CITATION: Li et al. v. Barber et. al., 2022 ONSC 1176
COURT FILE NO.: CV-22-88514-CP
DATE: 2022/02/22

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 DEVANEY, Plaintiffs

AND:

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

BEFORE: Regional Senior Justice Calum MacLeod

COUNSEL: Monique J. Jilesen, Madison Robins, Sarah Bittman and Jessica Kras, as agents for Paul Champ, Counsel, for the Plaintiff

HEARD: February 17, 2022

REASONS FOR DECISION

Introduction

[1] This is a proposed class proceeding brought by citizens of Ottawa against organizers, supporters and participants in the "Freedom Convoy" which has blockaded downtown Ottawa for

over three weeks. The plaintiffs seek compensation for damages inflicted upon those who live, carry on business or work in the downtown core. It is a civil claim based on the torts of private and public nuisance. It is therefore a lawsuit between private parties and should be distinguished from any criminal, regulatory or government action that may also be underway.

[2] The motion before the court on February 17, 2022 was brought without notice to the defendants because the plaintiffs alleged that the defendants were taking steps to move or dissipate assets and if they were aware of the proposed injunction, they would take steps to defeat it. In legal terms, it was a motion for an *ex parte* Mareva Injunction. In plain English, a motion brought without warning to freeze assets of the defendants to prevent them from disappearing.

[3] *Ex parte* means without notice. It stands in stark contrast with another Latin phrase that was recently in the news, *audi alterem partem.* The latter is a fundamental principle of justice. It means that no decision should be made without all parties being heard. It is a central tenet of our legal system. As such, although motions without notice are sometimes necessary and justified, any such order is made on a temporary basis pending a hearing of all sides of the issue. Pursuant to Rule 40.02 of the *Rules of Civil Procedure,* an injunction granted without notice is for a maximum of ten days. When the motion returns, the opposing parties must be put on notice and will have an opportunity to oppose the order or the continuation of the injunction.

[4] Despite these safeguards, the court will not make this type of order lightly. There are stringent tests for injunctions with or without notice. The bar for an order of this type obtained without notice is higher still.

[5] At the conclusion of the hearing on February 17, I was persuaded by the evidence and by the submissions of counsel that this was a case justifying the requested injunction. I signed the order with reasons to follow. The order will expire on February 28 if it is not renewed or extended after a hearing on notice.

[6] My reasons for granting the order are set out below.

The test for a Mareva Injunction

[7] An interlocutory injunction or a mandatory order may be made in the course of a lawsuit in advance of judgment where it is necessary in the interests of justice. Section 101 of the *Courts of Justice Act,* states that such an order may be made "where it appears to a judge of the court to be just or convenient to do so". The usual basis for such an order is to prevent a party from continuing to inflict damage on the other or to preserve the rights of the parties in the pending litigation.

[8] An interlocutory injunction is an equitable remedy that is ordinarily appropriate if there is a genuine issue to be tried, the moving party may suffer irreparable harm if the order is not granted and the balance of convenience favours the granting of the order. For a Mareva injunction, however, there is a higher test. The plaintiff must show he or she has an apparently strong case against the defendant, that the defendant has assets in the jurisdiction and there is a serious risk the

defendant will dissipate those assets or remove them from the jurisdiction if the order is not granted.[1]

Analysis

[9] The so called occupation of downtown Ottawa by the self declared "Freedom Convoy" has attracted worldwide attention. The participants in the protest are well organized and well funded. Apart from their declared opposition to COVID restrictions imposed by all levels of government, the participants have been presenting challenges to law enforcement and they have imposed significant negative impact on residents and businesses in the downtown core. Residents say they have endured days of impassible streets, constant noise, idling truck engines and obscenities. There have been allegations of racism, white supremacy, desecration of monuments, implied threats of violence and harassment of citizens who wear masks or otherwise attempt to comply with the current COVID restrictions.

[10] For purposes of this motion, I need not determine the point at which the right to freedom of speech and expression collides with the rights of other citizens such as to render the activity illegal. I need not determine the point at which a lawful assembly becomes unlawful. I need not determine if the continued blockage of the streets by large commercial vehicles is encompassed in the right to freedom of expression or is instead a form of illegal weaponization of a highly regulated vehicle. Suffice to say that lawful acts do not provide cover to break other laws with impunity and an otherwise lawful act becomes unlawful and criminal if it is carried on in defiance of a lawful order prohibiting it. These are issues for other court proceedings on other days. The only question on this motion is whether the injunction should be granted within the context of this litigation.

[11] As discussed in the introduction, this is a civil action for damages based upon the torts of private and public nuisance. The law of tort permits a private right of action whenever an individual suffers damage due to activities of another individual which are actionable. Under the law of nuisance, the common law imposes liability against a tortfeasor (defendant) when the activities of a defendant unreasonably and substantially interfere with the plaintiff's occupation or enjoyment of land. In tort law, it is the impact on the plaintiff and not the intent of the defendant which makes it actionable.

[12] The legal question in a nuisance action is whether the interference is substantial and unreasonable. It is important to understand that although the question of whether the defendant's activity is lawful or illegal factors into the question of whether the interference is reasonable, it is not determinative. Even lawful activity may be tortious measured against this standard.[2] Even if the defendants are ultimately found to be lawfully exercising constitutional rights of protest and dissent, it does not follow that in the exercise of those rights they do not have responsibilities to

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[1] See O2 Electronics Inc. v. Sualim, 2014 ONSC 5050. The leading appellate decision in Ontario remains *Chitel v. Rothbert,* 1982 CanLII 1956, 39 O.R. (2d) 513 (C.A.) The leading Supreme Court decision is *Aetna Financial Services Ltd. v. Feigelman,* [1985] 1 SCR 2

[2] See *Antrim Truck Centre Ltd. v. Ontario (Transportation),* 2013 SCC 13, [2013] 1 SCR 594 and *St. Lawrence Cement v. Barrette,* [2008] 3 SCR 392

their fellow citizens. Under our system of law, citizens have legal rights, but they also have legal responsibilities. Perfectly lawful acts which cannot result in fines or imprisonment, may nevertheless result in liability to those who are intentionally or inadvertently injured as a result. Civil liability is not the same thing as "guilt" under criminal or regulatory law.

[13] The tort of public nuisance is somewhat similar to private nuisance, but it is not concerned with occupation or enjoyment of property. It is public nuisance to unlawfully interfere with the right of the public to use and enjoy public areas such as streets and sidewalks. It may be public nuisance to interfere with the rights of the public at large without legal authorization. Public nuisance is a tort that focuses on damages sustained by members of the public when they are denied their right to enjoyment of the common spaces and public thoroughfares. Again, what makes it actionable is not the intent of the defendant, but the impact on the plaintiffs and the significance of the interference with the plaintiff's own rights. We are concerned here with the private right to sue and not the steps taken by police or government authorities.

[14] There can be little argument that based on the statement of claim, the plaintiffs have endured a substantial interference with their rights. The disruption has now continued for more than three weeks. The resident class claims to have endured constant and significant interference with the activities of daily living. The business class claims to have endured interference with the ability to carry on business so that they have had to close or limit the business and suffered loss of revenue. The employee class claims to have suffered loss or reduction of employment and loss of income. On the facts disclosed by the affidavits, there is an apparently strong case for establishing tort liability.

[15] A more difficult question is whether the plaintiffs have a claim against the funds they are attempting to freeze. Just because a fund was created to support the protest does not necessarily mean that a judgment against an individual defendant would attach to that fund. Fundraising law is complex. People who start a fundraiser may have a duty to the donors. Funds raised from the public may be impressed with a trust or in some cases may fall under the jurisdiction of the Public Guardian and Trustee. Suffice to say that a crowdsourcing fund held by a fundraising platform is probably not the property of the intended beneficiaries until the funds are released. It would be difficult to argue that such a fund would fall within the ambit of a Mareva injunction.

[16] The pertinent question for this motion is whether the funds the plaintiff seeks to enjoin are now owned or controlled by the defendants who are the target of the injunction and not whether the fundraisers owe obligations to donors or others. It is fundamental to the granting of a Mareva injunction that the defendants are attempting to dissipate funds to which a judgment might attach.

[17] A fundraising platform which controls the funds and acts like a granting agency might have the power to grant or withhold funds in its own discretion. An example of this occurred earlier in February. The protestors had originally raised a considerable sum of money through a GoFundMe campaign. At a certain point GoFundMe concluded that, in its view, the original peaceful protest had mutated into something more sinister and unlawful which was a violation of its terms of service. It froze the funds and returned them to the donors. Evidently, in that case, the ownership of the asset had not passed to the defendants.

[18] The situation is different if the funds are in the hands of the defendants and no longer controlled by either the original donors or the fundraising platform. In that case the gift has vested.[3]

[19] I am satisfied by the evidence that the funds, whether they are in the form of currency or cryptocurrency, are now legally in the possession, power and control of the defendants who are the target of the motion (referred to in the motion material as the "Mareva Defendants").

[20] I am also satisfied that the organizers of the protest and the Mareva Defendants have purposely arranged the control of the funds in this manner to avoid another scenario such as the GoFundMe situation. The funds have been purposely placed outside of the control of any fundraising platform. Moreover, the Mareva Defendants have been promoting the use of cryptocurrency such as bitcoin under the mistaken belief that it is untraceable and cannot be seized by a court or other legal authority.

[21] This is not the place for a detailed exploration of the nature of bitcoin or other cryptocurrencies. In summary, however, cryptocurrency is a web based currency that is not denominated in traditional legal tender. Traditional legal currency exists either as specie (banknotes or coins) which can be carried in a physical wallet or stored in a physical location but generally is stored by depositing it with a financial institution like a bank. There the funds exist not as bundles of money in a vault or a box, but as a ledger entry which records a debt by the financial institution to the client. In the modern age, those ledgers are all electronic, stored on computer databases. In that sense, we already live in an age of digital currency, but it is currency denominated in legal tender (state backed or "fiat" currency) such as Canadian dollars.

[22] Cryptocurrency, by contrast, is not stored in a financial institution. Bitcoin, for example, is a digital token stored on what is called an "online distributed ledger system" or blockchain. According to the expert affidavit, the defining characteristic of a blockchain is that it is an online distributed database (meaning it is stored in the "cloud" diffused over many computers or storage devices) and contains information about transactions that occur on it. A blockchain is what identifies ownership and records transactions that occur in a given cryptocurrency such as bitcoin. The person with the key (essentially the password) controls the blockchain and may be anonymous but it is an essential characteristic of the digital ledger that it can be viewed and verified. Digital transactions are therefore visible and recorded and are anonymous only to the extent that the keyholder is unknown. In fact, bitcoin transactions are all part of a public ledger that can be viewed by anyone.

[23] Digital funds are not immune from execution and seizure to satisfy a debt any more than a bank account provided the individual or institution which can access the funds are within the reach of a court order. Digital wallets may be self controlled, but more commonly are part of a service provided by a provider and accessed through an application or software in a similar manner to online banking. Cryptocurrency exchanges are used to convert bitcoin or other currencies to fiat

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[3] See *McNamee v. McNamee*, 2011 ONCA 533, 106 OR (3d) 401

currency. Many of these digital institutions are within the jurisdiction of the court or are located in jurisdictions where Ontario judgments and orders may be enforced. The defendants of course are themselves subject to the jurisdiction of the court because they are present in Ontario and they may be enjoined from cashing or transferring assets including cryptocurrency.

[24] In this case, the plaintiff has clear evidence that certain of the defendants are the owners of digital wallets storing significant funds that have been amassed in bitcoin or other digital currencies. The expert investigator has been monitoring activity in these wallets and provided evidence about the steps that have been taken to break up, move and distribute those funds. In addition to the visible activity in the digital wallets, there is also considerable evidence about the plans to distribute the funds as soon as possible in part to benefit the individual protestors but also to avoid any enforcement activity. This is seen in the defendants' own communications to their supporters on social media and elsewhere. The key point for this motion is that certain of the Mareva Defendants have ownership and control of the digital wallets and they are poised to distribute or dissipate those funds.

[25] It is also relevant that the fresh as amended claim names individuals and entities that have knowingly funded or supported the continuation of tortious activity as added defendants. In particular, certain of the Mareva Defendants are entities created for the purpose of collecting funds and using them to support the impugned activities. If those entities are liable to the plaintiffs, then their property would be exigible if and when a judgment is granted.

[26] The evidence also satisfies me that distribution of the funds is imminent or is underway and is for the very purpose of dissipating the fund so that it cannot be frozen or seized. At least at this preliminary stage, I am therefore persuaded that the test for this kind of injunction has been met.

[27] I did question counsel about whether an injunction was necessary in light of the other measures that are in place. I also challenged the plaintiffs to demonstrate that the injunction they seek is for a proper purpose. That is to preserve an asset to which the plaintiff (or the plaintiff class) may have a claim rather than to interdict the flow of funds which is the rationale behind a restraint order granted earlier this month or the new emergency regulations brought in by the Government of Canada. I was satisfied that the various orders would not be working at cross purposes and they seek to achieve different objectives.

[28] It is worth reviewing the other injunctions and orders to which I am referring. It is evident from that review that none of those other orders are aimed at ensuring a judgment is enforceable.

[29] On February 4, 2022, the plaintiff Zexi Li commenced this proposed class proceeding and on February 7, 2022, Ms. Li was successful in obtaining an interim injunction from my colleague, Justice Hugh McLean. Justice McLean ordered an end to the honking of horns, sounding of truck horns or train horns or air horns. While counsel for three of the named defendants appeared to oppose the granting of the injunction, he did not oppose the extension of the order when it came back before the court yesterday. To some degree at least, that injunction has been respected and

after the order was granted, the noise level dropped considerably although in other respects the disruption continued.

[30] Other injunctions or similar orders have been obtained in separate proceedings.

[31] On February 10, 2022, at the request of the Attorney General of Ontario, the court made an *ex parte* "restraint order" pursuant to s. 490.8 of the *Criminal Code of Canada* freezing and restraining distribution of funds raised through the American online funding platform, GiveSendGo.[4] That section of the *Code* permits the court to freeze assets that appear to be used in the commission of a serious criminal offence. Associate Chief Justice McWatt was persuaded that there was sufficient evidence of criminal activity to make the requested order.

[32] On February 14, 2022, on application by the City of Ottawa against persons unknown, the court issued an injunction restraining ongoing breaches of municipal by-laws. Those by-laws related to open fires, idling of vehicles, parking violations and noise. That matter was also heard by the Associate Chief Justice. It was clear that there were ongoing violations of the municipal by-laws and the City was entitled to a restraining order pursuant to s. 440 of the *Municipal Act.* While the injunction was obtained by counsel retained by the City, counsel for the Attorney General of Ontario and Attorney General of Canada appeared and were granted intervenor status.[5] The injunction was granted. It does not appear it has yet been enforced.

[33] On February 15, 2022, by Order-in-Council, the Government of Canada declared a Public Order Emergency pursuant to the *Emergency Act.* At the same time, pursuant to the legislation and the declaration, a number of executive orders were made. Besides prohibiting the current public assembly and restricting use of property to support or further the disruption thereby declared unlawful, the orders including an "Emergency Economic Measures Order". That order makes it illegal amongst other things for any person to provide any property including currency or virtual currency to or for the benefit of participants in the current disruption in Ottawa.

[34] Those latter two orders obtained by the Crown or made by the Government of Canada restrain, in a general way, the use of funds for purposes of promoting criminal and unlawful behaviour. The current motion, by contrast, is a motion by plaintiffs in a civil action to freeze specific assets in order to preserve a fund against which they may be able to execute if they obtain a civil judgment for damages.

[35] I was also concerned about overreach. Because the plaintiffs do not have details of what funds are contained in the bank accounts of individual defendants, the draft order contains a freeze over all of their bank accounts. This tracks the wording of the "model order" in use in Ontario for Mareva injunctions. It is necessary because the plaintiff, at this stage, cannot be more specific. The model order contains language to allow a defendant caught by the order to seek relief so that mortgages and expenses of daily living can be paid and also requires the defendants to disclose

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[4] Counsel for the Attorney General - Randy Schwartz, Director, Crown Law Office – Criminal

[5] Counsel for the City, Kevin Nearing & Michelle Doody, counsel for the AG Ontario Padraic Ryan & Waleed Malik, (Constitutional Law Branch), counsel for the AG Canada, Andrew Gibbs & Catherine Lawrence, DOJ.

what funds are in their accounts. I added language to permit the release of funds by written agreement with the plaintiff in order that this can be achieved quickly and without waiting for a court order. Ultimately, however, I was persuaded that if the order was to have its desired effect, an immediate freeze is necessary. This can be modified if and when the injunction is renewed and it will cease to apply if the injunction expires or is lifted.

[36] Given the evidence of active steps to dissipate the funds, I concluded that a Mareva injunction should be granted without first warning the defendants. As discussed earlier, that is drastic relief which can only be granted until the defendants are put on notice and have an opportunity to be heard.

Undertaking for Damages

[37] It is typically the case that a party who obtains an injunction in advance of judgment runs the risk that however strong their case may appear at the time of the injunction; they may be unsuccessful at trial. In that case the party who obtains the injunction may be liable in damages for what is ultimately shown to be an unjustified injunction. Ordinarily, the party seeking an injunction must give an undertaking to pay such damages as a condition of obtaining the order.

[38] In this case I was asked to waive the requirement for an undertaking. The court has the discretion to waive the requirement under Rule 40.03. There is authority that it is appropriate to waive the undertaking in cases which have broad public interest significance, or which are cases involving human rights.[6] There is also authority that such an undertaking should not be required from a representative plaintiff acting for the benefit of a class.[7] Under the circumstances of this case, I did not require such an undertaking as a condition of the order. I exercise my discretion pursuant to Rule 40.03 to waive the requirement.

The Amended Pleading

[39] I will just say a quick word about the pleading amendment because that was also the subject of an *ex parte* court order. Unlike the injunction, however, a pleading amendment at this stage in a proposed class action is not extraordinary relief but is routine. For transparency, I will explain.

[40] The original statement of claim only proposed one class of plaintiffs and named only Ms. Li as a representative plaintiff. The fresh as amended statement of claim not only expands the proposed classes to include businesses and employees, but also adds additional defendants quite apart from the numerous unidentified "John Doe" defendants.

[41] The plaintiff had prepared a draft "fresh as amended statement of claim" and had publicly announced that the class action was being expanded. The new pleading formed part of the motion materials but had not been formally issued. I was of the view that it was appropriate to deal with

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[6] See *Cardinal v. Cleveland Indians Baseball Company Limited Partnership*, 2016 ONSC 6929
[7] See *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.,* 2006 BCSC 1018; aff'd in part, 2007 BCCA 481

the proposed amendments before dealing with the motion for the injunction because otherwise the draft pleading would not have been approved by the court and might be subject to change.

[42] A motion to amend a pleading to add parties before anyone has defended the original action may be entertained without notice for the simple reason that the plaintiff could start a separate proceeding at any time before the expiry of a limitation period without notifying anyone. Defendants are not entitled to be told ahead of time that they are about to be sued.

[43] Pursuant to Rule 26.02, a plaintiff may amend a pleading without leave at anytime before pleadings are closed. Addition of parties, however, does require leave of the court under Rule 5.04 (2). Pursuant to that rule, leave will be granted if it does not result in prejudice that could not be addressed in costs or an adjournment. There is no prejudice in this case because the action is in its infancy and as mentioned, a separate proceeding could be started in any event. There is no benefit to having two parallel proceedings. The action has not been defended and the majority of the defendants have yet to be served (or even identified).

[44] The amendments add additional plaintiffs and propose additional classes. In addition to the class of residents, there will now be a class of businesses that were disrupted and employees of business whose employment was disrupted. In addition to damages for nuisance caused by noise, the claim now also seeks damages for other forms of nuisance such as air pollution from numerous idling diesel engines and tortious interference with the right to carry on business.

[45] To be clear, the class proceeding has not yet been certified as such. Consideration as to whether or not a class proceeding is appropriate will take place in due course at a motion under s. 5 of the *Class Proceedings Act.*[8] As soon as possible, I will designate a case management judge from the class proceedings team who will set a timetable and a date for the certification motion. We are not at that stage.

[46] It is important to note, however, that whether or not certification is granted, the named plaintiffs have individual rights to sue on their own behalf and to seek interim remedies such as an injunction.

Summary and Conclusion

[47] For the reasons discussed above, I signed two orders. The first was the pleading amendment order. The second was the temporary Mareva injunction.

[48] In addition to serving the orders on the parties affected, counsel for the plaintiffs will have to provide notice of a motion to extend the injunction if they propose to do so. I have made time available for that purpose on the morning of February 28, which is the day the temporary injunction will otherwise expire.

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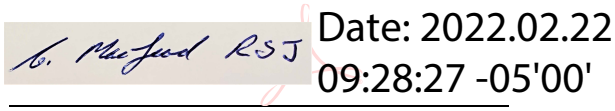
[8] *Class Proceedings Act, 1992,* S.O. 1992, c. 6 as amended to December 8, 2021 (the "Act")

[49] As I have been at pains to be clear, the class proceeding has nothing to do with any of the regulatory or criminal proceedings that are underway or may result from the actions of the protestors. Nevertheless, in light of the extraordinary public interest in this matter and the overlapping orders I have mentioned above, there is the possibility that the Mareva injunction could impact one or more of those other proceedings.

[50] Under the circumstances, it would be appropriate to put the Attorney General of Ontario and the Attorney General of Canada on notice in case they are of the view that this injunction clashes with other proceedings. I understand the Canadian Civil Liberties Association has also launched a challenge to the declaration of the *Emergencies Act* and while an injunction such as this engages different considerations, counsel for the CCLA should also be given notice.

[51] To be clear, I am not inviting anyone to intervene in the injunction motion, but I want to ensure they are aware of the hearing.



Mr. Justice C. MacLeod

Date: February 22, 2022

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BEFORE: Regional Senior Justice Calum MacLeod

COUNSEL: Monique J. Jilesen, Madison Robins, Sarah Bittman and Jessica Kras, as agents for Paul Champ, Counsel, for the Plaintiff

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REASONS FOR DECISION

Regional Senior. Justice C. MacLeod

Released: February 22, 2022