and engaged in the activities they describe in their testimony, as a means of expression, in support of the other protestors and in opposition to the Canadian federal government's Covid-19 policies.[31]

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[20] See the Affidavit of Selena Bird, sworn Aug. 25, 2023 (the "**Bird Affidavit**"), Exh. "A", **Motion Record, Tab 2**.
[21] See, e.g., the Affidavit of Dale Enns, sworn August 18, 2023 (the "**Enns Affidavit**"), at paragraph 5, **Motion Record, Tab 4**; the Affidavit of Miranda Gasior, sworn August 21, 2023 (the "**Gasior Affidavit**"), at paragraph 5, **Motion Record, Tab 7**; the Affidavit of Ryan Mihilewicz, sworn August 15, 2023 (the "**Mihilewicz Affidavit**") at paragraph 5. **Motion Record, Tab 8**; Jonker Affidavit, paragraph 8; the Affidavit of Sean Tiessen, sworn August 23, 2023 (the "**Tiessen Affidavit**") at paragraph 5, **Motion Record, Tab 9**.
[22] Enns Affidavit, paragraph 12. Gasior Affidavit, paragraph 17. Mihilewiz Affidavit, paragraph 11. Tiessen Affidavit, paragraph 10.
[23] Enns Affidavit, paragraph 12. Gasior Affidavit, paragraph 18.
[24] See, e.g., the Affidavit of Daniel Bulford, sworn August 24, 2023 (the "**Bulford Affidavit**"), at paragraph 7. **Motion Record, Tab 5**.
[25] Bulford Affidavit, paragraph 6. Affidavit of Tom Marazzo, sworn August 17, 2023 (the "**Marazzo Affidavit**"), paragraphs 7-9. **Motion Record, Tab 10**.
[26] Gasior Affidavit, paragraphs 11-13. Tiessen Affidavit, paragraphs 11-13
[27] Gasior Affidavit, paragraph 14.
[28] Gasior Affidavit, paragraph 15.
[29] Gasior Affidavit, paragraph 16.
[30] Mihilewicz Affidavit, paragraph 11. Jonker Affidavit, paragraph 7.
[31] Marazzo Affidavit, paragraphs 13-16 and 40; Tiessen Affidavit, paragraph 16 and 38; Mihilewicz Affidavit, paragraph 13 and 35; Gasior Affidavit, paragraph 19 and 48; Jonker Affidavit, paragraphs 4 and 11 and 35-36; Bulford Affidavit, paragraphs 11-13 and 43; Enns Affidavit, paragraphs 13 and 35; Howland Affidavit, paragraphs 10, 18-19.

27. In *Stewart v. Toronto (Police Services Board)*,[32] the Ontario Court of Appeal characterized "*participation in a public protest*" as "*quintessential expressive activity*" for purposes of considering whether a plaintiff's section 2(b) *Charter* freedom had been infringed.

28. Supreme Court of Canada jurisprudence also indicates that financial contributions to political causes qualify as "political expression" under section 2(b) of the *Charter*.[33]

29. Given the broad definition of "expression" in section 137.1(2) of the CJA, as well as the helpful guidance from the above jurisprudence, there can be no doubt that all of the defendants' conduct in this proceeding qualifies as "expression" for purposes of this motion. The Moving Parties note also that the Responding Parties *themselves*, through counsel, recognized on the record in this proceeding that this case involves the freedom of expression.[34]

30. Horn honking qualifies as expression. Relying on *Ottawa MacDonald Cartier International Airport Authority v. Madi*,[35] the Responding Parties' counsel also conceded this point during his oral submissions on the original injunction motion in this proceeding.[36]

31. Accordingly, Jonker, Jonker Trucking Inc. and the so-called "Trucker Defendants" were engaging in "expression" by allegedly honking horns, and by otherwise participating in the protest.

32. The same must hold for Howland and the so-called "Donor Defendants". It cannot seriously be denied that donating funds for the purposes of supporting the protest is anything other than expression for the purposes of this motion.

33. Finally, the same must also hold for the individual "Organizer Defendants". These defendants are not alleged to have honked horns. Rather, it is alleged that they organized,

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[32] *Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255 at paragraph 46.
[33] See, 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).
[34] Transcript of Proceedings, Feb 7, 2022, page 26, line 21 to page 26, line 28 ("**February 7, 2022 Transcript**"). **Supplementary Motion Record, Tab 20**.
[35] *Ottawa MacDonald Cartier International Airport Authority v. Madi*, 2015 ONSC 6336 (SCJ).
[36] February 7, 2022 Transcript, page 32, lines 7 to 20.

encouraged and facilitated the protest through their words and deeds. These defendants are alleged to have participated in the protest. Their conduct must amount to "expression" under s. 137.1(2).

34. Moreover, it cannot be seriously denied that the Moving Parties' expression in this case "relates to a matter of public interest". The Freedom Convoy protest was one of the largest protests in Canadian history, if not *the* largest. It is common knowledge (and, indeed, admitted in the Further Fresh as Amended Statement of Claim) that the protest was organized in opposition to the federal government's ongoing restrictions and policies that had been put in place in response to the Covid-19 situation, itself a matter of grave public interest. Indeed, when one recalls the momentous events that took place in Ottawa in January and February 2022, one struggles to imagine a "matter of public interest" that was *more* compelling and important, *in the entire world*. Indeed, the issues raised by the protestors (e.g. the desirability of ongoing vaccine mandates) continue to divide Canadians to this day.

35. Thus, the first step of the *Pointes* test is met, and the burden therefore shifts to the Responding Parties to demonstrate that this proceeding should not be dismissed.

The *Pointes* Test: Step Two – Whether the Proceeding has "Substantial Merit" and Whether the Defendants have no Valid Defences

36. 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". They are:

> (a) s. 137.1(4)(a) requires the plaintiff to "satisfy" the judge that there are "grounds to believe" that (i) its underlying proceeding has "substantial merit" and that (ii) the defendant has "no valid defence";[37]
>
> (b) the words "grounds to believe" requires that there be a basis in the record and law – taking into account the stage of litigation at which a s. 137.1 motion is brought – for finding that the underlying proceeding has substantial merit and that there are no valid defences;[38]

[37] *Pointes*, paragraph 34.
[38] *Pointes*, paragraph 39.

(c) for an underlying proceeding to have "substantial merit", it must have a real prospect of success… this requires that claim be legally tenable and supported by evidence that is reasonably capable of belief;[39]

(d) s. 137.1 contemplates that the parties will file evidence and permits limited cross-examination. This suggests that the parties are expected to put forward a record, commensurate with the stage of the proceeding at which the motion is brought;[40]

(e) in light of the existence of a record, the substantial merit standard calls for an assessment of the evidentiary basis for the claim – this is why the claim must be supported by evidence that is reasonably capable of belief;[41]

(f) a real prospect of success means that the plaintiff's case is more than a possibility; it requires more than an arguable case;[42]

(g) a motion judge deciding a s. 137.1 motion should engage in only limited weighing of the evidence and should defer ultimate assessments of credibility and other questions requiring a deep dive into the evidence to a later stage… [however], this is not to say that the motion judge should take the motion evidence at face value or that bald allegations are sufficient; again, the judge should engage in limited weighing and assessment of the evidence adduced;[43]

(h) with respect to s. 137.1(4)(a)(ii), once the moving party has put a defence in play, the onus is back on the responding party to demonstrate that there are grounds to believe that there is "no valid defence";[44]

(i) the word "no" is absolute, and corollary is that if there is any defence that is valid, then the plaintiff has not met its burden and the underlying claim should be dismissed;[45]

(j) as with the substantial merit prong, the judge [deciding whether a valid defence exists] must make a determination of validity on a limited record at an early stage in the litigation process – accordingly, this context should be taken into account in assessing whether a defence is valid. The motion judge must therefore be able to engage in a limited assessment of the evidence in determining the validity of the defence;[46]

(k) essentially, the motion judge must first determine whether the plaintiff's underlying claim is legally tenable and supported by evidence that is

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[39] *Pointes*, paragraph 49.
[40] *Pointes*, paragraph 38.
[41] *Pointes*, paragraph 50.
[42] *Pointes*, paragraph 50.
[43] *Pointes*, paragraph 52.
[44] *Pointes*, paragraph 57.
[45] *Pointes*, paragraph 58.
[46] *Pointes*, paragraph 58.

> reasonably capable of belief such that the claim can be said to have a real prospect of success, and must then determine whether the plaintiff has shown that the defence, or defences, put in play are not legally tenable or are not supported by evidence that is reasonably capable of belief such that they can be said to have no real prospect of success. In other words, "substantial merit" and "no valid defence" should be seen as constituent parts of an overall assessment of the prospect of success of the underlying claim.[47]

37. Before turning to the Moving Parties' arguments on this step of the *Pointes* test, it will be useful to first set out and review the legal principles and related jurisprudence concerning: (A) the elements of the torts of private and public nuisance; and (B) "common design" liability.

A. The Torts of Private and Public Nuisance

38. The leading case in Canada on the elements of the tort of **private** nuisance is *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*.[48] The test in *Antrim* was summarized in *Weenan v. Biadi*,[49] at paragraphs 8-10.

39. In *Antrim*, the Court also confirmed at paragraph 28 that the focus in nuisance is on whether the *interference suffered by the claimant* is unreasonable, not on whether *the nature of the defendant's conduct* is unreasonable.[50]

40. Meanwhile, the Supreme Court discussed the doctrine of **public** nuisance in *Ryan v. Victoria (City)*,[51] 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*".[52] In *Stein v.*

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[47] *Pointes*, paragraph 59.
[48] *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13 (SCC).
[49] *Weenen v. Biadi*, 2015 ONSC 6832 at paras. 8-10 (SCJ).
[50] *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13 at paragraph 28 (SCC).
[51] *Ryan v. Victoria (City)*, 1999 CanLII 706 at paras. 52-53 (SCC).
[52] *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, **Moving Parties' Book of Authorities not available Electronically ("MPBOA"), 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), **MPBOA, Tab 2**; *Susan Heyes Inc. v. Vancouver (City)*, 2011 BCCA 77 at paragraph 38 (BCCA); *Stein v. Gonzales* (1984), 14 LR (4th) 263 (BCSC).

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?*"[53]

41. Nuisance is a common law tort, and it is a form of strict liability that is not concerned with fault or misconduct.[54] Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance.[55]

42. Causation is a pre-requisite to a finding of nuisance.[56] 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.[57]

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

43. In *Rutman v. Rabinowitz*,[58] 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*".

44. In *Insurance Corp. of British Columbia v. Alexander*,[59] Justice Myers confirmed at paragraph 21 that "*there is no tort of assistance or inducement to commit a tort – the question is whether the actions of the defendant are such to make him liable as a joint tortfeasor and that is normally approached through the question of having acted pursuant to a common design*."

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

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[53] *Stein v. Gonzales* (1984), 14 LR (4th) 263 at paragraph 11 (BCSC).
[54] *Freedman v. Cooper*, 2015 ONSC 1373 at paragraph 33 (SCJ).
[55] *Barrette c. Ciment du St-Laurent inc.*, 2008 SCC 64 at paragraph 77 (SCC). See also *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13 (SCC) at paragraph 28. See also *Krieser v. Garber*, 2020 ONCA 699 at paragraph 18 (ONCA).
[56] *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.).
[57] *Weenen v. Biadi*, 2015 ONSC 6832 at paras. 14-15 (SCJ).
[58] *Rutman v. Rabinowitz*, 2018 ONCA 80 at paragraph 33 (ONCA).
[59] *ICBC v. Alexander*, 2016 BCSC 1108 at paragraph 21 (BCSC).

joint liability to arise. In *Best v. Ranking*[60] citing the Supreme Court of Canada in *Fullowka v. Royal Oak Ventures Inc.*,[61] 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 Responding Parties Fail the Second Step of the *Pointes* Test

46. The Responding Parties fail the second step of the *Pointes* test. They have not tendered sufficient evidence to demonstrate – even on the lower standard of proof required at this step – that their claim has "substantial merit" and that the Moving Parties have no valid defence. Accordingly, this proceeding should be dismissed in its entirely. In the alternative, this proceeding should be dismissed as against such plaintiffs and defendants as the Court considers appropriate.

The Responding Parties' Evidence on this Motion is Deficient

47. Virtually none of the evidence tendered by the Responding Parties is probative. Much of it is inadmissible. In short, it does not provide the Court with the ability to conclude that the plaintiffs' 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 Moving Parties 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. 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.

48. Moreover, the plaintiffs' burden on this step of the *Pointes* test is compounded by the realities that (a) the plaintiffs' theory of liability as against the so-called "Donor Class" and the so-

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

called "Organizer Defendants" is based on the theory of "common design"; and (b), this is a proposed class proceeding. The Moving Parties thus submit that in order for this action to be considered to have "substantial merit", the Responding Parties are required on this 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 plaintiffs' overall class proceeding is viable.

49. Ultimately, as discussed in the following paragraphs, the Responding Parties' evidence fails to establish any of these things.

The Affidavit of Trudy Moore, affirmed September 1, 2023[62]

50. Ms. Moore's evidence is not probative of the central issues in this proceeding. Ms. Moore is an assistant with the Responding Parties' 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.

51. Ms. Moore's affidavit only serves the purpose of attaching various documents. However, the documents she attached are either not probative, irrelevant or inadmissible.

52. Ms. Moore attaches as Exhibits "B" and "C" two volumes of the report produced by the Rouleau Commission, following the Public Order Emergency Commission. Whatever use that the plaintiffs intend to make of these volumes is irrelevant, since commission reports such as these are not admissible for the truth of their contents in a subsequent court proceeding.[63]

53. At paragraph 7, Ms. Moore then attaches documents as Exhibits "D" to "L". Ms. Moore is not the author of any of these documents, nor does she explain why or how they are relevant to of probative of the issues raised in this proceeding.

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[62] Affidavit of Trudy Moore, affirmed September 1, 2023, **Supplementary Motion Record, Tab 7**.
[63] See, e.g., *Robb Estate v. St. Joseph's Health Care Centre* (1998), 31 CPC (4th) 99 (Gen. Div.), **MPBOA, Tab 3**. See also *Barton v. Nova Scotia (Attorney General)*, 2014 NSSC 192 at paragraph s 102-103 (NSSC).

54. Further, the documents attached as Exhibits "M" to "U" (at paragraphs 8-10 of Ms. Moore's affidavit) have no discernable relevance to the issues raised in this proceeding at all.

The Affidavit of Sean Flynn, affirmed August 31, 2023[64]

55. Mr. Flynn's evidence is not probative of the central issues in this proceeding. Mr. Flynn's affidavit does not establish any evidentiary connections with any of the plaintiffs, defendants, 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 plaintiffs in fact *suffered* a private or public nuisance; or (b) any of the defendants 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.

56. 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, there is no indication that his watch was properly calibrated or was otherwise functioning properly. Moreover, the purported "decibel readings" were taken directly in front of a honking truck horn, which cannot be the location at which any of the plaintiffs or class members experienced honking from their homes – which is the critical location. Naturally, every plaintiff and class member experienced the honking noises in a unique way depending on the locations of the trucks and their own residences. Mr. Flynn's testimony sheds no light on those critical issues.

57. In short, all Mr. Flynn's evidence, at its highest, demonstrates, is what he personally experienced during the times when he ventured downtown. He is not a resident of downtown Ottawa and therefore cannot comment on anything else.

The Affidavit of Jeremy King, affirmed September 1, 2023[65]

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[64] Affidavit of Sean Flynn, affirmed August 30, 2023, **Supplementary Motion Record, Tab 6**.
[65] Affidavit of Jeremy King, affirmed September 1, 2023, **Supplementary Motion Record, Tab 4.**

58. Mr. King's affidavit is also not probative of the issues raised in this proceeding. Like Mr. Flynn's evidence, Mr. King does reside in downtown Ottawa; he has no first-hand knowledge of anything related to whether the plaintiffs or class members in fact suffered a public or private nuisance, or whether the defendants or class members in fact caused a public or private nuisance.

59. Mr. King's evidence is 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[66]

60. Ms. Owusu-Akeeyah's evidence is 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. She does not claim that she lived in the so-called Occupation Zone during the protest. She does not indicate that she ever saw any of the parties to this litigation. In fact, Ms. Owusu-Akeeyah does not proffer any first-hand testimony at all, about anything.

61. All that Ms. Owusu-Akeeyah's affidavit does is 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 goes on in her affidavit to include some quotes from the "What we heard" document, which she describes 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. There is no indication that such people were required to provide sworn testimony or that they were cross-examined during the "commission". There is no indication even of who these "witnesses" even were, or where they lived. Many of the "witnesses" whose "testimony" was quoted in the document are described as "Anonymous". In

[66] Affidavit of Debbie Owusu-Akeeyah, affirmed September 1, 2023, **Supplementary Motion Record, Tab 2**.

short, there is nothing to indicate that these "witnesses" even gave any testimony at all, or whether it was simply fabricated. Ms. Owusu-Akeeyah's "evidence" cannot be given any weight.

The Affidavit of Ivan Gedz, affirmed August 31, 2023[67]

62. Mr. Gedz's evidence must also be given no weight. He attempts to explain that his restaurant, the plaintiff 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 claims were a result of anything done by any of the defendants or class members.

63. Mr. Gedz's evidence is, in fact, nothing more than a collection of bald allegations, which is insufficient to clear the "Merits-Based Hurdle" of the *Pointes* test. On motions for summary judgment, a self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence.[68] The same is true on motions under s. 137.1(3) of the CJA, where the law is that "bald allegations or unsubstantiated damage claims are not enough".[69]

64. Yet, that is all that Mr. Gedz offers in his affidavit. He simply says, without any supporting documentation, that "there was a large drop in our expected customers". He appears to base his restaurant's "expectations" on previous occasions during the Covid-19 situation where the restaurant was allowed to open at 50% capacity. He does not explain when those times were (i.e. which season), how many customers were actually "expected", or anything else that would support the reasonableness of the restaurant's "expectations" in the first place.

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

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[67] Affidavit of Ivan Gedz, affirmed August 31, 2023, **Supplementary Motion Record, Tab 3.**
[68] See, e.g. *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 SCR 423 at para 31.
[69] See *Pointes*, supra, paragraph 82. See also *Joshi v. Allstate Insurance Company of Canada*, 2019 ONSC 4382 at paragraph 34.

66. At paragraph 8, Mr. Gedz baldly asserts that "a substantial number of reservations made in the course of the week were cancelled". There is no explanation or support for this statement.

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

68. At several places, Mr. Gedz also gives hearsay evidence without stating the name(s) of the hearsay declarant(s). such evidence is not even properly admissible, let alone probative.

69. Perhaps most importantly, Mr. Gedz's affidavit is obviously silent with respect to any other restaurants or businesses. He cannot speak for any of the other members of the so-called "Business Subclass" members. And, he also does not explain how the damages he purports 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[70]

70. Dr. Laroche's evidence similarly is not probative of any of the issues raised in this proceeding. Dr. Laroche admits in her affidavit that she does not reside in downtown Ottawa, nor did she attend downtown Ottawa in person during the protest. She does not claim to have actually examined any of the plaintiffs 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 is therefore unable to opine on whether any plaintiff in this proceeding actually suffered any damages, for any reason.

71. Taken at their highest, Dr. Laroche's expert conclusions appear to be nothing more than trite statements that likely do not even require expert opinion in order to be accepted by the Court. Such conclusions are found at paragraph 12 of Dr. Laroche's affidavit, and include such non-

[70] Affidavit of Chantal Laroche, affirmed August 31, 2023, **Supplementary Motion Record, Tab 1.**

controversial "opinions" as: (a) exposure to loud sounds can cause both temporary and lasting health impacts including hearing loss and tinnitus; (b) truck and train horns produce sound levels in excess of 100 decibels; and (c) sound levels recorded in excess of 100 decibels are consistent with sound levels caused by truck and train horns. With all due respect to Dr. Laroche, these "opinions" are not probative of anything.

72. With respect to Dr. Laroche's conclusion at paragraph 12(d), there is no indication as to how or why Dr. Laroche is able to conclude with certainty that "indoor noise levels were sufficiently high as to interfere with residents' daily activities of life and work and rest". There is also no evidence at all with respect to whether any plaintiffs' daily activities were in fact interfered with at all, and if so by whom.

The Affidavit of Larry Andrade, affirmed August 30, 2023[71]

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

74. At paragraph 7, Mr. Andrade admits 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, Mr. Andrade's calculations are worthless.

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

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[71] Affidavit of Larry Andrade, affirmed August 30, 2023, **Supplementary Motion Record, Tab 5.**

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

77. It is obvious that these figures are completely speculative; Mr. Andrade admits 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).

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

The Affidavit of Zexi Li, affirmed September 1, 2023[72]

79. As presented in her affidavit, Ms. Li's evidence is 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). Morever, 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 testifies 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.

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[72] Affidavit of Zexi Li, affirmed September 1, 2023, **Supplementary Motion Record, Tab 8**.

80. Moreover, Ms. Li does 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.

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

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

82. Remarkably, two plaintiffs have not submitted any affidavit evidence on this motion. Neither Geoffrey Devaney (the proposed representative of the so-called Employee Class) nor the Happy Goat Coffee Company (one of the proposed representatives of the so-called Business Class) saw fit to explain to the Court on this motion how they suffered a public nuisance, and by whom.

83. Since these two plaintiffs have not provided any evidence on this motion, they cannot meet the second step of the *Pointes* test. This action must be dismissed as against them both.

No Evidence Demonstrating "Common Design" Liability

84. In addition to the above evidentiary challenges with respect to proving their direct claims in private and public nuisance, the plaintiffs have also failed to elicit any evidence that would advance their theory of "common design" as against the so-called Donor Class and the Organizer Defendants.

85. For example, since most if not all of the donors' contributions did not actually reach the protestors to provide actual financial support, the plaintiffs' argument appears to be that the *symbolic value* of the donors' contributions *encouraged* the protestors and provided them with moral support. However, there is no evidence tendered by the plaintiffs on this motion that would substantiate such an allegation. The Moving Parties submit that in a case such as this, worth

potentially over $300 million, it is incumbent on the plaintiffs to at least attempt to provide some evidence to support their allegation.

86. Moreover, with respect to the donors, there is no evidence on this 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 Responding Parties have led no evidence about it. There is simply no evidence of a "common design", whether between the donors themselves or between the donors and other protestors.

87. Similar issues arise with respect to the Organizer Defendants. The plaintiffs have led no evidence demonstrating that any of the individually named defendants 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 plaintiffs' 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 Responding Parties Cannot Demonstrate "No Valid Defence"

88. In several places in their evidence, and in their draft Statement of Defence, the Moving Parties raise the following defences:

(a) the Moving Parties say that there was never any plan to park tractor-trailer trucks in downtown Ottawa. Rather, the protestors had been informed by the Ottawa Police Service that they could park their trucks on roads and parkways leading into and away from downtown Ottawa (referred to in the Statement of Defence as "staging areas"). However, on the day of their arrival into Ottawa, the Ottawa Police Service changed their instructions, and instead directed the protestors to park their trucks all over downtown Ottawa. Relying on the applicable provisions of the *Highway Traffic Act*, R.S.O. 1990, c. H-8, and in particular on section 134(1) thereof, the Moving Parties say that they had no choice but to follow the directions of the Ottawa Police Service and park where directed. The protestors' presence in

downtown Ottawa was therefore orchestrated by the Ottawa Police Service; the protestors had no choice but to comply. Were it not for the actions of the Ottawa Police Service in directing the protestors to park downtown, the events leading to this action would never have taken place;[73] and

(b) the Moving Parties say that it is obvious that the Responding Parties' proceeding cannot be certified as a class proceeding, but that the Responding Parties nonetheless persevere in their attempt to do so in an effort to disproportionately and artificially overinflate the value of their claim. This amounts to an abuse of process;[74]

(c) the Moving Parties say that the Responding Parties' alleged damages are excessive, remote and unforeseeable.[75]

89. The Responding Parties have not led any evidence on this motion that does anything to refute the defences described above. The Responding Parties are therefore unable to demonstrate that the Moving Parties' defences cannot succeed.

90. The Moving Parties expressly reserve their right of reply on this issue.

The *Pointes* Test: Step Three – The "Weighing" Exercise

91. In *Pointes*, at paragraphs 61-82, Côté J. described the principles applicable on the third step of the test, which she described as the "Public Interest Hurdle". They are:

(a) to avoid having its proceeding dismissed, the responding party must satisfy the motion judge that that 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;[76]

(b) section 137.1(4)(b) is the "core" of s. 137.1. It expressly contemplates the "harm" suffered by the responding party "as a result" of the moving party's expression being weighed against the public interest in protecting that expression. As a prerequisite to that exercise, two things must be shown: (i) the existence of harm; and (ii) causation – that the harm was suffered as a result of the moving party's expression;[77]

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[73] 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**"), **Motion Record, Tab 2**. See also all of the Moving Parties' Affidavits to similar effect. See also, for further evidence in support of this defence, the Request to Admit and Response to Request to Admit, both dated August 25, 2023, **Motion Record, Tabs 11 and 12**.
[74] Draft Statement of Defence, paragraphs 55-56.
[75] Draft Statement of Defence, paragraph 118.
[76] *Pointes*, paragraph 61.
[77] *Pointes*, paragraphs 62 and 68.

(c) once harm has been established and shown to be causally related to the expression, s. 137.1(4)(b) requires that the harm and corresponding public interest in permitting the proceeding to continue be weighed against the public interest in protecting the expression;[78]

(d) the quality of the expression, and the motivation behind it, are relevant to this analysis;[79]

(e) the weighing exercise under s. 137.1(4)(b) can thus be informed by the Court's 2(b) *Charter* jurisprudence. For example, the inquiry might look to the core values underlying freedom of expression, such as the search for truth, participation in political decision-making, and diversity in forms of self-fulfillment and human flourishing. The closer the expression is to any of these core values, the greater the public interest is in protecting it;[80]

(f) further factors that may bear on the public interest weighing exercise include: (1) a history of the plaintiff using litigation or the threat of litigation to silence critics; (2) a financial or power imbalance that strongly favours the plaintiff; (3) a punitive or retributory purpose animating the plaintiff's bringing of the claim; and (4) minimal or nominal damages suffered by the plaintiff;[81]

(g) additional factors may also prove useful, such as: (5) the importance of the expression; (6) the history of litigation between the parties; (7) the potential chilling effect on future expression either by a party or others; (8) the defendant's history of activism or advocacy in the public interest; (9) any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award; (10) the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group;[82] and

(h) the third step of the *Pointes* test must be met by the responding party on the "balance of probabilities" standard.[83]

<u>Argument</u> – The Responding Parties Fail the Third Step of the *Pointes* Test

92. The Responding Parties have not met the third step of the *Pointes* test. **First**, they have not demonstrated on a balance of probabilities that they suffered "harm" "as a result" of the expression at issue in this case. The Moving Parties rely on their submissions above for this proposition.

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[78] *Pointes*, paragraph 73.
[79] *Pointes*, paragraph 74.
[80] *Pointes*, paragraph 77.
[81] *Pointes*, paragraph 78.
[82] *Pointes*, paragraph 80.
[83] *Pointes*, paragraph 82.

93. The Responding Parties have not tendered 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' defendants' expression.

94. First, the Responding Parties' evidence tendered on this motion fails to establish that the plaintiffs 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 is 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.

95. Next, the Responding Parties have failed to demonstrate "common design". For example, there is 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 plaintiffs was "as a result" of the donors' contributions (particularly when one recalls that virtually no money actually made it through to actually be used by the protestors)?

96. Similarly, there is no evidence demonstrating that the activities engaged in by the Organizer Defendants were part of a "common design" that led to the commission of the torts of private and public nuisance.

97. **Second**, the Responding Parties have not demonstrated 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. This is

undeniable. 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.

98. The Moving Parties 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.

99. Against 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 the public interest in permitting this action to proceed. This involves taking a step back and assessing the overall value of this proceeding.

100. First, the Moving Parties 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 unacceptable chilling effect. Such a proposition has little to no value and cannot be accepted by the Court. It cannot outweigh the fundamentally important public interest in encouraging political expression through monetary donations.

101. Second, take the Organizer Defendants. Again, what is being weighed is a protestor's fundamental 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 an unacceptable 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.

102. The same argument holds true for Jonker, Jonker Trucking and the so-called Trucker Defendants. Jurisprudence is clear that "horn honking" is a protected form of political expression. Accordingly, it ought to be given the same weight in the analysis under this step of the test.

103. Against the public interest in protecting political expression is the public interest in permitting this action in nuisance to proceed. For the reasons described above, the Responding Parties' claims are weak and unsupported on this motion by any probative evidence demonstrating that the plaintiffs and the various class members will succeed. The public interest in protecting such a weak claim does not outweigh the public interest in protecting political expression.

104. The Moving Parties 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.

105. Furthermore, the tort of nuisance ought not to be misused in this particular case. The Moving Parties 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 quite minimal. It cannot be proportionate or reasonable for a three-week protest, loud as it may at times have been, 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.

106. Further, the potential chilling effect of this lawsuit on future political expression is real. 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 evidence as discussed above. Following *Pointes* at paragraph 80, these considerations also must not be overlooked by the Court in this case.

107. In sum, it is the Responding Parties' burden to establish, on a balance of probabilities, 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 cannot do so.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: November 29, 2023

CHARTER ADVOCATES CANADA
[redacted]

James Manson (LSO No. 54963K)

T: [redacted]
E: [redacted]

Lawyers for the Moving Parties, Lich, Barber, Marazzo, Tiessen, Gasior, Bulford, Enns, Mihilewicz, Howland, Jonker, Jonker Trucking Inc., and Freedom 2022 Human Rights and Freedoms

ZEXI LI. ET AL.
PLAINTIFFS

-and-

CHRIS BARBER ET AL.
DEFENDANTS

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

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT OTTAWA

FACTUM OF THE MOVING PARTIES
(Motion pursuant to s. 137.1(3) of the *CJA*)

CHARTER ADVOCATES CANADA
[redacted]

James Manson (LSO# 54963K)

T: [redacted]
E: [redacted]

Counsel for the Defendants Lich, Barber, Marazzo, Tiessen, Gasior, Bulford, Enns, Mihilewicz, Howland, Jonker, Jonker Trucking Inc., Freedom 2022 Rights and Freedoms