COURT OF APPEAL FOR ONTARIO

CITATION: Li v. Barber, 2025 ONCA 169
DATE: 20250306
DOCKET: COA-24-CV-0207

Lauwers, Brown and Coroza JJ.A.

BETWEEN

Zexi Li, Happy Goat Coffee Company Inc.,
7983794 Canada Inc. (c.o.b. as Union: Local 613)
and Geoffrey Devaney

Plaintiffs (Respondents)

and

Chris Barber*, Benjamin Dichter, Tamara Lich*, Patrick King*,
James Bauder, Brigitte Belton, Daniel Bulford*, Dale Enns*,
Chad Eros, Chris Garrah, Miranda Gasior*, Joe Janzen*, Jason
Laface, Tom Marazzo*, Ryan Mihilewicz*, Sean Tiessen*,
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 (Appellants*)

Proceeding under the *Class Proceedings Act, 1992*

James Manson and Chris Fleury, for the appellants 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

Shelley Overwater, for the appellants Patrick King and Joe Janzen

Reidar Mogerman, for the respondents

Heard: October 28, 2024

On appeal from the order of Regional Senior Justice Calum U. C. MacLeod of the Superior Court of Justice, dated February 5, 2024, with reasons reported at 2024 ONSC 775.

Brown J.A.:

[1] This is an appeal of another pre-certification order made in this proceeding, which was commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. The plaintiffs in this action seek damages for the private and public nuisances allegedly caused by the lengthy 2022 protest in Ottawa known as the Freedom Convoy. Certain of the defendants moved to dismiss the action under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the so-called anti-SLAPP provision. The motion judge, who was case managing the proceeding, dismissed the s. 137.1 motion; the appellants appeal.

BACKGROUND

[2] Zexi Li, the original plaintiff in this proceeding, was a resident of Ottawa at the time of the Freedom Convoy in January and February, 2022. She lived within the zone in which protesting truckers parked their rigs on public streets, frequently blew their air and train horns, and often idled their engines.

[3] The protest started on January 28, 2022. Li commenced this proceeding under the *Class Proceedings Act, 1992* (the "*CPA*") on February 4, 2022. Authorities brought the Convoy protest to an end on February 21, 2022 following the invocation by the federal government on February 14 of the *Emergencies Act*,

R.S.C. 1985, c. 22 (4th Supp.), under which it declared a public order emergency in respect of the Freedom Convoy protest.

[4] The claim started out modestly: Zexi Li was the sole proposed representative plaintiff seeking damages for private nuisance in the amount of $4.8 million, plus punitive damages, on behalf of residents who lived within a six-block radius around the main protest streets. The initial claim named as defendants the appellants Chris Barber, Benjamin Dichter, Tamara Lich, and Patrick King, together with 60 “John Does”.

[5] After two amendments, the March 2023 Further Fresh as Amended Statement of Claim now names:

(a) four proposed representative plaintiffs:

(i) Zexi Li, on behalf of the Resident Class – those who resided within the protest zone;

(ii) Happy Goat Coffee Company Inc. and 7983794 Canada Inc., c.o.b. as Union: Local 613, two restaurants on behalf of the Business Class – businesses that operated within the protest zone and claim to have experienced business losses as a result of the Convoy;

(iii) Geoffrey Devaney, who worked as a server in a restaurant in the protest zone, on behalf of the Employee Class – persons who worked as employees within the protest zone;

(b) a number of individual defendants whom the respondents allege were the organizers and financial managers of the Convoy, specifically: Chris Barber;* Benjamin Dichter; Tamara Lich;* Patrick King;* James Bauder; Brigitte Belton; Daniel Bulford;* Dale Enns;* Chad Eros; Chris Garrah; Miranda Gasior;* Joe Janzen;* Jason LaFace; Tom Marazzo;* Ryan Mihilewicz;* Sean Tiessen;* Nicholas St. Louis; Freedom 2022 Human Rights and Freedoms;* GiveSendGo LLC; and Jacob Wells (the appellants are identified by asterisks after their names); and

(c) several defendants whom the respondents will seek on their certification motion to have the court designate as representative defendants for two defendant classes:

(i) Trucker Class Defendants: the operators and owners of trucks parked in the protest zone and that honked air or train horns, blocked streets, and idled their engines. The plaintiffs propose that Harold Jonker* and Jonker Trucking Inc.* should be appointed as representatives of the Trucker Class of Defendants;

(ii) Donor Class Defendants: persons who donated funds to the Convoy truckers on or after February 4, 2022 – when GoFundMe suspended the Convoy's fundraising account – who "knew or ought to have known that the truckers were engaged in tortious or illegal activity". The plaintiffs propose that Brad Howland* should be appointed as the representative of the Donor Class Defendants.

[6] The claim, as amended, seeks four heads of damages:

(i) General damages of $60 million for private nuisance and public nuisance causing pain, suffering and psychological distress;

(ii) Special damages of $70 million for private and public nuisance causing business losses;

(iii) Special damages of $150 million for private and public nuisance causing loss of wages; and

(iv) Punitive damages of $10 million.

[7] The claims asserted by the Resident Class, Business Class, and Employee Class sound in both private and public nuisance.[1]

[1] Further Fresh as Amended Statement of Claim, at paras. 1(c) and 15.

[8] To date, no certification motion has been brought. Several pre-certification motions have been heard over the past three years that have resulted in a number of orders, including the one under appeal:

(i) A February 7, 2022 injunction order that prohibited trucks participating in the Convoy from blowing their air or train horns while located in downtown Ottawa;

(ii) A February 16, 2022 order that extended the "no honking" injunction. The only defendants who appeared on the return of that motion – Chris Barber, Tamara Lich, and Benjamin Dichter – consented to the extension, although they had opposed the granting of the initial injunction. The extension order was granted two days after the federal government had invoked the *Emergencies Act*;[2]

(iii) a February 17, 2022 order amending the Statement of Claim and granting a temporary *Mareva* injunction: 2022 ONSC 1176;

(iv) a February 28, 2022 order extending and varying the *Mareva* injunction: 2022 ONSC 1351;

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[2] As stated by Mr. Wilson, counsel for Chris Barber, Tamara Lich, and Benjamin Dichter, on the return of the motion to extend the injunction:

> K. Wilson: But we consent to this order. We don't oppose it. My three individually named clients do not believe that horns should be used. As you know, two of them don't even have truck here, but in principle, they agree that it's too disruptive to the residents and they're even going the extra step of trying to move the trucks north.

Transcript, February 16, 2022, ABCO at pp. 1165-1166.

(v) a March 13, 2023 order that dismissed the appellants' motion to strike out the claim under rr. 21.01(b) and 25.11 of the *Rules of Civil Procedure* and permitted the plaintiff to file a further amended claim: 2023 ONSC 1679; and

(vi) the order under appeal, which is the February 5, 2024 order that dismissed the appellants' motion to dismiss the claim under s. 137.1 of the *Courts of Justice Act* (the "*CJA*"). (There was no order as to costs.)

[9] The appellants appeal the dismissal of their s. 137.1 motion.

[10] For the reasons that follow, I would dismiss their appeal.

SECTION 137.1 MOTIONS

The statutory provision

[11] Section 137.1 of the *CJA* creates a special screening mechanism by which defendants (or respondents in an application) can ask the court to dismiss one specific type of legal proceeding: namely, a proceeding that arises from an expression made by the person that relates to a matter of public interest.

[12] The section appears in the *CJA* under the heading, "Dismissal of proceeding that limits debate". Subsection 137.1(1) explains the goals the Ontario Legislature sought to achieve by enacting the section:

> **137.1** (1) The purposes of this section and sections 137.2 to 137.5 are,
>
> (a) to encourage individuals to express themselves on matters of public interest;
>
> (b) to promote broad participation in debates on matters of public interest;
>
> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
>
> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. [Emphasis added.]

[13] The protection of "expression on matters of public interest" lies at the heart of the section, which defines "expression" very broadly to mean "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."

[14] How does the section seek to protect "expression on matters of public interest"? By giving judges the power to dismiss proceedings – actions or applications – in certain circumstances, as explained by s. 137.1(3):

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

[15] As can be seen from that language, the statutory direction to judges to dismiss a proceeding that "arises from an expression made by the person that

relates to a matter of public interest" is subject to a significant caveat. A judge must not dismiss such a proceeding where the plaintiff or applicant – the person against whom a s. 137.1 motion is usually brought – can satisfy certain conditions, which are set out in s. 137.1(4):

> (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
>
> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit, and
>
> (ii) the moving party has no valid defence in the proceeding; and
>
> (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[16] As explained by the Supreme Court of Canada in its decision in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, [2020] 2 S.C.R. 587, at para. 31:

> [Section] 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 relates 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.

The controlling interpretation of *CJA* s. 137.1

[17] Although the language and structure of *CJA* s. 137.1 suffers from a certain awkwardness, in two 2020 decisions the Supreme Court of Canada provided the governing interpretation of the section that any motion judge must apply: *Pointes Protection* and *Bent v. Platnick*, 2020 SCC 23, [2020] 2 S.C.R. 645. The reasons of the motion judge in this case disclose that he was aware of the controlling principles emanating from those two cases and he purported to apply them.

[18] Later in these reasons, I will refer in some detail to relevant principles that have been stated in the *Pointes Protection* and *Bent* cases. At this point, I wish to recall how the Supreme Court has explained what role s. 137.1 may play in assessing whether a proceeding should be dismissed and, of equal importance, what role s. 137.1 cannot play. The limits the jurisprudence places on the reach of s. 137.1 motions are important for understanding whether the decision of the motion judge should be upheld or reversed.

[19] In understanding the scope and limits of what judges do when considering a s. 137.1 motion, the following points must be recalled:

- The Supreme Court has emphasized that a s. 137.1 motion is “unequivocally not a determinative adjudication” of the merits of the underlying claim or a conclusive determination of the existence of a defence: *Pointes Protection*, at paras. 37, 50, 52 and 71; *Bent*, at para. 4;

- A s. 137.1 motion is one of several procedural tools available under Ontario civil procedure to dispose of public interest expression cases before they reach trial or some other final hearing on the merits. For such types of cases, a s. 137.1 motion occupies a position that falls somewhere between a motion to strike out a claim as disclosing no reasonable cause of action or defence (which does not involve the consideration of any evidence) and a summary judgment motion that considers whether there is any genuine issue requiring a trial (which requires a deep dive into the evidence): *Pointes Protection*, at paras. 38, 52;
- Section 137.1 functions "as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions." In deciding such motions, a judge uses a "limited record" and "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, where judicial powers of inquiry are broader and pleadings more fully developed": *Pointes Protection*, at paras. 16, 37, and 52. As recently put by this court in *Burjoski v. Waterloo Region District School Board*, 2024 ONCA 811, at para. 6, the section "is intended to shut down plaintiffs who file abusive claims that have the effect of silencing opposing views, rather than to vindicate an apparently legitimate claim";

- A judge must recognize the limited nature of the record that is placed before the court on a s. 137.1 motion and the possibility of future evidence later in the litigation: *Pointes Protection*, at para. 37;
- As well, any determination on the admissibility or exclusion of evidence on a s. 137.1 motion does not bear on the evidence's ultimate admissibility at trial: as suggested in *Bent*, at para. 48;
- All of which is to say, a s. 137.1 motion is nothing like a trial. It does not reach a determinative adjudication of the merits of a claim or defence. The standard of proof to satisfy the elements of s. 137.1 is not as rigorous as the standard required to establish a claim at trial on a balance of probabilities. The section merely acts as a special pre-trial screening mechanism that enables a certain type of proceeding – those arising from public interest expression – to move along to a trial if it survives scrutiny under the s. 137.1 test;
- The heart or core of a judge's task in deciding a s. 137.1 motion is the weighing of competing interests and effects: a judge must weigh the public interest in vindicating legitimate claims through the courts against the resulting potential for quelling expression that relates to a matter of public interest. The weighing exercise directed by s. 137.1(4)(b) "allows motion judges to assess how allowing individuals or organizations to vindicate their rights through a lawsuit … affects, in turn, freedom of expression and its

corresponding influence on public discourse and participation in a pluralistic democracy": *Pointes Protection*, at paras. 33, 62 and 81.

- Finally, where the proceeding has been commenced under the *CPA*, a s. 137.1 motion does not perform the same functions as a *CPA* s. 5 certification motion. A proceeding commenced under the *CPA* that survives a s. 137.1 motion must still go through a certification motion in order to be able to proceed to a final adjudication on the merits under that Act.

The scope of an appeal court's review of a s. 137.1 order

[20] Just as the scope of the examination performed by a judge hearing a s. 137.1 motion is limited in nature, so too the scope of an appeal court's review of a s. 137.1 order is limited.

[21] An appeal court does not perform a fresh analysis of a party's s. 137.1 motion. Quite the contrary.

[22] As the Supreme Court explained at para. 77 of its decision in *Bent*, "[a] motion judge's determination on a s. 137.1 motion will typically be entitled to deference upon appeal, absent reviewable error." Examples of the sorts of reviewable errors that remove the need for an appellate court to defer to a motion judge are: (i) applying the wrong legal test on a s. 137.1 motion; (ii) misconstruing the law regarding the constituent elements of a claim and its defences; (iii)

misapprehending the evidence; and (iv) where a judge has made a finding of fact, committing a palpable and overriding error of fact: *Bent*, at para. 77.

[23] In *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129, 165 O.R. (3d) 753, leave to appeal refused, [2023] S.C.C.A. No. 172, this court reminded litigants about the deferential standard of review that applies on appeals from an order made under s. 137.1 stating, at para. 42:

> Lastly, it bears repeating that a motion judge's determination on a s. 137.1 motion will be entitled to deference on appeal absent an error in law or palpable and overriding error. This is especially so with respect to a motion judge's weighing of the public interest. Parties should be mindful of this standard of review when seeking to appeal an order in anti-SLAPP proceedings. As mentioned, this court has seen a proliferation of anti-SLAPP appeals. [Citations omitted.]

GROUNDS OF APPEAL

[24] The appellants advance the following grounds of appeal:

(i) First, the appellants submit the motion judge erred in several respects in his treatment of the merits-based hurdle in s. 137.1(4)(a)(i):

- He misapprehended the quality of the evidence filed by the respondents and failed to recognize that such evidence did not demonstrate "grounds to believe" that all aspects of the respondents' claims had substantial merit;

- He misapprehended the law of public nuisance and common design liability, which led him to fail to realize that the respondents' claims on those bases could not succeed on the evidence filed, including the lack of evidence of special damages suffered by the respondents as the law requires to establish public nuisance;
- He erred in finding that it was premature to consider whether the claim against the Donor Defendants sub-class had substantial merit;

(ii) The motion judge misconstrued the requirements of the "no valid defence" element found in s. 137.1(4)(a)(ii):

- by applying erroneous tests of "whether any of the potential defences are likely to prevail" or whether the appellants could demonstrate a "slam dunk defence"; and
- failing to consider the defences raised by the appellants or to recognize that the respondents had failed to adduce evidence on this aspect of the test; and

(iii) The motion judge erred by failing to conduct the weighing exercise mandated by s. 137.1(4)(b) and the analysis on that issue set out at para. 20 of his reasons was insufficient.

[25] I propose to deal with each ground of appeal in turn.

FIRST GROUND OF APPEAL: ERRORS INVOLVING THE SUBSTANTIAL MERIT ELEMENT: *CJA* s. 137.1(4)(a)(i)

Overview

[26] The appellants submit that the evidence tendered by the respondents did not provide the motion judge with the basis to conclude that their proceeding has substantial merit within the meaning of *CJA* s. 137.1(4)(a)(i).

[27] My analysis in this section will proceed in the following manner. First, I will set out the governing test and the motion judge's reasons. Next, I will identify the main errors alleged by the appellants in respect of the motion judge's merits-based element analysis, specifically: (i) his treatment of the issue of the evidence regarding concerted action by the appellants; (ii) his analysis of the claim against the proposed donor class of defendants; and (iii) his consideration of the proposed claims based on public nuisance. In the course of considering each error alleged, I shall set out in some detail the evidence that was before the motion judge.

The governing test

[28] Section 137.1(4) of the *CJA* stipulates that a judge shall not dismiss a proceeding that "arises from an expression made by the [plaintiff] that relates to a matter of public interest" if the responding party – in the present case, the respondent plaintiffs – satisfies the three conditions set out in ss. 137.1(4)(a)(i), (ii) and (b).

[29] What do the first two conditions require? As the Supreme Court explained in *Pointes Protection* at para. 42:

> [W]hat s. 137.1(4)(a) asks, in effect, is whether the motion judge concludes from his or her assessment of the record that there is a basis in fact and in law – taking into account the context of the proceeding – to support a finding that the plaintiff's claim has substantial merit and that the defendant has no valid defence to the claim.

[30] In *Pointes Protection*, the Supreme Court interpreted the "substantial merit" element of s. 137.1(4) as requiring a plaintiff to "satisfy the motion judge that there are grounds to believe that its underlying claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success": at para. 54.

[31] What does "a real prospect of success" mean? The Supreme Court explained at para. 49 of *Pointes Protection*:

> [F]or an underlying proceeding to have "substantial merit", it must have a real prospect of success – in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. In context with "grounds to believe", this means that the motion judge needs to be satisfied that there is a basis in the record and the law – taking into account the stage of the proceeding – for drawing such a conclusion. This requires that the claim be legally tenable and supported by evidence that is reasonably capable of belief.

[32] In assessing whether a plaintiff has demonstrated that there are grounds to believe the proceeding has substantial merit, the motion judge does not perform a

"deep dive" into the evidence. On the contrary, the motion judge's scrutiny of the evidentiary record on a s. 137.1 motion is much more "light touch". Direction on this issue was provided by the Supreme Court in *Pointes Protection*, at para. 52:

> [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, where judicial powers of inquiry are broader and pleadings more fully developed. 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. This might also include a preliminary assessment of credibility – indeed, the legislative scheme allows limited cross-examination of affiants, which suggests that the legislature contemplated the potential for conflicts in the evidence that would have to be resolved by the motion judge. However, s. 137.1(4)(a)(i) is not an adjudication of the merits of the underlying proceeding; the motion judge should be acutely conscious of the stage in the litigation process at which a s. 137.1 motion is brought and, in assessing the motion, should be wary of turning his or her assessment into a *de facto* summary judgment motion, which would be insurmountable at this stage of the proceedings. [Emphasis added.]

The reasons of the motion judge and the errors alleged by the appellants

[33] The motion judge accurately set out and summarized the principles expressed in *Pointes Protection* on the substantial merit branch of the s. 137.1(4) test: at paras. 9-15. As I will set out below, the motion judge applied those principles at paras. 26-29 of his reasons.

[34] The motion judge concluded that the plaintiffs had satisfied him there were grounds to believe that the proceeding had substantial merit. The appellants submit that the motion judge erred in several respects in reaching that conclusion:

- He misapprehended the quality of the evidence filed by the respondents and failed to recognize that such evidence did not demonstrate “grounds to believe” that all aspects of the respondents’ claims had substantial merit;
- He misapprehended the law of public nuisance and common design liability, which led him to fail to realize that the respondents’ claims on those bases could not succeed on the evidence filed, including the lack of evidence of special damages suffered by the respondents as the law requires to establish public nuisance;
- He erred in finding that it was premature to consider whether the claim against the Donor Defendants sub-class had substantial merit;

[35] Before considering those three alleged errors, I would observe that at several points in their argument the appellants appeared to dispute that the protest had any adverse impact on the plaintiffs. I say “appeared” because at other points the appellants seem to acknowledge that the three-week protest resulted in some disruption to the lives of those who lived and worked in the protest zone (which the respondents style in their pleading as the “Occupation Zone”).

[36] At para. 26 of his reasons, the motion judge concluded that the conduct of the protest had a significant impact on the lives of those within the protest zone, writing:

> 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.

[37] That conclusion was amply supported by the following evidence in the record before the motion judge:

- Zexi Li deposed to the noise levels inside and outside her apartment, the "overwhelming" smell of diesel fumes in downtown Ottawa during the protest, and the heckling she received from truckers when she left her apartment;
- Chantal Laroche provided an expert opinion about the detrimental health effects of high noise levels;
- Sean Flynn deposed to high noise levels, diesel fumes and public road blockades in the protest area. He attached as exhibits videos of the noise made by trucks both before and after the "no honking" injunction was issued on February 7, 2022;

- Ivan Gedz, one of the owners of the Union: Local 613 restaurant, provided an affidavit attesting to the economic impact of the protest on his restaurant's operations; and
- Larry Andrade, a Chartered Business Valuator and a partner at Deloitte LLP, provided an expert opinion on his estimated quantification of the total losses suffered by the Business and Employee Sub-Classes during the Convoy protest.

[38] Given that extensive evidentiary record, I understand the real thrust of the appellants' critique of the motion judge's reasons as focusing on three more specific issues that I outlined in para. 34 above. I shall consider each alleged error in turn.

First Error: Finding the claims based on the concerted action principle of tort liability satisfy the "substantial merit" element of the s. 137.1 test

The appellants' argument

[39] The motion judge was satisfied that the respondents had demonstrated grounds to believe their claim against the Organizer Defendants and Trucker Class Defendants had substantial merit. He wrote at para. 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.

[40] As I understand the evidence filed by the appellants and their argument on this appeal, they acknowledge that they each participated, in some way, in some aspect of the protest in Ottawa. However, they deny their participation and dealings with each other amounted to concerted action that would attract tort liability. The appellants submit the motion judge provided no details with respect to his findings in that regard and "thus seriously misapprehended the evidence" filed on the motion, thereby committing a reversible error.[3]

[41] The motion judge's reasons were brief. That, however, does not indicate he misapprehended the evidence. Civil motion judges in this province operate under tremendous time constraints. The supply of judicial time available to deal with civil motions simply is inadequate to meet the demand of litigants for time to hear such motions. In the present case, the motion was heard half a year after it was brought.

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[3] Appellants' Factum, at para. 78.

In some regions of this province, where judicial time is particularly scarce, that would be considered “fast track”.

[42] Based on my review of the record, I am not persuaded the motion judge’s conclusion was based on a misapprehension of the evidence. I propose to start my consideration of this ground of appeal by reviewing the scope of the record that was before the motion judge.

Evidence regarding the conduct of the non-affiants

[43] Most of the appellants filed affidavits in support of their 137.1 motion. Three did not: Chris Barber; Tamara Lich; and Patrick King.

[44] As part of their record on the s. 137.1 motion, the respondents/plaintiffs filed an affidavit from a legal assistant, Trudy Moore, that attached as exhibits parts of Volumes 1 and 2 of the 2023 *Final Report of the Public Inquiry into the 2022 Public Order Emergency* (the “Rouleau Report”). Several of the appellants testified at the Inquiry, including Chris Barber, Tamara Lich, and Patrick King.[4]

[45] In their factum, the appellants submit that the documents attached to Trudy Moore’s affidavit were not probative or were either irrelevant, inadmissible, or both.

[46] However, as the Supreme Court repeatedly emphasized in *Pointes Protection*, a s. 137.1 motion does not involve a determinative adjudication of a

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[4] Rouleau Report, Vol. 4: Process and Appendices, at pp. 21-3, 21-4.

claim on its merits. In *Bent*, the court suggested that any determination on the admissibility or exclusion of evidence on a s. 137.1 motion does not bear on the evidence's ultimate admissibility at trial: at para. 48. That result follows from the lower standard applied on a s. 137.1 motion than on a final adjudication on the merits. On a s. 137.1 motion a plaintiff need only satisfy the judge that there are "grounds to believe" that a proceeding has substantial merit. Moreover, in their notice of appeal the appellants do not advance as a ground of appeal that the motion judge erred by taking into account inadmissible evidence in his "grounds to believe" analysis.

[47] The Rouleau Report contains an extensive description of the conduct of the Convoy based on the evidence presented before the Inquiry. There are numerous references to the involvement of the appellants Chris Barber, Tamara Lich, and Patrick King in the Convoy's events.[5]

[48] As mentioned, Tamara Lich did not file an affidavit in support of her s. 137.1 motion. However, the affidavit of Trudy Moore attaches several exhibits that refer to or contain statements made by Tamara Lich regarding her involvement in the Convoy including: (i) the Amazon.ca website page advertising her April 2023 book, *Hold the Line: My story from the heart of the Freedom Convoy*; as well as (ii) video interviews of Tamara Lich about her book that aired on various online sites,

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[5] Rouleau Report, Vols. 1 and 2.

including Viva Frei; The Rubin Report; The Dr. Jordan B. Peterson Podcast; The Andrew Lawton Show; The Glazov Gang; The Ezra Levant Show; and The Western Standard.

[49] One of the major acts of nuisance upon which the plaintiffs advance their claim involves allegations that the large number of Convoy trucks parked in downtown Ottawa engaged in prolonged and intense honking of their air and train horns. On February 7, 2022, the plaintiff, Li, sought and obtained an injunction to restrain such honking. At the hearing of the injunction motion, the appellants Tamara Lich, Chris Barber, and Patrick King were represented by the same counsel. They opposed the granting of the injunction on numerous grounds. One ground was that an "informal group" of protesters had proposed a schedule for permissible honking and the schedule was an adequate alternative to an injunction.[6]

[50] The respondents filed an affidavit from Jeremy King, of the King International Advisory Group, that reported on the results of his search of social media postings about the Convoy by the appellants Tamara Lich, Chris Barber, and Patrick King. Social media posts by Chris Barber and Patrick King clearly encouraged protesting

[6] Submissions by their counsel, Mr. Wilson, Exhibit Book, at pp. 1114-1115. The proposed schedule was described in the February 5, 2022 affidavit sworn by the appellant, Daniel Bulford, at para. 7, Supplementary Exhibit Book, at pp. 21-22.

truckers to honk their horns after the plaintiff Li had obtained an injunction restraining such honking.[7]

[51] The respondents also filed several affidavits from an Ottawa resident, Sean Flynn, that contained videos taken by him of honking trucks at various protest locations. The videos were taken both before and after the issuance of the "no honking" injunction on February 7, 2022. In some of the videos, Mr. Flynn included shots of sound level readings displayed on his watch.

Non-trucker affiants

[52] Affidavits were filed from several appellants who did not drive a truck in the Convoy but who engaged in various activities in regard to the Convoy protest. They denied, often using the same language, that they were part of any organization or common design. A typical example was the affidavit filed by Daniel Bulford, a former RCMP officer, who deposed, in part, at paras. 6 to 10:

> I also confirm that I participated in the "Freedom Convoy" protest that took place in Ottawa in January and February of 2022. My original role for the protest was to work with others to provide a volunteer security presence for certain individuals (i.e. The Hon. Brian Peckford, Dr. Byram Bridle, Dr. Paul Alexander, Dr. Francis Christian, Dr. Eric Payne and Dr. Julie Ponesse) appearing publicly as guest speakers during the protest. However, that never came to pass. My ultimate role came to be that of a liaison between the protest and the Ottawa Police Service, the Parliamentary Protective Service, the Ontario Provincial Police and the RCMP. My primary

[7] Affidavit of Jeremy King affirmed September 1, 2023, at paras. 8 to 11, Exhibit Book, at pp. 472-474.

function was to triage information relating to anything that might have been construed as a threat to public safety and to forward such information to the different police organizations with whom I was in contact.

I also participated in a number of press conferences during the course of the protest.

That all said, I reject the allegations at paragraph 29 that I played an “important logistical and coordinating role in the tactical planning and execution of the tortious horn blasting and idling trucks”. That is totally false. I am not aware of any evidence that would support such an allegation.

…

I deny that I or any of the other defendants referred to at paragraph 43 were “responsible” for the various generic activities listed therein. There were never any such “responsibilities” in the sense that either I or the other so-called “Organizer Defendants” had any formal or definite roles to play while participating in the Freedom Convoy. There were no such roles. There was certainly never any “common design”, whether among the “Organizer Defendants” themselves or between them and any other individuals, to commit the torts or private and/or public nuisance, or any other tortious conduct. Indeed, there was never any “common design”, whether among the “Organizer Defendants” themselves or between them and any other individuals, to do any of the things that are alleged by the plaintiffs to constitute a private and/or public nuisance in this proceeding, including the use of truck horns, the production of diesel fumes as a by-product of idling truck engines, etc.

Furthermore, I deny that the various generic activities described at paragraph 43 of the Claim were things that I or the other so-called “Organizer Defendants” ever contemplated. For example, there was never any contemplation of “strategy” or “tactics” in the sense suggested by the plaintiffs. These words suggest a concerted effort by the so-called “Organizer Defendants”

> to direct or control other participants in the Freedom Convoy – by way of example, that the so called "Organizer Defendants" somehow came up with a plan to use truck horns as a form of protest, and to coordinate times where horns would be blown in unison, in order to disrupt the lives of Ottawa residents as much as possible. To be clear, there was never any such "strategy" or "tactic". To the extent that the Claim alleges any such strategy or tactics, those allegations are unfounded.

Trucker affiants

[53] Several affidavits were filed from appellants who acted as "road captains" for parts of the Convoy as it travelled to Ottawa. They admitted their role as road captains but denied they acted as organizers or leaders of the Convoy protest in Ottawa. For example, Dale Enns deposed, in part, at paras. 18, 24 and 28 of his affidavit:

> I generally admit that the other so-called "Organizer Defendants" made some efforts to discuss and coordinate plans, and divide responsibilities among ourselves to oversee planning and logistics, and manage social media and fundraisers. However, I deny that those efforts resulted in any kind of formal hierarchy, organization or "central command" that would go on to control and direct the Freedom Convoy in any appreciable way.
>
> …
>
> I agree that some of the "Organizer Defendants", including me, would do what we could to help out in general as we saw a need, including delivering various supplies to truck drivers from time to time. However, it is untrue that "the trucks remained running all day and night".
>
> …

> I admit that there were many instances where protestors honked the horns of many of the tractor-trailer units that were located in downtown Ottawa during the protest. That said, I deny all of the specific allegations in these paragraphs, including the allegations to the effect that the honking of horns was a "main tactic" that was part of any "common design" on the part of any of the defendants. Neither I nor, to the best of my knowledge, any of the other so-called "Organizer Defendants" ever "planned, organized, encouraged and directed" anyone to "blast the horns on their vehicles, non-stop, for several hours every day". I reject the very notion that I had any authority to do so, or that any of the other protestors would have followed any such instructions anyway. I also reject the allegation that any horns in fact were being honked "non-stop, for several hours every day". To the best of my recollection, I personally never honked any horns at all during the Freedom Convoy protest.

[54] Harold Jonker, whom the respondents will ask the court on the certification motion to designate as the representative defendant for the "Trucker Class Defendants", deposed that he and other trucker employees of his company, the appellant Jonker Trucking Inc., drove twelve of the company's trucks to Ottawa to participate in the Convoy protest. Initially, most of those trucks were directed by the police to park along Queen Elizabeth Driveway in a residential area. However, Mr. Jonker deposed that he and most of the other company truckers soon left that location to park in a staging area known as "Coventry". Thereafter, he moved to another staging area, "Yard 88", while the remaining company truckers "would move around from time to time to other locations in the protest area." As Mr. Jonker deposed, in part, at paras. 7, 8, 25, 29 and 30:

I also confirm that I was a vocal supporter of the protest. It is true that I gave a number of media interviews while I was in Ottawa. That said, I deny that any such interviews were to “support, encourage and promote the ongoing occupation of Ottawa”.

…

I confirm that I was a “road captain” for Southwestern Ontario, meaning that I had a hand in organizing the actual movement of trucks that departed from southwestern Ontario, bound for Ottawa. The convoy of trucks that I was involved with actually started from Fort Erie, Ontario. My role before the convoy departed was to basically respond to phone calls and provide information to people who were either interested in travelling in the convoy to Ottawa, or donate to the convoy, etc.

…

My own Jonker Trucking Inc. truck remained at the Coventry location until I personally moved it to another yard (known as “Yard 88”) located outside the City of Ottawa several days later. To the best of my knowledge, the remaining Jonker Trucking Inc. trucks that had relocated with me to the Coventry location did not remain at the Coventry location for the duration of the protest, but rather would move around from time to time to other locations in the protest area. I was, however, not in control over, and did not direct, where those trucks went on any given day, or how long they stayed there, or what the drivers of those trucks did at those times.

…

I almost never honked any horns at all during the Freedom Convoy protest. I honked my truck horn a little bit during the first day of the protest upon arriving in Ottawa – this was usually in response to children who would see my truck and motion for me to honk my horn (as children often do). However, aside from those initial occasions, I don’t recall ever honking my horn during the protest. I have no idea what any of the other so-called

> "Trucker Class Defendants" did or didn't do while they were in Ottawa.
>
> …
>
> I am not aware of there ever having been any "directions on horn honking" that would emanate from any meetings at the ARC Hotel.[8]

Analysis

[55] As this representative survey of the record reveals, the evidence before the motion judge dealt at some length with the activities of the appellants during the Convoy protest. Nevertheless, the appellants submit the evidence does not provide grounds to believe the plaintiffs' tort claims against them based on the theory of concerted action liability have substantial merit.

[56] As pleaded, the plaintiffs' concerted action-based tort claims allege that the Organizer Defendants "planned, encouraged, facilitated, supported, promoted and directed" the honking and prolonged emission of diesel fumes or acted "in concert with the common intention of causing discomfort, distress and harm to the Resident Class Members in order to pressure, compel and coerce the Government of Canada and other levels of government to meet their demands of withdrawing all COVID-19 public health measures and restrictions."[9]

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[8] The ARC Hotel in downtown Ottawa was one of three hotels in which various Convoy organizational activities were undertaken: Rouleau Report, Vol. 1, Executive Summary, at p. 55.
[9] Further Fresh as Amended Statement of Claim, at paras. 226, 228.

[57] As was explained by this court in *Rutman v. Rabinowitz*, 2018 ONCA 80, 420 D.L.R. (4th) 310, leave to appeal refused, [2018] S.C.C.A. No. 130, at para. 35, concerted action liability in tort is a fact-sensitive concept. In that case, this court set out at paras. 33 and 34 the key elements of tort liability based upon concerted action:

> Concerted action may occur in a variety of ways. Generally, it involves a common design or conspiracy. In *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, the Supreme Court of Canada adopted the following formulation of the law regarding concerted action liability as set out by John G. Fleming in *The Law of Torts, 8th ed.* (Sydney: Law Book Co., 1992), at p. 255:
>
> > The critical element of [concerted action liability] is that those participating in the commission of the tort must have acted in furtherance of a common design. … Broadly speaking, this means a conspiracy with all participants acting in furtherance of the wrong, though it is probably not necessary that they should realize they are committing a tort.
>
> The difficulty, of course, is determining the degree of involvement or connection necessary to meet the requirements of concerted action liability. 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 … In *The Law of Torts, 10th ed.* (Sydney: Thomson Reuters, 2011), at p. 302, Fleming puts it this way: "[k]nowingly assisting, encouraging or merely being present as a conspirator at the commission of the wrong would suffice, so too would any form of 'inducement, incitement or persuasion' which procures the commission of the wrong." And, W. Page Keeton, in *Prosser and Keeton on the Law of Torts, 5th ed.*

(Minnesota: West Publishing Co., 1984), at p. 323, states:

> All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable.

[58] The motion judge concluded, at para. 27 of his reasons:

> 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.

[59] I do not regard that conclusion as the product of reviewable error by the motion judge. Specifically, I am not persuaded that it was based on a misapprehension of the evidence. A deferential standard of review therefore applies. In my view, the evidence filed by both parties was sufficient to satisfy the motion judge that there are "grounds to believe" the respondents' proceeding against the appellants based on concerted action liability has "substantial merit", as that term has been interpreted in the s. 137.1 jurisprudence.

[60] That said, I would not interfere with the motion judge's conclusion for another reason. Concerted action liability lies at the heart of the respondents' theory of their

tort claims. Yet, as this court stated in *Rutman*, concerted action liability in tort is a fact-sensitive concept.

[61] I have set out above at some length extracts from the evidence of several appellants that show their litigation response to the allegation of concerted action: the appellants admit they did things that can only be regarded as supportive of the Convoy protest and in doing those things they interacted with some of the other appellants and protesters, but they adamantly deny their conduct was part of a common design or plan. In light of their position, an adjudication of the plaintiffs' common design allegation will require a court to make numerous findings of credibility in respect of conduct by the appellants that spanned some three weeks. As the Supreme Court emphasized in *Pointes Protection*, deciding under *CJA* s. 137.1(a)(i) whether there are grounds to believe a claim has substantial merit does not involve a full adjudication of the merits of the underlying proceeding: at para. 52. As a result, "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, where judicial powers of inquiry are broader and pleadings more fully developed": at para. 52.

[62] Yet, by bringing a s. 137.1 motion against the background of the Rouleau Report and taking the position that their interactions over several weeks could not amount to concerted action, the appellants (several of whom filed no evidence) are

trying to use a light-touch screening mechanism to get rid of a case for which any determination on the merits patently will require a deep dive into the evidence and the making of extensive findings of credibility. In sum, the appellants are trying to use their s. 137.1 motion for purposes for which it is not designed or appropriate.

Second Error: Finding the claim against the Donor Defendants satisfies the "substantial merit" test

The claim asserted

[63] The respondents assert a claim for damages, based on private and public nuisance, against some of those who donated funds to the Freedom Convoy. Their pleading describes the group as the Donor Class Defendants. The respondents allege that Donor Class Defendants are "those persons who contributed funds to the Freedom Convoy through various means with knowledge that the Freedom Convoy participants were engaging in the tortious and other unlawful behaviour described [in the statement of claim] and with the intention of supporting and facilitating these acts with those financial donations."[10]

[64] According to the respondents, the "Donor Class Defendants encouraged and incited the ongoing tortious behaviour of the Trucker Class Defendants by donating funds to the cause, through GiveSendGo or other means, on or after February 4, 2022. By knowingly assisting or encouraging the Trucker Class

[10] Further Fresh as Amended Statement of Claim, at para. 140.

Defendants to commit the tortious behaviour described [in the statement of claim], the Donor Class Defendants furthered the common design of the other Defendants, and are joint tortfeasors and jointly and severally liable for the damages caused."[11]

The record

[65] The Freedom Convoy protest attracted significant financial support from the public. According to the Rouleau Report, in excess of $20 million was raised in support of the Freedom Convoy, mainly through the use of two fundraising platforms: GoFundMe, which suspended the online campaign on February 4, 2022; and GiveSendGo. Slightly over $1 million was raised through other campaigns.

[66] However, the Rouleau Report states that most of the money donated through the two online platforms ultimately was refunded to the donors. It appears that approximately $4 million was paid over to an escrow agent appointed under the February 28, 2022 *Mareva* injunction order. The money in escrow stands to the credit of this action.[12] Only a very small portion of the donated funds were disbursed to the protesting truckers.

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[11] Further Fresh as Amended Statement of Claim, at para. 142.
[12] Rouleau Report, Vol. 1, at s. 16.6.

[67] The appellant Brad Howland is a New Brunswick businessman. In his affidavit, he admits that on February 9, 2022 he made a donation of USD $75,000, through his company, to support the GiveSendGo Convoy fundraising campaign. He denied that he ever knew or believed that the Freedom Convoy's activities were tortious or unlawful or intended to support such types of activities; instead, his intention was to support the peaceful goals of the Freedom Convoy protest.[13] None of the funds that Mr. Howland donated through GiveSendGo were returned to him.[14]

Reasons of the motion judge

[68] The motion judge wrote at paras. 28 and 29 of his reasons:

> 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 urge protestors to "hold the line", to "stay for as long as

[13] Affidavit of Brad Howland sworn August 21, 2023, at para. 5, Exhibit Book, at p. 45.
[14] Transcript of the September 15, 2023 cross-examination of Brad Howland, at Q. 39, Supplementary Exhibit Book, at p. 81.

> necessary" and to donate funds in ways that "cannot be obstructed".
>
> 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.

Analysis

[69] The appellants submit it was wrong for the motion judge to conclude it was premature to consider whether the respondents' claim against the Donor Class had substantial merit.

[70] I see no reversible error in the motion judge's conclusion. The appellants brought their s. 137.1 motion in the context of a proceeding commenced under the *CPA* and before the certification motion had been heard. Given that the respondents are trying to assert a claim against a class of donors in circumstances where most funds donated were returned to the donors, some of the donated funds were directed by court order to be held by an escrow agent, and little of the donated funds actually made their way to the protesting truckers, it is not surprising that the motion judge thought those issues would be best dealt with on the certification motion where the issues of class definition and preferable procedure are considered.

[71] To put the matter a different way, just because a defendant wishes to use one procedural device – a s. 137.1 motion – to limit its liability does not preclude a motion judge from concluding that a different procedural device, such as the certification motion, is better suited to more fairly deal with certain issues at play.

[72] Consequently, I see no reversible error.

Third Error: Finding the claim for public nuisance damages satisfies the "substantial merit" test

[73] As mentioned, the damage claims advanced by all three proposed Classes are partially based on the tort of public nuisance. The respondents allege the truckers blocked several downtown Ottawa public streets rendering them impassable, unreasonably honked their air and train horns while parked on those streets, and emitted diesel fumes as their parked trucks idled.[15]

[74] The claim alleges that businesses located in the protest zone suffered significant loss of revenue and income as a result of the public nuisance created by the appellants,[16] while individuals employed by those businesses also suffered significant loss of wages.[17]

[75] As I understand their submissions, the appellants argue that the motion judge committed three main errors in concluding that he was satisfied there were

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[15] Further Fresh as Amended Statement of Claim, at paras. 229-232.
[16] Further Fresh as Amended Statement of Claim, at paras. 184, 203 and 239.
[17] Further Fresh as Amended Statement of Claim, at paras. 187, 221 and 240.

grounds to believe the public nuisance damages claims on behalf of the proposed business and employee sub-classes have substantial merit:

(i) The motion judge failed to find that the Business Class public nuisance damage claim lacked substantial merit because:

- The proposed Business Class representative plaintiff, the Union: Local 613 restaurant, failed to file any substantive evidence that it had suffered any loss as a result of the protest; and
- The proposed Business Class representative, Happy Goat Coffee Company Inc., failed to file any evidence at all;

(ii) The motion judge failed to find that the Employee Class public nuisance damage claim lacked substantial merit because the proposed Employee Class representative, Geoffrey Devaney, failed to file any evidence; and

(iii) The motion judge failed to find there was no evidence of "special damages" to support a claim for public nuisance damages.

[76] I am not persuaded by the appellants' submissions. I shall deal with them in order.

[77] First, the majority owner of the Union: Local 613 restaurant, Ivan Gedz, filed an affidavit that described at some length the economic impact the protest had on his restaurant's business. While his description of the losses incurred was more qualitative than quantitative in nature, it was not, as argued by the appellants, mere

"bald allegations". Also, his evidence reflected the common sense proposition that if protesters' trucks were blocking nearby streets and parking lots, customers would be less likely to eat at his restaurant.

[78] The specific experience of Mr. Gedz's restaurant found corroboration in the more macro financial impact analysis performed by Mr. Andrade in his expert opinion affidavit.[18] In paras. 10, 23 and 24, Mr. Andrade deposed as follows:

> I have estimated a range of losses for the Business and Employee Sub-Classes of $150.0 million to $210.0 million as outlined in Table 1 below. Please refer to paragraphs 27 to 65 for a detailed explanation of our calculations.
>
> …
>
> The Business Sub-Class damages are based on my estimate of lost profits as a percentage of the estimated GDP lost as a result of the Protests. The profit margin was calculated based on our analysis of the components of GDP.
>
> …
>
> The Employee Sub-Class damages are based on wages that would have been earned by employees but for the Protests. To estimate the Employee Sub-Class losses, I have relied upon the percentage of annual GDP that pertains to compensation of employees (includes wages & salaries and employer's social contributions).

[18] Mr. Andrade's "Table 1 – Summary of Preliminary High-Level Estimate of Damages", found at ABCO p. 971, is attached as "Appendix A" to this decision.

[79] Accordingly, an evidentiary basis existed to support the motion judge's conclusion. That the evidentiary basis may not have provided the detail that would be required to obtain summary judgment or judgment at a trial does not detract from its adequacy for purposes of a s. 137.1 motion. Further, had the appellants wanted to test Mr. Gedz's evidence, it was open to them to cross-examine him. They elected not to.

[80] Further, the absence of evidence from two of the proposed representative plaintiffs did not require the dismissal of the class claims, especially in light of the macro financial impact opinion evidence filed by Mr. Andrade. While the absence of such evidence may well indicate that Happy Goat Coffee and Mr. Devaney would not be appropriate representative plaintiffs, that is an issue for the certification motion down the road.

[81] Finally, the appellants submit that the absence of evidence of "special damages" was fatal to the respondents' public nuisance claims. I am not persuaded by this submission, for two reasons.

[82] First, the appellants' submission ignores the order made by the motion judge on the earlier motion under r. 21 of the *Rules of Civil Procedure*. The appellants submit the motion judge's s. 137.1 reasons do not contain any detailed analysis of whether an essential element of a claim for public nuisance brought by a private individual or corporation is proof of "special damages". True, there was no such

detailed analysis, but at paras. 23 and 24 of his s. 137.1 reasons the motion judge explained why:

> 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. I will not repeat that analysis here.
>
> 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. 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 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. [Footnotes omitted.]

[83] The motion judge did not repeat in his s. 137.1 reasons his conclusions on the earlier r. 21 motion. He did not have to. When a specific judge has been assigned to case manage a proceeding, the efficient use of judicial resources demands that the parties read as a package the reasons the case management judge issues; they should not be read on a stand-alone basis. A case management judge need not repeat what he has previously decided and written.

[84] At paras. 31-32 of his January 24, 2023 reasons on the appellants' r. 21 motion to strike, the motion judge considered the nature of the special damages that an individual must prove to support a public nuisance claim:

> 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. 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. Substantial economic loss and substantial inconvenience have been recognized as special damage in this context. [Emphasis added; footnotes omitted.]

[85] The appellants did not appeal the r. 21 decision of the motion judge.

[86] The motion judge's r. 21 decision reflects a movement in the public nuisance jurisprudence away from the view expressed many years ago by the single judge in *Stein v. Gonzales* (1984), 14 D.L.R. (4th) 263 (B.C. S.C.), that special damages required plaintiffs to show that they suffered a different type of loss than the public, to one where special damages could include circumstances where the plaintiff suffered more severe damage than the public generally: see the discussion of the

jurisprudence in *O'Connor v Canadian Pacific Railway Limited*, 2023 BCSC 1371, at paras. 150 to 170 (Emphasis added).

[87] My second reason for rejecting the appellants' submission is that in the present case the respondents did file evidence to support the claim that they had suffered more severe damage from the protest than the general public. Ms. Li's evidence described the harm suffered by the residents of Ottawa who lived within the protest zone, harm that patently was not suffered by those who resided outside the zone. In terms of the other proposed classes, evidence such as the expert opinion of Mr. Andrade provided support for a claim that businesses and employees who operated and worked in the protest zone suffered more severe economic damage than residents of Ottawa who lived outside the protest zone.

Conclusion on the "substantial merits" ground of appeal

[88] Accordingly, for the reasons set out above, I see no reversible error in the motion judge's conclusion, at para. 26 of his reasons, that "[o]n my view of the evidence, there is sufficient basis to conclude that the plaintiffs have a meritorious case", within the meaning of s. 137.1.

SECOND GROUND OF APPEAL: ERRORS INVOLVING THE FINDING THAT THE "NO VALID DEFENCE" TEST WAS SATISFIED

The issue

[89] One condition a plaintiff must meet to avoid the dismissal of its proceeding that arises from public interest expression made by a defendant is to satisfy the

motion judge that "there are grounds to believe that … the [defendant] has no valid defence in the proceeding": s. 137.1(4)(a)(ii).

[90] The motion judge concluded that the respondents had satisfied that condition: at para. 31. The appellants contend that the motion judge committed two reversible errors in reaching that conclusion:

(i) He applied the incorrect legal test; and

(ii) He failed to consider the draft statement of defence tendered by the appellants in their evidence on the motion.

[91] For the reasons set out below, I am not persuaded that the motion judge made either error.

First error: Application of the wrong legal test

[92] Of all the awkward language employed in s. 137.1, the phrase "no valid defence" in s. 137.1(4)(a)(ii) ranks as the most awkward of all. That said, in *Pointes Protection* at para. 60 the Supreme Court set out the governing interpretation of that sub-section:

> In summary, s. 137.1(4)(a)(ii) operates, in effect, as a burden-shifting provision in itself: the moving party (i.e. defendant) must put potential defences in play, and the responding party (i.e. plaintiff) must show that *none* of those defences are valid in order to meet its burden. Mirroring the "substantial merit" prong, under which the plaintiff must show that there are grounds to believe that its claim has a real prospect of success, the "no valid defence" prong requires the plaintiff, who bears the

> statutory burden, to show that there are grounds to believe that the defences have no real prospect of success. This makes sense, since s. 137.1(4)(a) as a whole is fundamentally concerned with the strength of the underlying proceeding. [Emphasis added.]

[93] The motion judge addressed the test applicable under the "no valid defence" branch of s. 137.1(4) at several places in his reasons:

- First, at para. 16, he wrote:

> "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. This assessment requires an evidentiary basis, but it does not require certainty. [Emphasis added; footnotes omitted.]

- Then, at para. 23 he stated, in part:

> 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. [Emphasis added.]

- Finally, at para. 31, the motion judge wrote:

> 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. 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. [Emphasis added; footnotes omitted.]

[94] As I read his reasons, it appears that the motion judge tried to use language that would assist lay readers – such as the appellants – to understand the rather convoluted analysis that s. 137.1 requires a judge to perform. As a result, he paraphrased the Supreme Court's interpretation of the "no valid defence" provision. The Supreme Court's interpretation requires a plaintiff to demonstrate that "there are grounds to believe that the defences have no real prospect of success"; the motion judge paraphrased that requirement into one where the plaintiff would have to demonstrate that "it is reasonably possible that none of the available defences will succeed" or "there is unlikely to be a complete defence" or "[t]here is no 'slam dunk defence'" or none "of the potential defences are likely to prevail".

[95] While attempting to make judicial reasons more accessible to the lay reader is a laudable goal, when it comes to describing the elements of the s. 137.1 test I think the best principle for any motion judge to follow is quite simple: just use the language of the Supreme Court's decisions. Paraphrasing risks complicating an already too awkward statutory provision.

[96] The question then becomes whether, in paraphrasing the Supreme Court's interpretation of the "no valid defence" element of s. 137.1, the motion judge altered and applied a different test, or whether his paraphrases were functional equivalents that lacked any substantive analytical difference? Reading the reasons of the motion judge as a whole, I think the latter is the case. While employing the language used by the Supreme Court in *Pointes Protection* would have been the better course of action, I am not persuaded that the motion judge's language resulted in him applying a substantively different test.

Second error: Failing to consider the defences advanced in the appellants' proposed pleading

[97] The appellants further submit the motion judge "completely failed to consider the three defences, as pleaded in the Statement of Defence". I am not persuaded the reasons disclose any such error.

[98] At para. 30 of his reasons, the motion judge stated that "[a]t this point I do not believe any [of the defendants] have filed statements of defence." That was an accurate statement. However, the appellants had filed, as part of their evidence on the s. 137.1 motion, a proposed statement of defence that they intended to serve and file at some point in the proceeding.

[99] In his reasons, the motion judge did not advert to that specific piece of evidence. Instead, at para. 30, he talked in more general terms about the defences disclosed by the evidence filed on the motion stating:

> 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.

[100] In their factum, the appellants do not identify the three defences they say the motion judge failed to consider. Their proposed statement of defence does not clearly identify three discrete defences. However, as I read the reasons of the motion judge, his para. 30 fairly summarizes most of the defences advanced by the appellants in their proposed defence.

[101] With one exception.

[102] In their proposed statement of defence, the appellants plead that initially the Ottawa Police Service had provided maps to truckers in the protest convoy that directed them to park in three staging areas: a limited number of trucks in front of Parliament Hill, with most trucks spread along two stretches of highway outside the downtown core, namely along the Sir John A. MacDonald and Sir George Etienne Cartier Parkways. According to the proposed pleading, as the trucks started to arrive in Ottawa, the police changed the plan and started to direct large numbers of trucks to park on streets in the downtown core. The Rouleau Report confirms that change of plan by the Ottawa Police Service.

[103] The appellants propose to plead that s. 134(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "*HTA*")[19] required the truckers to follow those police directions, which they did and therefore parked their rigs in Ottawa's downtown core. As I understand their proposed pleading, the appellants take the position that their obedience to those police traffic directions operates as a defence to the respondents' nuisance claims.

[104] The motion judge did not deal directly with the appellants' proposed *HTA* s. 134(1) defence. However, I am not persuaded that omission undermines the motion judge's conclusion that the respondents had satisfied the "no valid defence" element of the s. 137.1 test.

[105] Large numbers of protesting truckers parked their rigs on downtown Ottawa streets for a little over three weeks, from January 28, 2022 until approximately February 19, 2022. My review of the record revealed no evidence that the police directed the truckers to remain parked on public streets for the length of time they

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[19] Proposed statement of defence of the appellants, at paras. 82-84. Section 134(1) of the *Highway Traffic Act* states:

> **134 (1)** Where a police officer or an officer appointed for carrying out the provisions of this Act considers it reasonably necessary,
>
> (a) to ensure orderly movement of traffic;
>
> (b) to prevent injury or damage to persons or property; or
>
> (c) to permit proper action in an emergency,
>
> he or she may direct traffic according to his or her discretion, despite the provisions of this Part, and every person shall obey his or her directions.

did, nor any evidence that the police directed the truckers to honk their horns with the frequency and intensity they did, nor any evidence that the police directed the truckers to continuously run their engines. Yet, the plaintiffs base their nuisance claims on the length of time the truckers parked on or obstructed public streets, their blowing of air and train horns, and the continuous emission of diesel fumes. Looking at the record, I am satisfied that the respondent plaintiffs have demonstrated there are grounds to believe that the appellants have no *HTA* s. 134(1) defence in this proceeding since such a defence has no real prospect of success on the evidence filed.

Conclusion

[106] For the reasons set out above, I am not persuaded the motion judge committed a reversible error in concluding that the respondents had satisfied s. 137(4)(a) of the *CJA*.

THIRD GROUND OF APPEAL: THE MOTION JUDGE ERRED IN HIS COMPARATIVE WEIGHING UNDER *CJA* s. 137.1(4)(b)

[107] The appellants submit the motion judge erred in his analysis of the public interest hurdle contained in *CJA* s. 137.1(4)(b), which provides, in part, that:

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

[108] In *Pointes Protection*, the Supreme Court described the weighing exercise set out in s. 137.1(4)(b) as the "core" or "crux" of the s. 137.1 analysis, because it "is open-endedly concerned with what is at the heart of the legislation at issue and anti-SLAPP legislation generally: the weighing of the public interest in vindicating legitimate claims through the courts against the resulting potential for quelling expression that has already been determined under s. 137.1(3) to be related to a matter of public interest": at paras. 33, 62, and 82.

[109] As the Supreme Court further observed at para. 81 in *Pointes Protection*:

> [T]he open-ended nature of s. 137.1(4)(b) provides courts with the ability to scrutinize what is really going on in the particular case before them: s. 137.1(4)(b) effectively allows motion judges to assess how allowing individuals or organizations to vindicate their rights through a lawsuit – a fundamental value in its own right in a democracy – affects, in turn, freedom of expression and its corresponding influence on public discourse and participation in a pluralistic democracy.

[110] The appellants argue that the motion judge committed two reversible errors in his s. 137.1(4)(b) analysis. First, at paras. 91 through 102 of their factum they repeat arguments they made about the substantial merits element of the test. I have dealt with those arguments above; I do not intend to repeat the analysis.

[111] Second, they contend the motion judge failed to undertake a meaningful weighing exercise at all and also failed to consider the significant public interest in

protecting the types of expression at issue in the present case. I am not persuaded by this submission.

[112] The motion judge's reasons reveal that he was fully alive to the tension between the different aspects of the public interest at play on the motion. He wove his weighing of those interests throughout his reasons:[20]

- He recognized that "[t]he 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": at para. 2;
- He noted that "[s]ection 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": at para. 7;
- In summarizing the legislative provision, the motion judge stated that the third question raised by the motion was "whether the issues raised by the action are of sufficient importance that they outweigh any chilling effect of allowing the litigation to continue": at para. 12;

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[20] *Park Lawn*, at para. 56.

- Finally, he recognized, at para. 18, that the conduct for which the appellants were being sued was a form of political expression:

> 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.

[113] Simply put, the motion judge was fully alive to the important competing interests at stake on the motion. His s. 137.1(4)(b) weighing analysis is found at para. 20 of his reasons, where he wrote:

> 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* protected rights are not absolute. 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.

[114] While his analysis was brief, it was to the point. The motion judge did not apply the wrong test, as argued by the appellants. To the contrary, in my view his analysis succinctly captured the weighing exercise required by s. 137.1(4)(b). Nor

did the motion judge misapprehend the evidence: he understood the political motivation and goals of the Convoy protest, and he understood the harm the residents and businesses in the protest zone contended they had suffered as a result of how the protest was conducted. Accordingly, I see no reversible error in his s. 137.1(4)(b) weighing.

[115] I would go further to state that I agree with the motion judge's conclusion that it is in the public interest for the questions of the competing interests raised by this proceeding to be determined by the courts.

[116] Section 137.1 applies to public interest expressive conduct in a large variety of circumstances, including political protest in public places such as occurred in the present case. Earlier in my judicial career I decided a case that raised similar issues about the interplay between political protest and the use of public spaces. In *Batty v. Toronto (City)*, 2011 ONSC 6862, 108 O.R. (3d) 571, which was also known as the Occupy Toronto case, protesters had turned a large downtown public park into a tent-city political protest site. After the lapse of a month, the City of Toronto sought to evict them from the park. The protesters challenged the eviction notice in court.

[117] In *Batty*, I opened my reasons with the suggestion that the interplay between public political protest and its impact on the community in which the protest takes place raises two fundamental questions:

> How do we live together in a community? How do we share common space?

[118] I ventured that guidance on how to answers those fundamental questions can be found in the Preamble to our *Canadian Charter of Rights and Freedoms*. I suggested the Preamble identified two principles of practical political philosophy that govern public political interactions amongst Canadians: first, as human beings, when dealing with our fellow citizens, whether we are part of the governed or part of those who govern, we all must display humility; and, second, we are not unconstrained free actors but must all live subject to some rules. While through our adoption of the *Charter* Canadians have placed great emphasis on the liberty of the individual – including the right to robust and, indeed, challenging political expression – at the same time the *Charter* reminds us that individual action must always be alive to its effect on other members of the community since limits can be placed on individual action as long as they are "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[21]

[119] The weighing that lies at the core of s. 137.1, when applied to legal proceedings that involve political expression in public places, in a sense is a practical manifestation of the larger question about our political interaction as Canadians, namely how do we live together in a community? I think the motion judge's reasons capture the essence of that question, as expressed in the

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[21] *Batty*, at paras. 1-2.

weighing exercise that lies at the heart of the statutory provision. As well, I agree with him that is in the public interest for the questions regarding the competing interests raised in this proceeding be determined by the courts. Accordingly, I see no basis for appellate intervention in the weighing exercise he performed under s. 137.1(4)(b).

DISPOSITION

[120] Consequently, for the reasons set out above I am not persuaded by the appellants' grounds of appeal.

[121] I would dismiss their appeal.

[122] If the parties are not able to reach an agreement on costs, they may each file brief written submissions of no more than five pages in length no later than Friday, March 14, 2025. This is a hard deadline and cannot be extended as reasons for costs will have to be released before the end of March.

Released: March 6, 2025 PDL

J.A.

I agree. Pepall J.A.

I agree. Coroza J.A.

Appendix A

Description	Low	High
Estimated Losses to the Employee Sub-Class:	$ 105,677,215	$ 145,616,706
Estimated Losses to the Business Sub-Class:	$ 44,498,615	$ 61,316,356
Total Losses to Employee & Business Sub-Classes:	$ 150,175,831	$ 206,933,061
Total Losses to Employee & Business Sub-Classes (Rounded):	**$ 150,000,000**	**$ 210,000,000**

Table 1 - Summary of Preliminary High-Level Estimate of Damages