CITATION: Li et al. v. Barber et al., 2024 ONSC 775
COURT FILE NO.: CV-22-88514-CP
DATE: 2024/02/05

SUPERIOR COURT OF JUSTICE – ONTARIO
Proceeding under the *Class Proceedings Act*, 1992

RE: 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

BEFORE: C. MacLeod RSJ

COUNSEL: **Paul Champ**, for the Plaintiffs (Responding Parties)

James Manson 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 (Moving Parties)

Shelley Overwater for defendants King & Janzen

HEARD: December 14, 2023

DECISION AND REASONS

Introduction

[1] This is the proposed class proceeding by downtown Ottawa residents, business owners and employees against the protestors, organizers and funders of the "Freedom Convoy" that took place in January and February of 2022.[1]

[1] See 2022 ONSC 1176, 2022 ONSC 1351 and 2023 ONSC 1679 amongst other decisions for the factual background and history of the litigation.

[2] The litigation pits the rights of individuals to use of their property and public streets, to carry on business and to earn a living, against the rights of protestors to make their grievances heard and to utilize pressure tactics against the government in the national capital. As a civil case, centred on questions of liability and damage, it has little or nothing to do with the various criminal cases making their way through the courts and is not in any way affected by the recent decision of the Federal Court about the use of the *Emergencies Act* by the Government of Canada.[2]

[3] The motion now before the court is a motion by certain of the defendants to halt the class proceeding pursuant to s. 137.1 of the *Courts of Justice Act (CJA)*[3]. This provision is usually referred to as the "anti-SLAPP legislation" and these motions are referred to as "anti-SLAPP motions".

[4] The defendants argue that this litigation is subject to s. 137.1 and does not cross the threshold that is required for actions arising out of expression on a matter of public interest. Accordingly, they ask the court to stay or dismiss the action.

[5] For the reasons that follow, I decline to do so.

The anti-SLAPP legislation in Ontario

[6] In Canada, criminal law and procedure is within the exclusive jurisdiction of the Parliament of Canada but property and civil rights and therefore the right of citizens to sue each other civilly is within the exclusive jurisdiction of each province.[4] Furthermore, although the *Canadian Charter of Rights and Freedoms*[5] informs the interpretation of common law rights, the *Charter* applies to legislation and government action and does not regulate the rights of individuals to sue each other.[6] This action is therefore governed by Ontario law and Ontario civil procedure.[7]

[7] Section 137.1 of the *CJA* was enacted in 2015 to protect freedom of expression and discourse on matters of public interest. While most frequently associated with "libel chill", the legislation is not limited to defamation actions. The purpose of the amendment was to inhibit the use of litigation to shut down debate on matters of public interest. That purpose is articulated in subsection (1) of s. 137.1 as follows:

> **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;

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[2] *Canadian Constitution Foundation v. Canada (Attorney General),* 2024 FC 38
[3] R.S.O. 1990, c.C.43, as am.
[4] *Constitution Act, 1867,* 30 & 31 Victoria, c.3 (UK), s. 91 (27) and s. 92 (13) & (14)
[5] *Constitution Act, 1982* enacted by the *Canada Act, 1982,* 1982, c.11 (UK), Schedule B
[6] *Charter,* s. 32
[7] Specifically, the *Courts of Justice Act,* RSO 1990, c. C-43 as amended, *Rules of Civil Procedure,* RRO 1990, Reg. 194 as amended and the *Class Proceedings Act, 1992,* S.O. 1992, c.6 as amended.

(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. [8]

[8] The Supreme Court of Canada has described the phenomenon which gave rise to the legislation as follows:

> "Strategic lawsuits against public participation ("SLAPPs") are a phenomenon used to describe exactly what the acronym refers to: lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest. SLAPPs are generally initiated by plaintiffs who engage the court process and use litigation not as a direct tool to vindicate a *bona fide* claim, but as an indirect tool to limit the expression of others. In a SLAPP, the claim is merely a façade for the plaintiff, who is in fact manipulating the judicial system in order to limit the effectiveness of the opposing party's speech and deter that party, or other potential interested parties, from participating in public affairs."[9]

[9] The Ontario legislation requires the court to apply a screening mechanism to an identified category of cases. The mechanism is intended to "weed out litigation of doubtful merit which unduly discourages and seeks to restrict free and open expression on matters of public interest."[10] If such a motion is brought and the case is found to relate to protected freedom of expression, the action will only be allowed to proceed if the plaintiff can meet the statutory test. If it does not, the action cannot proceed, and the court is obligated to stay or dismiss it.

[10] It is critical to understand the structure of the legislation. Once it is determined that the proceeding arises from an expression that relates to a matter of public interest, the court is required to dismiss or stay the action unless it meets the saving provision in s. 137.1 (4). This is a statutory screening mechanism and not a determinative adjudication of the merits of the proposed action.[11]

[11] Section 137.1 (4) reads as follows:

> (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,

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[8] S.O. 2015, c. 23, s. 137.1 (1)
[9] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, [2020] 2 SCR 587 @ para. 2
[10] *1704604 Ontario Ltd. v. Pointes Protection Association,* 2018 ONCA 685
[11] See *Bent v. Platnick,* 2020SCC 23 @ para. 4 and see *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129 @ paras 38 & 39

(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.

[12] In summary, the questions raised by the motion are firstly whether s. 137.1 is available to the defendants against this proposed class proceeding, secondly if the plaintiff can show that the action is a serious action to which there may be no valid defence and thirdly whether the issues raised by the action are of sufficient importance that they outweigh any chilling effect of allowing the litigation to continue.

[13] There has been a considerable amount of jurisprudence in relation to these provisions including guidance from the Supreme Court of Canada. The leading authority is *Pointes Protection.* [12] In *Pointes,* the Supreme Court observed that once the statute is engaged, the burden of proof on this motion is more than on a motion to strike pleadings, but less than a motion for summary judgment.

[14] The operative words of the saving provision are "grounds to believe" that the proceeding has substantial merit and there is no valid defence. These words must be interpreted in light of the nascent stage of the litigation when such motions will typically be brought.

[15] Paragraphs 38 and 39 of the *Pointes* decision read as follows:

> "[38] Section 137.1(4)(a) may therefore be interpreted by distinguishing a motion made under s. 137.1 from a motion to strike and a motion for summary judgment, both of which are tools that remain available to parties notwithstanding the existence of s. 137.1. The very fact that the legislature created s. 137.1 as a mechanism indicates that a s. 137.1 motion was meant to fulfil a different purpose than these other motions. While a summary judgment motion allows parties to file a more extensive record and a motion to strike is adjudicated solely on the pleadings, 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, that lends itself to the inquiry mandated under s. 137.1(4)(a). Thus, although the limited record at this stage does not allow for the ultimate adjudication of the issues, it necessarily entails an inquiry that goes beyond the parties' pleadings to consider the contents of the record (the extent of such consideration will be explored further in the next section).

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[12] *Supra* @ note 8

> [39] Accordingly, I conclude that "grounds to believe" requires that there be a basis in the record and the 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 is no valid defence."

[16] "No valid defence" at such a preliminary stage of the litigation cannot mean that the court should determine definitively that there are no defences. It does however mean that simply showing that the action has substantial merit is not enough. The plaintiff will not meet the test unless he or she can also show it is reasonably possible that none of the available defences will succeed. Conversely, if it appears that one of more of the defences will probably succeed, the motion must be granted, and the action halted.[13] This assessment requires an evidentiary basis, but it does not require certainty.

Analysis & Decision

[17] It is not necessary in applying the statute to compartmentalize the steps or to examine them in formulaic order because if the section is engaged (Step 1), the plaintiff must clear both the "grounds to believe" test (Step 2) and the balancing exercise (Step 3).[14] This motion turns primarily on s. 137.1 (4). (Step 2)

[18] There can be no doubt that a protest against COVID-19 mandates or other policies of public authorities or simply protesting to show displeasure with the government of the day are expressions on matters of public interest. This is generally conceded by the plaintiffs, and they also concede that the manner in which the protesters chose to express themselves would also engage freedom of speech.[15]

[19] At the first stage of the analysis, Section 137.1 is therefore engaged at least for those defendants who acknowledge having participated in the activity. I agree with the plaintiffs' submission that the protection of s. 137.1 may not be available to a party who denies having made the expression at issue. A party cannot simultaneously claim protection for freedom of speech under anti-SLAPP legislation while denying involvement in the expression at issue.[16]

[20] At the other end of the analysis, (Step 3), it appears beyond doubt that the question at the heart of this litigation is a serious question. To what extent does exercise of the right to protest protect those involved from liability to residents whose lives were disrupted? To put this another way, is it reasonable for denizens of downtown Ottawa to anticipate a certain level of disruption because of their proximity to the seat of government? It is likely these rights overlap. Even *Charter*

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[13] *Lascaris v. B'nai Brith Canada,* 2019 ONCA 163, 144 OR (3d) 211 @ para. 33
[14] *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129 @ paras 56 & 57
[15] In that regard, see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 and *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2
[16] *Walsh v. Badin,* 2019 ONSC 689 cited with approval *Christman v. Lee-Sheriff,* 2023 BCCA 363

protected rights are not absolute.[17] It may be, however legitimate the activities of the protesters may be determined to be by courts, the participants remain liable to those who suffered damage as a result of the manner those activities were carried out. It is in the public interest for those questions to be determined by the courts.

[21] In general, the analysis should not be affected by the fact that this is a proposed class proceeding.[18] Firstly, as mentioned, the action has not been certified. Secondly, class proceedings are procedural devices to efficiently permit multiple tort victims to claim damages but they do not alter the substantive law. Thirdly, if a class proceeding is not certified, the plaintiffs may elect to continue the action as an ordinary proceeding. It is worth noting, however, that one of the purposes of the *Class Proceedings Act* is to provide access to justice for individuals who may individually have suffered small losses but who collectively have a right to a remedy.[19] It may therefore be unimportant whether individual plaintiffs can prove they sustained substantial damages. It is the public interest in justice for the plaintiffs which must be weighed against the public interest against restrictions on freedom of speech through threats of litigation.

[22] The plaintiffs represent the residents, business owners, and employees whose property rights, right to operate a business or right to pursue their livelihood were allegedly disrupted by the activities of the protesters. While the plaintiffs acknowledge the right of the protestors to make their views known to government and to seek support from the public, the plaintiffs allege that the ongoing noise, pollution, blocking of the streets and impeding use of their property and businesses was tortious or unlawful. This is a very significant issue for the exercise of rights in a free and democratic society.

[23] The question then is whether the evidence on this motion demonstrates grounds to believe the plaintiff's claims have merit and there is unlikely to be a complete defence. An unusual aspect of this motion is the fact that I have already ruled on a previous motion that the statement of claim disclosed reasonable causes of action against the defendants.[20] I will not repeat that analysis here.

[24] The prior ruling is not challenged by the defendants. It was not appealed, and they concede that it is theoretically possible to assert liability against certain defendants based on torts such as private and public nuisance.[21] They argue, however, that the evidence put forward by the plaintiff is insufficient to show the case has substantial merit against each category of defendant. Recall

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[17] *Hamilton (City) v. Loucks,* 2003 CarswellOnt 3663, [2003] O.J. No. 3669, 232 D.L.R. (4th) 362, 40 C.P.C. (5th) (SCJ) @ para 52

[18] *Hudspeth v Whatcott*, 2017 ONSC 1708 is one of the few instances where a s. 137.1 motion has been brought in the context of a class proceeding. While the decision provides a helpful analysis of class proceedings in the context of defamation action, it does not deal with this point directly.

[19] *Hollick v. Toronto (City)*, 2001 SCC 68

[20] See 2023 ONSC 1679, *supra* @ paras 7 - 12

[21] While an individual suing for public nuisance without the involvement of the Attorney General must show special damages, the case of *O'Neil v. Harper,* (1913) 13 DLR 649 (SCO, AD) and the English authorities cited therein appear to remain good law. Substantial loss occasioned by a person by a blockage of a road that prevents or impairs access to a business may be sufficient.

that in addition to seeking to certify classes of plaintiffs, the plaintiffs are also seeking to certify classes of defendants. The plaintiffs claim against participants, organizers, fundraising platforms and donors.

[25] A central requirement to fix liability against a group without showing who specifically caused damage to each plaintiff, is the theory of joint or collective responsibility. This is critical to the plaintiffs' case because the plaintiffs do not assert that all of the defendants were directly engaged in tortious activity. 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 severally liable for the damage.[22] As set out in the cases, it may not be necessary for all parties to be aware that the proposed action is tortious so long as they acted in concert in furtherance of the wrong.

[26] On my view of the evidence, there is sufficient basis to conclude that the plaintiffs have a meritorious case. There is evidence that certain plaintiffs were subjected to what they contend to have been extreme amounts of noise, horn honking, incessant diesel fumes and other pollution, blockage of the streets and intimidation. There is evidence that plaintiffs had difficulty accessing their properties and that business was disrupted, reservations cancelled, and revenue negatively impacted.

[27] While I recognize that the defendants have denied a common intention to block the streets or to put pressure on the government by creating hardship for residents of Ottawa, there is evidence by which a trier of fact could conclude that disrupting daily life in the city, blocking the streets indefinitely and making as much noise as possible were precisely what the organizers and participants were intending. Indeed, some of them are facing criminal charges based on just such evidence. It remains to be seen how many of those other proceedings end in convictions but evidence that is insufficient to justify a criminal conviction may nevertheless be sufficient to show joint or concerted action in a civil tort case. The elements of tort liability are not the same as the elements of a criminal offence and the standard of proof is a balance of probabilities rather than proof beyond a reasonable doubt as is the case in a criminal prosecution.

[28] The most tenuous claim advanced by the plaintiffs may be the claims against funding platforms and donors. Here, it is the plaintiffs' position that after it became apparent the protestors were planning to remain in the city and to engage in unlawful activity, in particular after Go Fund Me halted the initial crowdfunding campaign, those who continued to donate knew or ought to have known that they were promoting the impugned harm to the plaintiffs. Indeed, the plaintiff argues that the named fundraising platforms and the individual donors who used those platforms, knew perfectly well that the funds were being used to prolong a protest that had become an occupation and therefore must share liability. There are videos and text messages available which

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[22] See *Botiuk v. Toronto Free Press Publications Ltd.,* [1995] 3 S.C.R. 3, @ paras. 74-77 and *Fullowka v. Royal Oak Ventures Inc.,* 2010 SCC 5, [2010] 1 SCR 132 @ para. 152 @ 154

urge protestors to “hold the line”, to “stay for as long as necessary” and to donate funds in ways that “cannot be obstructed”.

[29] I agree with the defendants that not every individual donor may be impressed with the necessary knowledge and I also agree there may be policy reasons that weigh against finding individual minor donors jointly liable with the principal tortfeasors (if there are found to be any). No doubt these arguments will also figure in the certification motion but it is premature to consider them on this motion. There is evidence by which a court could conclude that the named defendants share liability with the organizers and protesters.

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

[31] It is plausible that some of these defences may be successful for some defendants and of course it is always possible that the plaintiffs will fail to prove their case once their evidence is tested under cross examination at a trial. Speculation about potentially successful defences is not what the analysis under s. 137.1 demands.[23] There is no “slam dunk defence”. Despite the extremely thorough arguments of Mr. Manson on behalf of his clients, I am not persuaded that this action should be halted under the anti-SLAPP provisions. It cannot be said on the limited evidentiary record available on this motion that any of the potential defences are likely to prevail.[24]

Conclusion and Decision

[32] In conclusion, the defendants’ motion to stay or dismiss the action is dismissed.

[33] I have not dealt with costs. I encourage counsel to review s. 137.1 (8) of the Act and to agree on a costs order. If they are unable to do so and wish to make costs submissions, they are to contact my office for further direction. I may either convene a further hearing or I may be prepared to accept submissions in writing. If I do not hear further on this point by March 5, 2024 there will be no order as to costs.

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Date: 2024.02.05 16:05:20 -05'00'

Justice C. MacLeod

Date: February 5, 2024

[23] See *Hudspeth v Whatcott*, 2017 ONSC 1708
[24] *Yates v. Iron Horse Corporation and St. Martin*, 2023 ONSC 4195 @ para 100

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Shelley Overwater for defendants King & Janzen

DECISION AND REASONS

Released: February 5, 2024 C. MacLeod RSJ