CITATION: Li et al. v. Barber et al., 2023 ONSC 1679
COURT FILE NO.: CV-22-88514-CP
DATE: 2023/03/13

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: **Paul Champ and Christine Johnson**, for the Plaintiffs

James Manson & Jorge Pineda for the Defendants, Tamara Lich, Tom Marazzo, Chris Barber, Sean Tiessen, Miranda Gasior, Daniel Bulford, Ryan Mihilewicz, Dale Enns and Freedom 2022 Human Rights and Freedoms and the Proposed Defendants/Moving Parties, Harold Jonker, Jonker Trucking Inc. and Brad Howland

Brigitte Belton, in person

HEARD: January 24, 2023

DECISION AND REASONS

Introduction

[1] This motion deals with the form of the Statement of Claim in this proposed class proceeding which, for convenience, I will call the "Convoy Class Proceeding". Technically, there are two motions, a motion by the plaintiff to amend the claim and a motion by a group of defendants to strike it. The issue is the same. Is the proposed Statement of Claim acceptable?

[2] Consideration of the pleading has been delayed by the initial round of motions which took place at the beginning of the action and also to some extent by the federal inquiry into the use of the *Emergencies Act* which occupied the time of many of the principal actors and their counsel. The facts surrounding the Convoy and the previous steps in this litigation are well documented. [1]

[3] There is nothing fundamentally wrong with the plaintiffs seeking remedies against the defendants who were involved in one way or another with the activities of the "Freedom Convoy" and their "occupation" of downtown Ottawa. In Canada, individuals who believe they suffered damage due to the actions or omissions of others may seek redress from those others through the courts. This is possible in any situation where the injured party alleges that its rights have been unreasonably breached by another party, even a party that is otherwise acting lawfully. The mechanism for this is a civil action for tort damages.

[4] In addition to the right to sue for damages, legislation in most provinces provides for collective litigation in appropriate cases. The mechanism for this is a class proceeding. It is a procedural question whether or not to allow a class proceeding rather than a series of individual lawsuits.[2] That is not the question of the day. Nor is this the day to determine whether the claim of the plaintiffs will be successful. We are concerned, on this motion, with the drafting of the Statement of Claim because that is the document that shapes the litigation and to which the defendants must respond.

[5] Counsel for the defendants concedes that it is theoretically possible for the plaintiff to successfully plead liability for private and public nuisance. He also concedes that Canadian law recognizes the concept of joint liability for parties involved in a common design or purpose but he argues that the Statement of Claim as now proposed does not articulate causes of action against the named defendants. Alternatively, he argues that the Statement of Claim offends numerous rules of pleading and should be struck out.

[6] For the reasons that follow, I do not accept that the claim as drafted discloses no cause of action and I accept that the plaintiffs should not be unduly limited in how they choose to frame the

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[1] See 2022 ONSC 1176, 2022 ONSC 6899 as well as other decisions, endorsements and case management orders. The unfolding series of events surrounding the Convoy are also set out in detail in the Report of Commissioner Paul Rouleau which was released on February 17, 2023: https://publicorderemergencycommission.ca/final-report/

[2] S. 5, *Class Proceedings Act, 1992*, S.O. 1992, c. 6 as amended

litigation. On the other hand, the court has a responsibility not to allow litigation such as this to spin out of control by pleading facts that are both highly contentious and irrelevant to what the plaintiffs would have to prove to win the case. Some judicious pruning is necessary.

Background and History of the Litigation

[7] From approximately January 28, 2022 until February 21, 2022 the City of Ottawa was home to a demonstration styled the Freedom Convoy. It was ostensibly a protest against the continuation of COVID-19 public health measures including vaccine and masking mandates. The Convoy also attracted participants with various anti-government messages including those who wished to show their distain for the current Prime Minister.

[8] The central feature of the protest involved blocking the streets in front of Parliament and the surrounding downtown core with large tractor trailers and other vehicles. One of the tactics of the protesters, besides blocking the streets, was to make continuous noise with truck horns and other devices. Besides the truck horns, there were exhaust fumes from truck engines and other activities which disrupted the normal lives of those who live and work in Ottawa.

[9] On February 4, 2022, the plaintiff Zexi Li commenced this action on her own behalf and on behalf of other residents of the downtown core. On February 5 and 7, the plaintiff was successful in obtaining an interim injunction restraining the continuous use of truck horns.[3] That initial injunction was granted by my colleague, Justice McLean. Subsequently, in my role as the Regional Senior Justice, I appointed myself as the class proceedings judge for this proceeding and I have heard the subsequent motions. I have also conducted case conferences as necessary for organization and scheduling purposes.

[10] On February 17, 2022, I granted an *ex parte Mareva Injunction* and I also permitted the plaintiff to amend the original pleading.[4] The amendment added three representative plaintiffs and proposed three classes: a resident class, a business class and an employee class. This "Fresh as Amended Statement of Claim" is the current pleading. It names 18 identified defendants and it names 62 "John Doe" or "Jane Doe" defendants which are place holders for defendants whose identities were not known at the time.

[11] The claim pursues damages for harm and losses said to have been incurred by the residents, businesses and employees in what the Statement of Claim defines as the "occupation zone". It asserts liability on the part of the participants, organizers, fundraisers and donors based primarily on the torts of public and private nuisance.

[12] Several of the named defendants have been represented by counsel and have appeared before the court on the motions to amend and extend the original injunction as well as a motion to

[3] 2022 ONSC 1037 & 2022 ONSC 1513
[4] 2022 ONSC 1176

release some of the frozen funds. For purposes of the current motion, I need not detail all of those events but the *Mareva Injunction* has been replaced with a preservation order and the undistributed funds raised to support the convoy are currently frozen in the hands of an escrow agent answerable to the court. A portion of those funds is also the subject of a "restraint order" made pursuant to the *Criminal Code of Canada.* On two occasions, I have granted consent amendments to the restraint order which was originally granted by Associate Chief Justice McWatt.

[13] In the current pleading, the named defendants include the ten defendants represented on this motion by Mr. Manson, Ms. Belton (who appeared in person), Benjamin Dichter and Chris Garrah (who are represented by counsel but did not appear on this motion[5]) as well as Mr. St. Louis, Mr. Eros, Mr. Bauder, Mr Jansen and Mr. Laface (who did not attend and were not represented). Mr. Manson also represents Harold Jonker, Jonker Trucking Inc. and Brad Howland who counsel for the plaintiff now proposes to name as defendants in the amended claim.

[14] No one appeared for the proposed American defendants, GiveSendGo LLC and Jacob Wells. Mr. Wells did appear by video on one of the earlier motions but at that time no one was proposing to name him as a defendant.

The Nature of the Motion

[15] As mentioned, the previous motions dealt largely with interim injunctions and the freezing of funds. This motion deals with the pleadings and specifically with a proposed "Further Fresh as Amended Statement of Claim". The motion was discussed and scheduled at previous case conferences or other court appearances. [6] It is countered by several of the defendants who bring a motion to strike the claim for failure to adhere to proper pleading rules.

[16] To repeat, this is not a motion to determine the merits of the claim or whether it should be allowed to proceed as a class proceeding. The first step in framing any civil dispute is the delivery of the plaintiff's Statement of Claim. That is the foundational document that determines what questions the plaintiff wishes to put in issue. Whether it has merit and whether a class proceeding is a suitable vehicle for the litigation will be determined subsequently.

[17] For their part, the defendants represented by Mr. Manson move to strike the Statement of Claim. They argue that the new "Further Fresh as Amended Statement of Claim" proposed by the plaintiffs is a defective document and should not be permitted.

[18] Ms. Belton (who is self represented) advised the court that she did not think the attempt by the plaintiff to sue people who donated funds to support the protest was fair. As she put it, should a single mother who donated $5 thinking she was doing a good thing be sued? That is a fair question which may have to be answered at some point but it is a question for another day.

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[5] See 2022 ONSC 6304 and 2022 ONSC 6899
[6] 2022 ONSC 6304

[19] The form of the pleading is just a starting point. It is notice to the defendants of the remedies sought by the plaintiffs and the basis on which they are making their claims. Allegations in a Statement of Claim must subsequently be proven unless they are admitted by the defendants. There are many processes available to defendants at different stages in the litigation to seek dismissal of an action that has no merit. In the life of a class proceeding, there is an important step at which the court must decide if a class proceeding is an appropriate vehicle for the litigation. We are not there yet.

The Nature and Role of Pleadings

[20] It is necessary to say a word about the pleading rules in Ontario and the purpose of pleadings. In Canada, civil procedure is a matter within the jurisdiction of the provinces and as such the rules and terminology are slightly different from province to province.[7]

[21] In Ontario, pleadings consist of a Statement of Claim followed by a Statement of Defence and if necessary a Reply. There are other more exotic pleadings such as crossclaims, counterclaims and third party claims, but for purposes of this motion we are concerned with the Statement of Claim which is the initiating document in the main action of a civil proceeding. The content and form of pleadings are set out in Rule 25 of the *Rules of Civil Procedure* and in particular in Rule 25.6. The most basic rule is that a pleading is to "contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved."

[22] The distinction between material facts and evidence is not a bright line. The party pleading is supposed to provide sufficient detail that the party responding knows the nature of the case it has to meet and can determine what is the factual basis for the claim being advanced by the plaintiffs. While conclusions of law may be stated and the plaintiff may plead specific causes of action, the pleading is not the place to make legal argument or to introduce issues that are not relevant to a legal claim. The rules contain prohibitions on improper pleading.

[23] Rule 21.01 (b) permits a party to move before a judge to strike out a pleading on the ground "that it discloses no cause of action". Rule 25.11 permits the court to strike out or expunge all or part of a pleading because it may, "prejudice or delay the fair trial of an action", "is scandalous, frivolous or vexatious", or "is an abuse of the process of the court". By contrast, Rule 26.01 requires the court to grant leave to amend a pleading "on such terms as are just unless prejudice would result that could not be compensated for by costs or an adjournment". Rule 5.04 (2) deals with adding or deleting parties and is in similar terms except that it is discretionary. The court may add or delete a party "on such terms as are just unless prejudice would result that could not be compensated for by costs or an adjournment".

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[7] The names of the courts differ as well. The Superior Court of Justice is the name of the superior court in Ontario. In other provinces, it may be known as the Court of King's Bench or the Supreme Court, Trial Division. See here for a generic outline of the Canadian court system: https://cscja.ca/canadas-court-system/

[24] On a combined motion such as this, these rules must be read together. The amendments should not be granted if they would result in pleadings that could be struck out or if they would result in irremediable prejudice. A pleading should be struck out if the pleading discloses no cause of action. Assuming the facts as pleaded to be true (unless they are ridiculous or incapable of proof) the court must assess whether the Statement of Claim discloses a plausible cause of action against the defendants. If there is no plausible case disclosed by the pleading and the action is impossible of success on those facts, the claim should be struck. On the other hand, the pleading should be read generously. If the claim could succeed as framed, it should not be struck.[8]

[25] The factors listed in Rule 25.11 are also important as are the pleading amendment rules in Rules 26.01 and 5.04 (2). It is always prejudicial for a defendant to be named in a lawsuit but that is not the prejudice referred to in Rules 26.01 or 5.04 (2). A party might object that it is prejudicial to add or delete parties because the addition or deletion adversely impacts their defence but the party cannot simply object to being sued. That is particularly the case when, as here, the limitation period has not expired. [9] The plaintiffs can still start new proceedings against parties they did not name in the original lawsuit.

[26] It would be prejudicial however to add a party to a frivolous lawsuit and it would be prejudicial to allow amendments which violate any of the factors set out in Rule 25.11. In this case, it is important to review the Statement of Claim and not to allow pleadings that appear to overly complicate the proceeding, are frivolous, vexatious or an abuse of process.

[27] It is well to keep in mind the purpose of pleading. A statement of claim should give the defendant notice of the case against him or her. The pleading should "define with clarity and precision the question in issue between the litigants", give "fair notice of the precise case that is required to be met and the precise remedies sought" and should "assist the court in its investigations of the truth and the allegations made in the pleading". [10]

[28] In addition, pleadings define the issues for the action by determining what facts are in controversy and what are not. By giving notice of the claim, the pleading permits the defendants to marshal the evidence necessary to prove or refute the facts in dispute. The pleadings alert the court to the questions of fact and law it must determine. Pleadings also establish the record so that it is possible to determine what questions the litigation will resolve. Beyond this, however, pleadings serve a tactical purpose and a persuasive function.[11] It follows that the court should not unduly interfere with the right of each party to present its case in the manner it feels will best advance its position.

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[8] See *Lysko v. Braley,* (2006) 79 O.R. (3d) 721 (CA)
[9] *Limitations Act, 2002,* SO 2002, c. 24, Sched B., s. 4 & 5. In addition, limitation periods are suspended when a Class Proceeding is started. See s. 28, *Class Proceedings Act, 1992,* SO 1992, c. C.6 as amended
[10] *National Trust v. Furbacher,* [1994] O.J. No. 2385 (Quicklaw) (Gen. Div.)
[11] See Perell & Morden, *The Law of Civil Procedure in Ontario,* 4th edition, LexisNexis Canada, 2020, paras 5.89 – 5.100

[29] The objective on a pleadings motion is not to rigidly enforce technical rules of pleading. Rather, the objective is to ensure that the pleading fairly outlines the case against the defendants in a manner that the defendants should reasonably be expected to respond to.

Analysis

[30] There is no mystery to the theory of lability advanced by the plaintiffs. It is based on well established heads of tort liability. Liability for private nuisance exists where the activities of a defendant on nearby land unreasonably interfere with the plaintiff's right to use and enjoyment of his or her own property. Intrusion of noise, vibrations, pollution, odours or other substances which interfere with enjoyment of land including leased premises such as apartments can be the basis of tort liability even if the activity of the defendant is itself reasonable and lawful.[12] In the present instance, the plaintiffs assert that noise, odour and pollution invaded the homes and businesses in the centre of Ottawa and interfered with daily living, with operation of businesses and with the rights of employees to earn a living. This is an entirely plausible cause of action.[13]

[31] Tort liability for public nuisance is slightly more complicated. Public nuisance exists where there is unreasonable interference with a public right such as the right to use the roads or sidewalks of the city. But to sue privately for public nuisance (without the approval of the Attorney General) requires the plaintiff to demonstrate particular loss or damage not suffered by the community at large.[14] In this case, the plaintiffs assert that those who live and work in the "occupation zone" were particularly impacted by the continuous interference with their rights of passage and rights of ingress and egress to their residences or businesses. It is not certain that the action will succeed or that it can be certified as a class proceeding, but again, on the facts as pleaded, this is a plausible cause of action.[15] Substantial economic loss and substantial inconvenience have been recognized as special damage in this context.[16]

[32] The defendants agree that it is plausible and possible for the plaintiffs to construct causes of action against certain defendants. They argue however that the plaintiffs cannot simply sue a group of defendants in a block for individual torts. For example, one of the proposed defendants parked his truck on Wellington Street in front of Parliament Hill. It is therefore impossible that noise from his truck interfered with Ms. Li in her residence.

[33] There are answers to this. Firstly, regardless of where individual trucks were located, it was the collective mass of all of the trucks and all of the protestors as well as the other activities

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[12] See Linden, Feldthusen, Hall, Knutsen & Young, *Canadian Tort Law,* 12th Edition, Lexis Nexis, Canada Inc., 2022 @ pp. 569 - 570

[13] *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13 (CanLII), [2013] 1 SCR 594 and see *Weenen v Biadi*, 2015 ONSC 6832 (CanLII)

[14] *Canadian Tort Law, supra,* p. 572 - 574

[15] *Ryan v. Victoria (City)*, 1999 CanLII 706 (SCC), [1999] 1 SCR 201

[16] *Canadian Tort Law, supra,* p. 578

taking place during the convoy which allegedly caused damage to the plaintiffs. No single vehicle would have had the same impact.

[34] The plaintiffs also rely upon the theory of common purpose. It has been found that where two or more individuals agree on a common purpose that is unlawful or tortious in itself, and in furtherance of that purpose one of them commits a tort, then all may be held jointly liable.[17] This requires a joint unlawful objective on the one hand and reasonably foreseeable tortious activity on the other.[18] The plaintiffs assert that the defendants came to Ottawa as part of the Convoy, helped to organize the Convoy or continued to fund the Convoy for the specific purpose of blocking the streets, making noise and impeding the operation of the national capital in order to force the government to bow to their demands.

[35] If the parties agreed or intended that the Convoy participants would blockade the streets, disrupt the operations of the city and disrupt the normal activities of the citizens, they may be found to be joint tortfeasors. Extension of such liability to those who continued to donate funds once the nature of the activity in Ottawa became apparent may be novel but it is not impossible of success. Concerted action liability is a fact-sensitive and fact specific concept.[19] It may be (as Ms. Belton suggests) that there are policy grounds for not extending liability to a class of donors even if the use or misuse of the funds was foreseeable. That is not an analysis that should be done at a pleadings stage.

[36] All of the necessary facts are pleaded. In some cases, they are pleaded more than once. The proposed statement of claim clearly discloses a plausible cause of action against all of the categories of defendants including the new defendants which the plaintiffs seek to name in place of the "John Doe" and "Jane Doe" defendants.

[37] There can be no prejudice in granting the amendments and adding or substituting parties for the John Doe and Jane Doe defendants. This is because no statements of defence have yet been filed and no limitation periods have expired. No one wants to be sued. Certainly no one wants to be named as a defendant in what may turn out to be protracted litigation but that is not a factor which precludes an amendment or the addition or deletion of parties.

[38] Whether it is appropriate to certify classes of defendants or to designate the targeted defendants as defendant class representatives is an issue for the certification motion. I will simply observe that objection to being so designated is not a bar to certification nor to designation as a representative defendant.[20] It is therefore not prejudicial to give notice of that intention in the

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[17] *Rutman v. Rabinowitz*, 2018 ONCA 80 (CanLII)
[18] *Fridman's The Law of Torts in Canada,* 4th Edition, Thomson Reuters Canada Limited , 2020 @ pp 1112 - 1113
[19] *Rutman v. Rabinowitz, supra* @ para. 35
[20] *Chippewas of Sarnia Band v. Canada (Attorney General)*, (1996) 29 OR (3d) 549, 2 CPC (4th) 295, 137 DLR (4th) 239 (Ont. Gen. Div); *Berry v. Pulley*, (2001) 8 CPC (5th) 366, 197 DLR (4th) 317 (SCJ)

Statement of Claim and the unwillingness to be designated as a class representative is not a matter to be considered at the pleadings stage.[21]

[39] The plaintiffs also seek punitive damages. While the normal measure of damages in tort cases is an amount considered necessary to compensate for the harm suffered and any actual provable economic losses, punitive damages are additional damages which courts may impose in certain cases. They are available if the conduct of the defendants is such that the conduct requires denunciation by the court and compensatory damages are deemed insufficient.

[40] To award punitive damages, a court must be persuaded that considering any damage award and any other punishment arising from the same circumstances, a further award of damages is rationally necessary.[22] A plaintiff seeking punitive damages must plead the basis for seeking such an award with particularity.[23] This explains the relevance of pleadings relating to whether or not the conduct of the defendants was malicious, targeted the plaintiffs or was disproportionate and unreasonable compared to the objectives of a reasonable right to protest. It is conceivable that punitive damages could be awarded on the facts as pleaded.

[41] I do not accept the proposition that the proposed "Further Fresh as Amended Statement of Claim" discloses no cause of action. To the contrary, it discloses a potential basis for liability on the part of some or all of the defendants as discussed above.

[42] If there are issues with the pleading, they lie not in whether it discloses a plausible cause of action or in the unwillingness of parties to be named as defendants. I have more sympathy with the objections of the defendants to the length of the pleading, with extraneous facts that are pleaded and with the language used in certain paragraphs. The new proposed pleading is 245 paragraphs in length. The defendants argue that this can hardly be described as a concise statement of material facts.

[43] Striking pleadings must be approached with caution. Anything that can be proven and may have a role in determining the rights of the parties may be pleaded. Irrelevant facts, facts inserted solely for colour or facts which are marginally relevant but highly prejudicial may be struck out. If a party is required to respond to irrelevant facts, inquire into those facts on discovery and respond to evidence of those facts at trial, the litigation and trial will be diverted by inquiries into facts that have no connection to the real issue before the court. [24]

[44] I do not accept the argument that the "Overview" in the Statement of Claim is inherently improper but it does pose some difficulties because it invites the defendants to dispute facts that would require extensive evidence quite unnecessary in order to prove liability. The background of the pandemic and the imposition of public health measures that were opposed by the defendants

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[21] *Witham v. FCA Canada Inc.*, 2018 ONSC 7703
[22] *Whitten v. Pilot Insurance Co.,* 2002 SCC 18, [2002] 1 SCR 495 *@ para. 74*
[23] *Whitten, supra @* para. 87
[24] *Canadian National Railway Company v. Brant,* (2009) 96 OR (3d) 734 (SCJ)

is relevant but in my view these paragraphs as now drafted pose a real risk of sidetracking the litigation. A Statement of Claim is intended to set out facts material to the causes of action, to the damages suffered and to the remedies that are sought. It is not to be drafted as a political manifesto.

[45] Paragraphs two to four of the proposed pleading read as follows:

> 2. Since 2020, the COVID-19 pandemic has caused significant stress, severe illness, death and grief to people across Canada. By February 2022, over 33,000 Canadians had died from COVID-19 and thousands more suffered from its prolonged effects.
>
> 3. Governments at all levels across the country adopted public health measures to prevent severe illness and death from COVID-19. These public health measures caused significant disruption to the lives of every Canadian. Despite this disruption, the vast majority of Canadians supported public health measures, including vaccine mandates, because these measures saved lives.
>
> 4. A minority of Canadians were strongly opposed to these public health measures. The Defendants are among this minority. To express their political opposition to COVID-19 public health measures, the Defendants organized a "Freedom Convoy" of vehicles, including a large number of semi-tractor-trailer trucks, to travel from different parts of Canada and converge on the national capital of Ottawa and occupy its roads and streets for an indefinite period of time.

[46] It may well be true that 33,000 Canadians had died of Covid at the time of the Convoy, but it is hardly necessary for the plaintiffs to have to prove that number. Similarly, putting in issue whether vaccine mandates actually saved lives and whether a majority of Canadians supported the public health measures is unnecessary and perhaps inflammatory given the circumstances.

[47] It seems to me that the last sentence of paragraph three is either an opinion or an irrelevant fact or both. Similarly, the first sentence of paragraph four is entirely unnecessary. What is important to the causes of action as pleaded is the allegation that the defendants were strongly opposed to the continuation of public health measures and they planned to occupy the roads and streets of Ottawa for an indefinite period of time.

[48] Accordingly, I agree with the defendants that portions of paragraphs two to four should be struck. I would also strike the last sentence from paragraph 12 which asserts that the “Freedom Convoy occupation made downtown Ottawa a living hell for residents”. Whether or not the experience was viewed that way, the assertion that it was “a living hell” is not a material fact capable of proof. It may be that living downtown became intolerable for some of the residents.

[49] I do not accept the defendants’ criticism that defining the area where members of the plaintiff classes lived, worked or carried on business as the “occupation zone” or using the word “occupation” is inflammatory. The plaintiffs’ claims are based in part on the assertion that the organizers and participants came to Ottawa with the explicit purpose of occupying the city to put

pressure on the government. It is relevant to the claim for joint liability and for punitive damages that at least some of the defendants intended to act unlawfully and to inflict inconvenience, if not harm, on the residents of Ottawa.

[50] Similarly, I do not accept the argument that pleading that certain of the defendants were charged with criminal offences is either inflammatory or irrelevant. Obviously, criminal charges will be determined in a different forum and being charged with a crime does not prove tortious conduct. It is, however, relevant to the claim for punitive damages and to the question of whether the activity of the protestors was reasonable.[25] As the defendant correctly argues, the focus in nuisance is not on whether the activity of the tortfeasor is reasonable but rather upon whether or not the interference with the plaintiff's rights was reasonable. Indeed, what is *prima facie* lawful may become tortious if it is done in an unreasonable manner.[26] But, the lawfulness of the activity is not irrelevant to that analysis. The defendants' intentions, knowledge or foresight may affect the analysis of whether liability should be imposed. [27]

[51] At 244 paragraphs, the Statement of Claim is a somewhat sprawling document and there is no doubt that the pleading is somewhat repetitive. It could be made more precise. Paragraph 118, which pleads that operator manuals for the air horns and train horns contain a warning about hearing damage can be criticized as a pleading of evidence. Similarly, paragraph 132, which pleads that Freedom 2022 approached several financial institutions that refused to open bank accounts for fear that the funds would be used to support illegal activities is problematic. It is also unnecessary given the content of paragraph 133. I would strike these two paragraphs.

[52] At the end of the day, however, the plaintiffs are seeking to pursue a novel claim in which they seek to certify both plaintiff and defendant classes. It is necessary for them to plead with robust particularity what role each named defendant played, what role each proposed class of defendants played and how exactly the plaintiffs seek to attribute liability to each. In these circumstances some flexibility is appropriate.

Conclusion and Decision

[53] In conclusion, I allow the plaintiffs to issue a Further Fresh as Amended Statement of Claim substantially in the form proposed. The plaintiffs shall remove the second sentence of paragraph two, the last sentence of paragraph three and the first and second sentences of paragraph four. The plaintiffs shall also remove the last sentence of paragraph 12 and paragraphs 118 and 132. The plaintiffs may renumber the paragraphs accordingly.

[54] I also grant leave to add the additional named defendants, to delete the John Doe and Jane Doe defendants and to amend the title of the proceedings in the manner set out in the proposed statement of claim.

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[25] See *Demers v. Ontario,* 2023 ONSC 1267 (CanLII)
[26] *Fridman, supra,* p. 204
[27] *Fridman, supra,* p. 206

[55] Finally, I grant leave to issue the document as Further Fresh as Amended Statement of Claim rather than attempting to comply with Rule 26.02 (2) and (3). Marking the amendments on the face of the claim would result in an unreadable document and since there are not yet any statements of defence, it would serve no purpose.

[56] The amended claim is to be issued within seven days and is to be served on all defendants within 90 days.

Costs

[57] I did not hear submissions on costs. I encourage counsel to agree on a costs order but if they are unable to do so, 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 April 14, 2023 there will be no order as to costs.

Justice C. MacLeod

Date: March 13, 2023

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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: **Paul Champ and Christine Johnson**, for the Plaintiffs

James Manson & Jorge Pineda for the Defendants, Tamara Lich, Tom Marazzo, Chris Barber, Sean Tiessen, Miranda Gasior, Daniel Bulford, Ryan Mihilewicz, Dale Enns and Freedom 2022 Human Rights and Freedoms and the Proposed Defendants/Moving Parties, Harold Jonker, Jonker Trucking Inc. and Brad Howland

Brigitte Belton, in person

DECISION AND REASONS

Regional Senior Justice C. MacLeod

Released: March 13, 2023