CITATION: Li et al. v. Barber et al., 2022 ONSC 6899
COURT FILE NO.: CV-22-88514-CP
DATE: 2022/12/06

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: Jim Karahalios and Daniel Naymark for the defendants, Dichter and Garrah (Moving Parties)

Paul Champ for the Plaintiffs (Responding Parties)

Norman Groot as agent for Keith Wilson for Freedom 2022 Human Rights and Freedoms

Melissa Adams and Susan Keenan, for the Attorney General of Ontario

Brigitte Belton (in person)

James Manson (observing as potential counsel for certain defendants or proposed defendants)

HEARD: November 15, 2022

DECISION AND REASONS

[1] This is a motion brought by the defendants Chris Garrah and Benjamin Dichter for access to $200,000.00 of the funds frozen by orders of this court and currently in the hands of an escrow agent ("the escrow funds"). The moving parties argue that they need access to the escrow funds to retain counsel and defend against the action. This includes certain currently scheduled motions relating to the pleadings.

[2] The motion to release the funds is opposed by the plaintiffs and the Attorney General for Ontario. Freedom Corporation[1] does not necessarily oppose the motion but argues that it is premature. The motion is supported by Brigitte Belton who is a named defendant and appeared in person. None of the other named defendants appeared or filed materials.

[3] As I will discuss, while the escrow funds were previously in the possession of certain of the defendants affected by a *Mareva* injunction, they are funds which were raised to support the participants in the self styled "Freedom Convoy" and do not represent personal assets of the moving parties. There is no order that now freezes their personal or business bank accounts or any other property belonging to the defendants.

[4] Under those circumstances, the court should require robust evidence that access to the frozen funds is the only practical way to fund a defence. In this case, the evidence falls short and the motion is denied. My reasons are as follows.

Background

[5] The background to this litigation is well known and has been discussed in previous decisions. A brief outline is necessary to put this decision into context. I will describe the instant litigation and the nature of the escrow fund. I will then outline the procedural history of the action and describe the circumstances which now motivate these defendants to seek funding.

[6] The action in which this motion takes place is a proposed class proceeding brought on behalf of citizens of Ottawa against the organizers, participants and fund raisers involved in the "Freedom Convoy" and the associated "occupation" of downtown Ottawa earlier this year. At a preliminary stage in the litigation, I granted a *Mareva* injunction, freezing assets of certain of the defendants who were in possession of funds raised on social media platforms to support the participants in the Convoy. [2]

[7] The escrow funds consist in part of the funds frozen by the injunction which I granted initially on an *ex parte* basis on February 17, 2022.[3] The escrow fund also includes funds from other sources. The fund was augmented by amounts that had also been frozen by an order made under the *Criminal Code of Canada*. A "restraint order" had been granted pursuant to s. 490.8 (3)

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[1] FREEDOM 2022 HUMAN RIGHTS AND FREEDOMS was incorporated under the Canada Not-for-profit Corporations Act on January 30, 2022. Its registered address is the home address of Mr. Garrah.
[2] See 2022 ONSC 1176
[3] Note 2, supra

of the *Code* by Associate Chief Justice McWatt on February 10, 2022. There are also funds that were paid into the trust fund by the TD Bank which had brought an interpleader application and funds paid into trust at the request of the Royal Bank.

[8] The fund therefore consists of Canadian currency and cryptocurrency transferred to the escrow agent and derived from a number of different sources. For purposes of this motion, the moving parties only seek to access the *Mareva* funds and not the other "buckets" of funds described in a chart prepared by Mr. Naymark and partially reproduced at Schedule A to these reasons. The figures in the chart have not been verified with the escrow agent, but it is useful for descriptive purposes.

[9] The action itself may or may not be appropriate as a class proceeding. That will be determined at a certification motion.[4] Before that motion is argued, the pleadings must be amended, the claim must be served in some fashion on all of the defendants and the parties must be given an opportunity to retain counsel and defend against it. Assuming the action is certified, it will ultimately pit the right of the plaintiffs to seek tort damages against the rights of the defendants to engage in what they assert to have been a lawful and constitutionally protected exercise of freedom of speech and freedom of assembly.

[10] I do not have to resolve that tension today, but as I have previously observed, just because an activity may be legal or even constitutionally protected does not mean that the manner in which the activity was conducted cannot also be tortious. In their affidavits, the defendants seem to conflate these ideas just as they assert that if they themselves did not honk horns or block streets, they cannot be liable for the actions of others. In tort law, facilitating the injurious actions of others will sometimes result in joint liability. Criminal law enforced by the state concerns itself with concepts of guilt and punishment. Tort law enforced by individuals concerns itself with reasonableness, foreseeability, causation and compensation. In point of fact, however, the plaintiffs argue that the "occupation" was both illegal and tortious. They are not alone in that point of view.

[11] The Province of Ontario, in separate proceedings, also takes the position that the activities of the defendants constituted criminal activity and the funds raised to support the protestors constitute "offence-related property" under the *Criminal Code of Canada* and "proceeds or an instrument of unlawful activity" pursuant to the *Civil Remedies Act, 2001*.[5] The province in other words, seeks forfeiture of the escrow funds (or portions thereof) pursuant to both criminal and civil statutory remedies.

[12] The parallel criminal and civil forfeiture proceedings relate to different portions of the frozen funds and for that reason both Crown Law Office (Civil) and Crown Law Office (Criminal) on behalf of His Majesty in Right of Ontario are affected parties. On an earlier date, at the request of counsel for the Attorney General, I directed that the Attorney General be notified of any motions to deal with the escrow funds and would be entitled to be heard.

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[4] See s. 5 of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 as amended to November 22, 2022

[5] Restraint order granted in Court file no. 22-23355MO and Application for civil forfeiture in court file no. CV-22-88880.

[13] As discussed in my reasons for granting the injunction, the *Mareva* injunction was an injunction granted only against the defendants Dichter, Lich, Garrah, St. Louis, King and Freedom Corporation who were believed to be controlling funds raised on fundraising platforms to support the participants in the Freedom Convoy. The manner in which the injunction was granted and the process of converting the injunction into an escrow order and a freezing order requires a brief review.

[14] At the time of the *ex parte* motion, I was persuaded on the evidence put before me by counsel acting for the plaintiff that funds raised to finance the activities of the Convoy had been transferred to the *Mareva* defendants and were about to be dissipated in a manner that would have made them difficult to trace or recover.[6] I was also persuaded that the order was properly sought without notice despite the fact that the plaintiff was aware the *Mareva* defendants (except for Mr. King) were represented by Keith Wilson, an Alberta lawyer who had appeared before this court to oppose an earlier injunction motion brought by Mr. Champ and granted by Justice McLean ("the anti-honking injunction").[7]

[15] Some of the funds frozen by the *Mareva* injunction were held in bank accounts and some were held in the form of crypto-currency. The decision attracted significant attention because it may have been the first time a *Mareva* injunction had been granted at the behest of a plaintiff in a non fraud tort action class proceeding and was one of very few such injunctions involving crypto-currency.

[16] In the normal course, an injunction granted without notice expires at the end of ten days. The usual result is then a motion on notice in which the plaintiff argues for an extension of the injunction and the defendant argues that it should be dissolved or should not have been granted in the first place. Frequently such motions turn on the question of full and frank disclosure to the court by the party which moved without notice, on the strength of the plaintiff's case and on the balance of convenience.[8]

[17] That is not what occurred here because the motions to extend the injunction and to dissolve the injunction were never argued on their merits. On February 28, 2022, Mr. Groot appeared as agent for Mr. Wilson representing the Mareva defendants. Several other counsel and parties who were affected by, or interested in, the injunction also appeared. The Mareva defendants proposed the appointment of an escrow agent to whom the funds would be transferred and the adjournment of the motion.

[18] At that time, it was anticipated there would still be a hearing to challenge the injunction but the consent order provided for certain funds and crypto-currency wallets (along with keys and passwords) to be transferred to the escrow agent. On consent, the injunction was continued in

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[6] See note 1, supra
[7] See 2022 ONSC 1037 and 2022 ONSC 1513. Mr. Champ and Mr. Wilson had also appeared before me in order to obtain an urgent date for that motion.
[8] See *O2 Electronics Inc. v. Sualim,* 2014 ONSC 5050 cited in my original decision.

modified form and the motion was adjourned to March 9, 2022.[9] Subsequently this date was extended to March 31, 2022 (also on consent).

[19] On March 31, 2022, I received a report from the Escrow Agent, but adjourned the motion at the request of the plaintiff due to the volume of material that had just been served on behalf of the Mareva defendants.[10] It was still assumed that there would be a contested motion about whether or not the injunction should have been granted and whether or not it was overly broad.

[20] Ultimately the parties – that is the plaintiffs and the *Mareva* defendants - and the Attorney General reached agreement on the continuation of the escrow fund subject to a detailed preservation order. The *Mareva* injunction was then dissolved against all *Mareva* defendants except Patrick King (who never appeared and was not represented). I now understand that besides settling the motions before me, this also resolved a potential appeal to the Divisional Court.

[21] The ultimate result of the consent order was to escrow all funds that had been collected by the *Mareva* defendants or transferred to them by one of the fundraising platforms and which had remained in their hands at the time the freezing orders were granted. Any restriction on the *Mareva* defendants dealing with their own personal bank accounts or assets was lifted or dissolved.

[22] As discussed above, the escrow fund now consists of monies originally frozen by the *Mareva* injunction as well as funds frozen by the restraint order and transferred to the escrow agent by agreement between the Mareva defendants and the Attorney General.

[23] It is worth mentioning that there is a motion pending on behalf of the plaintiff to make further amendments to the statement of claim and to amend the title of the proceedings to name proposed representative defendants. At a case conference on November 3, 2022, I fixed the date for that motion for the end of January. The moving parties wish to bring a concurrent motion to strike certain portions of the existing statement of claim and /or of the proposed amended statement of claim. It is in part for this step that the release of funds is sought to retain counsel.

[24] On behalf of Freedom Corporation (and as agent for Mr. Wilson), Mr. Groot filed a factum although he did not file affidavit evidence. The purpose of this factum was to bring the court up to date on certain events that had occurred and to explain the position of Freedom Corporation. Counsel for the moving parties consented to the introduction of the factum and also consented to Mr. Groot appearing on November 15, despite he (and Mr. Wilson) now having an apparent conflict of interest.

[25] The conflict of interest arises not because Freedom Corporation and the remaining *Mareva* defendants are necessarily opposed in interest in defending against the class proceeding, but because there has been a falling out between the corporation and the other defendants. Mr. Groot originally acted for all of the *Mareva* defendants including Mr. Garrah and Mr. Dichter (and Tamara Lich who was not present or represented on this motion). At the time, those defendants

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[9] See 2022 ONSC 1351
[10] 2022 ONSC 2038

were members of the board of directors. I am advised that while Mr. Garrah and Mr. Dichter along with Ms. Lich are still shown as directors of the corporation on its corporate profile registered with Corporations Canada, in fact these directors have now resigned from the board or have been removed. I am not privy to the details. Mr. Garrah and Mr. Dichter agree that they have been "kicked out" of the corporation.

[26] Apparently, the corporation had been created to receive funds that were in the process of being raised on the GiveSendGo platform after the GoFundMe campaign had ended and GoFundMe had decided to return funds to donors. At the time the injunction was granted, Freedom 2022 had not yet completed its banking arrangements and it agreed to alternative banking arrangements where certain of the *Mareva* defendants would hold funds on its behalf. The corporation has now produced an agreement between Freedom Corporation and Jacob Wells of GiveSendGo signed by two of the directors on behalf of the corporation on February 9, 2022. That was one day before the restraint order was granted and just over a week before the injunction was granted.

[27] It is the position of the corporation that all funds raised through the GiveSendGo fundraising platform and placed with any of the *Mareva* defendants under the "alternative banking arrangements" should revert to the corporation if they are ultimately released from escrow.

[28] Clearly, the corporation is now in a partially adverse relationship with the other *Mareva* defendants. In addition, Mr. Wilson was recently a witness before the federal inquiry. It appears likely he may be a witness in this proceeding. The corporation will shortly be seeking new counsel. It is for this reason that Mr. Manson was present, but counsel for the moving parties did not want to adjourn. He agreed on behalf of his clients to waive any conflict for the purpose of arguing the motion and also agreed that I could receive the facts described above and set out in the factum.

[29] On behalf of the corporation, Mr. Groot stated that the corporation was not opposing the motion, but (as he described it) as a friend of the court believed the information about the corporate status and the banking arrangements should be disclosed to me. Mr. Groot submitted that the motion is premature and it should await the determination of the pleading amendment motion. Needless to say, the moving parties disagree with this.

[30] Counsel for the Attorney General on the criminal side does not oppose the requested order provided the order does not affect the buckets of funds that relate to the restraint order. Counsel has served notice that she will be seeking forfeiture of the funds frozen by the restraint order pursuant to the *Criminal Code* in the event that certain of the defendants are convicted of criminal offences at their upcoming criminal trials.[11]

[31] Counsel for the Attorney General on the civil side has served notice that the Crown seeks civil forfeiture of the funds originally frozen by the Mareva injunction and has amended the

[11] A restraint order simply imposes a temporary freeze on "offence related property" that appears to be used to facilitate criminal activity. By contrast, a forfeiture order permanently vests those assets in the Crown in right of Ontario. See s. 490.8 and s. 490.2 of the *Criminal Code of Canada.*

application under the *Civil Remedies Act, 2001* to make that clear.[12] This forfeiture claim is intended to rank behind the claims of the plaintiff classes if they are ultimately successful in the claim for compensation and are entitled to payment out of the frozen funds. The Attorney General therefore supports the plaintiff in opposing the relief. In her submission, counsel for the Attorney General argues that the funds should be preserved for the potential benefit of the plaintiffs or of the Crown and not eroded by multiple requests for funding.[13]

Discussion and Analysis

[32] A leading case cited by all parties in relation to access to frozen funds following a *Mareva* injunction is *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business & Technology.*[14] In that case Justice Molloy distinguished between proprietary injunctions which purport to freeze or preserve assets or property over which the plaintiff claims ownership and *Mareva* injunctions which are an exception to the rule that execution is not available prior to judgment.[15] In the latter case, where the injunction freezes assets or property belonging to the defendants, it is usual to give the defendant access to the frozen property for ordinary expenses of daily living including reasonable legal expenses. Indeed, as counsel for the moving party points out, there is a specific paragraph in the standard form order (including that granted by me originally) which provides for this possibility.

[33] In the original decision of the Supreme Court of Canada which confirmed the availability of *Mareva* injunctions in Canada, the court drew a slightly different distinction. In that case, the Supreme Court held that the power of the court to freeze or protect assets that were the very subject matter of the litigation was not only clear but was reflected in various statutes and rules of court. The question before the court was whether injunctive relief should be available to freeze the assets of a litigant who appeared to be moving his assets out of the jurisdiction to avoid possible judgment and execution.[16] The *Mareva* injunction is an intervention to prevent a defendant from defeating the court process and, despite requiring the plaintiff to show a strong case, it is not designed to prejudge the case or to put the plaintiff in a superior position to other creditors. Evidently, it is not intended to be a tactical weapon to impoverish a defendant and deny the defendant the means to oppose the litigation itself.

[34] Mr. Champ argues that the distinction made by Justice Molloy in the CIBC case must be modified in the context of this action. He submits that the frozen funds, although seized from the *Mareva* defendants are not their property or their assets. He argues that they are trust funds owned not by the *Mareva* defendants but held by them on behalf of the convoy participants. Mr. Naymark

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[12] The *Civil Remedies Act, 2001,* S.O. 2001, c. 28 is provincial legislation whose purpose is preventing criminal activity and providing remedies to victims of crime. See s. 1 of the Act.

[13] It should be noted that there is no interim freezing order in the civil application because the injunction and the subsequent agreement made that unnecessary. The AG is asserting a civil claim for forfeiture against the portion of the frozen funds which the moving party defendants seek to access through this motion.

[14] 2003 CarswellOnt 35, [2003] O.J. No. 40 (SCJ)

[15] See paras. 15 & 16, supra. In the former case, it is not always necessary to rely on injunctive relief as such. S. 104 of the *Courts of Justice Act* provides for interim recovery of personal property and Rule 45 provides for interim preservation orders. Both of these orders are within the jurisdiction of an Associate Judge as well as a Judge.

[16] *Aetna Financial Services Ltd. v. Feigelman,* [1985] 1 S.C.R. 2, [1985] S.C.J. No. 1, 15 D.L.R. (4th) 161 (SCC)

disputes that they are trust funds because they lack the "three certainties" required to establish a legal trust.[17] As noted above, Mr. Groot argues that the funds are actually the property of Freedom Corporation which was to hold them for the purpose of supporting the convoy.

[35] I agree with Mr. Champ that the funds in question are in a different category from funds seized from the defendant's personal bank accounts because they can be clearly identified as funds raised through a fundraising campaign. I do not find it necessary, in this analysis, to determine whether they are legally impressed with a trust or which of various competing defendants might be entitled to control those funds if they were to be unfrozen. Although the plaintiff cannot assert a proprietary interest in the frozen funds, it appears the moving parties cannot do so either. Some of the affidavits put before the court manifest an intention to distribute the funds or to return them to donors. While there is evidence that the purpose of the funds raised for donors may have included legal protection for participants in the convoy, there is no evidence that the funds were intended for the personal use of the convoy organizers or the fundraisers themselves.

[36] At the time I granted the injunction, the plaintiff persuaded the court that the funds raised on the GiveSendGo platform and subsequently paid to any of the *Mareva* defendants were no longer under the control of the fund raising platform or of the original donors. I concluded that they were in the possession and control of the *Mareva* defendants and were exigible. The issue of whether or not the funds were impressed with some kind of trust in favour of the convoy participants was not argued. What was clear was that the funds were being rapidly disbursed at least in part to avoid government or court action to freeze those funds. There were clearly identifiable funds in the hands of the *Mareva* defendants raised for the support of the convoy participants and in the process of dissipation.[18]

[37] A second important point is this. There is no longer a *Mareva* injunction freezing the assets or property of the *Mareva* defendants.[19] As a consequence of the settlement of the injunction and the agreement with the Attorney General, the fundraising funds were paid to the escrow agent and the injunction was lifted. The trade off was to freeze the fund raising funds and to lift restrictions on the personal assets and bank accounts of the defendants.

[38] I therefore agree with counsel for the plaintiff and with counsel for the Attorney General that to lightly permit access to these funds by individual defendants runs the risk of similar repeated requests by the moving parties and other defendants. This motion is brought by only two of the named defendants and the affidavits clearly state that their new counsel require an initial retainer of $200,000.00 which may be followed by further requests. Access to the frozen funds should not be granted lightly because it would effectively subject the frozen funds to the "death of a thousand cuts" and would risk undoing the effect of the agreement reached between the parties when the injunction was lifted and the escrow fund established.

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[17] Certainty of intention, certainty of subject matter and certainty of objects – see for example *Duca Financial Services Credit Union Ltd. v. Bozzo,* 2011 ONCA 455 @ paras. 2 & 5

[18] Besides the named defendants who controlled the funds, the other convoy participants who blocked the streets or engaged in alleged tortious activities are unidentified defendants.

[19] With the possible exception of Mr. King who has never appeared or been represented.

[39] This alone might be insufficient reason to deny the defendants access to the funds if that fund was the only practical way to permit the defendants to retain counsel. In the *CIBC* case, Justice Molloy accepted the English precedents to the effect that a threshold requirement in granting the relief requested was a showing that the defendant had no other assets. Access to frozen funds is not required if the defendants have other means by which they could retain counsel or defend themselves.

[40] In instant case, I am not satisfied that the moving parties have met that bar. Both are self employed. Mr. Dichter is a truck driver and a producer of podcasts. He deposes that he is not independently wealthy and has limited income but provides little in the way of details other than deposing to his declared income for last year. Mr. Garrah is a general contractor. He too deposes that he is not independently wealthy and that he cannot afford to retain counsel and he similarly deposes to a modest declared income but provides little else in the way of details as to his personal finances. In earlier affidavits, now reaffirmed by the moving parties and attached as exhibits to their affidavits, they each declare that one of the reasons for agreeing to transfer the escrow funds was to be relieved from the requirement in the original order that they prepare an affidavit of assets or be cross examined.[20]

[41] Neither of the moving parties have made the kind of frank financial disclosure that might be necessary to make a finding of impecuniosity.

[42] "Impecuniosity" has become something of a term of art and something of a battleground in security for costs cases and has generated decades of jurisprudence. Without endorsing that term of art as part of the test for access to frozen funds, the jurisprudence is helpful to this extent. In the security for costs cases, the party relying on impecuniosity bears the burden of proving it and is required to "do more than adduce some evidence of impecuniosity and, rather, must satisfy the court that it is genuinely impecunious with full and frank disclosure of its financial circumstances and its incapacity to raise the security".[21] I am not suggesting that a defendant seeking to defend himself is in the same position as a plaintiff seeking to avoid posting security for costs but the word "impecuniosity" was used in argument. There is no doubt that on this motion, the moving parties have the onus. I must be satisfied that they cannot defend the action without access to the frozen funds.

[43] I am conscious of the need for fairness. It would be fundamentally unfair to permit the plaintiff to freeze a defendant's assets and then deny the defendant the means to resist the plaintiff's court action by denying the defendant the means to do so. The allegations against the defendants are unproven and continue to evolve. The court must be alert to ensure the litigation is not simply a means to terrorize, persecute or punish the convoy organizers. This motion for release of funds to fund the defence must be taken seriously but the moving parties must demonstrate that their access to justice is imperilled. This requires more than bald statements that they cannot afford counsel and in my view the evidence falls short.

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[20] Paragraph 4 of the affidavits of February 27, 2022
[21] See *Chill Media Inc. v. Brewers Retail Inc.*, 2021 ONSC 1296

[44] A further difficulty with the motion is the absence of any kind of proposed bill of costs or litigation budget. The moving parties simply assert that their counsel require a retainer of $100,000.00 for each of them. This number appears to be based on the amount that was released to Mr. Groot's firm as part of the agreement establishing the escrow fund. Quite apart from the fact that the earlier payment was part of the agreement and was therefore on consent, the work done to devise an escrow structure, to negotiate a resolution and to obtain court approval was in the interests of all parties and the administration of justice. Presumably, all parties felt that settlement of the outstanding motions and appeals in this manner provided a net benefit. In any event, simply because the court released an amount with the consent of all of the parties involved does not mean that every party to the litigation is entitled to an equivalent amount when that relief is opposed.

Conclusion and Decision

[45] For the reasons enunciated above, I find that the moving party defendants have not demonstrated an inability to defend against the action without access to the frozen funds. As discussed, they are parties to an agreement to lift the injunction against their personal assets and property in favour of establishing an escrow fund.

[46] As shown in Schedule A, the source of the escrow fund is entirely from the fundraising done to support the convoy and not from the personal assets of the defendants. Under these circumstances, the defendants would have to demonstrate that they have no reasonable capacity to retain counsel and that it would be fair to use some of the frozen funds for that purpose.

[47] As further discussed above, even if funds ought to be released, there is no justification for simply picking an amount out of the air without a legal budget. In the *CIBC* decision and in other cases, when funds were released, there was a requirement that other parties scrutinize the accounts on an ongoing basis before they were paid.

[48] The motion is dismissed. This is without prejudice to renewing it if circumstances change.

Costs

[49] If counsel are unable to agree on costs, I will entertain written submissions. Given the considerable uncertainty as to whether or not this action will become a certified class proceeding, however, and the fact that the plaintiff was released from the requirement of an undertaking in damages, I am inclined to the view that costs of this motion should await the outcome of the motions to be argued in January.

December 6, 2022

C. MacLeod RSJ

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Mr. Justice C. MacLeod

Schedule A – Defendants' Position on Makeup of the Escrow Funds

"Bucket"	Original Source of Funds	Amount & Particulars*	Moving parties seeking access?
1	Adopt-A-Trucker campaign on GiveSendGo platform (Garrah)	**$375,999.68** (from Garrah Stripe account + **$141,481.98** (from Garrah RBC account **$517,481.66** + 0.052312520 BTC / 0.392300813 ETH / 0.047724040 LTC / 1.1400560130 ETC3 **= ~ $1,850**	Yes
2	HonkHonkHodl Fundraiser (Dichter, St. Louis et al.)	7.85919518 BTC4 = ~ **$175,000**	Yes
3	Freedom 2022 campaign on GoFundMe platform	$1,393,399.18 + 3,000.00 **$1,396,399.18** (from Lich bank accounts)	No – pending determination on full record
4	Freedom 2022 campaign on GiveSendGo platform	**$3,401,844.30** (from Stripe customer account ****	No – pending determination on full record
5	Steinbach Credit Union bank draft (from Garrah)	**$10,000.00**	No – pending determination on full record
*** Adapted from the Chart Uploaded by the Defendants – Bank account numbers have not been reproduced**			

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SUPERIOR COURT OF JUSTICE

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James Manson (observing as potential counsel for certain defendants or proposed defendants)

DECISION AND REASONS

Regional Senior. Justice C. MacLeod

Released: December 6, 2022