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# Rig in a Parlour: The Freedom Convoy and the Law of Private Nuisance

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**Matter Commented On:** *Li v Barber et al*, Court File No CV-22-00088514-00CP

After more than a week of disruptive, and at times highly offensive, protesting in the nation's capital, private law has been engaged. Specifically, residents of the inner downtown area applied to the Ontario Superior Court for injunctive relief (essentially, a temporary ban on certain conduct) and for damages under the tort of private nuisance. This post discusses the basic elements and principles of private nuisance as they relate to the present context (we do not comment on procedural aspects – e.g., certification of the proceeding as a class action). Our preliminary assessment is that the prospects for success on the question of private nuisance are very good. Early indications from the Court are consistent with this assessment, as Justice Hugh McLean of the Ontario Superior Court granted an interim injunction on Monday (copy of the Court order here). In doing so, Justice McLean indicated that the right of citizens to peace and quiet was the overriding right (see this detailed thread on Twitter summarizing the Court proceedings).

## Background

On January 28, 2022, a convoy of transport trucks and other vehicles protesting COVID restrictions and vaccine mandates arrived in the National Capital Region (NCR) and stationed themselves in front and in the vicinity of Parliament Hill. An intention of the protestors at the time, set out in a memorandum that has since been withdrawn, was to somehow replace or overthrow the current federal government. In any event, some protestors proceeded to engage in egregious conduct, some of which likely constitutes tortious conduct, as we discuss below. As indicated in the Plaintiff's statement of claim, a core part of this conduct has been honking or blasting a variety of very loud horns, including the horns of commercial transport trucks, air horns, and train horns (para 7). After more than a week of what has been described as an occupation, and in the context of inadequate responses by all levels of government and law enforcement, residents of the Ottawa downtown core turned to private law. Specially, they applied to the Court for an injunction and damages. The core of the application is the tort of private nuisance, which turns on whether this behaviour constitutes an unreasonable interference with the use and enjoyment of one's home and property. While such interference could involve actual physical damage to one's property, it also includes interference with the health, comfort or convenience of an owner or occupier. We discuss the basic elements of this tort below and relate them to the present situation.

**Private Nuisance Basics: Substantial and Unreasonable Interference?**

*Antrim Trucking Centre Ltd v Ontario (Transportation)* (2013 SCC 13 (CanLII)) is the leading authority on private nuisance in Canada. It sets out a basic two-part sequential test: First, is the interference substantial? If the answer to that threshold question is yes, then the question becomes whether the interference is unreasonable.

The bar on the first question is quite low. In short, it requires that the plaintiffs show that the interference goes beyond "trivial annoyances" and is more than a slight annoyance or trifling interference" (para 22). Only those inconveniences that materially interfere with ordinary comfort can be considered unreasonable (para 22). In the present context, it is very hard to see how this interference is not substantial. The volume, type, and duration of the honking appears substantial. Residents, and the plaintiff in particular, have indicated that the noise has consistently exceeded 80 decibels (dB) *inside* their homes (at para 46), and it is obviously much higher than that outside. This noise is coming from commercial transport truck horns which are normally only used for a few seconds at a time. Finally, prior to the injunction, residents and the media reported that the noise continued essentially all day and all night (para 28), despite a promise by the protesters at one point to limit it to 8 am-8 pm.

As such, this matter warrants moving onto the second part of the *Antrim* test: is the interference unreasonable? Again, it is quite clear the answer here is yes. In this context, the interference is what would be called 'amenity nuisance', the legal analysis for which involves a balancing of factors: the character of the neighbourhood, the character of the harm, intensity of the interference, duration and time of day, sensitivity of the plaintiffs, breach or compliance with relevant standards or legal rules, and the nature of the defendant's conduct. The basic premise is that citizens in any given neighbourhood must engage in some reasonable "give and take" when it comes to competing rights, but the give or the take can only go so far.

***Character of the Neighbourhood***

Because nuisance depends on where the interference takes place, the character of the neighbourhood is an important consideration. In tort law, this has been colourfully described as a "pig in the parlour", as opposed to a pig in the barnyard (see e.g. *Tock v St John's Metropolitan Area Board*, [1989] 2 SCR 1181, 1989 CanLII 15). Downtown Ottawa is much more parlour than barnyard. A downtown core is arguably not the place for long, persistent truck horns and air horns. Indeed, cities and towns explicitly limit the use of horns or other noises likely to disturb residents (see e.g. Ottawa Noise By-law [By-law No 2017-255] at s 3 and s 15). This would also likely violate s 75(4) of the Ontario *Highway Traffic Act* [RSO 1990, c H.8], which prohibits sounding of any "bell, horn or other signalling device so as to make an unreasonable noise." Of course, one can argue that protests are part of life near Parliament Hill, and counsel for the plaintiff class admitted as much in their application for an injunction; however, this is a protest without a permit, and one that has spilled far from the typical protest area on the Hill. Most importantly, however, it involves large commercial vehicles as opposed to just individuals and signs that are typical of a protest. Consequently, this factor points towards unreasonable conduct.

***Character of the Harm***

The type of harm used to be an important consideration in the private nuisance analysis. Where a plaintiff could show physical damage to their property, courts were very quick to conclude that the interference was unreasonable. The absence of physical damage, however, has never precluded a successful claim. This situation is sometimes referred to as amenity nuisance and includes interferences with the use and enjoyment of property caused by odour, smoke, or – as alleged here – noise. In the present context, the loud, continuous honking at extremely high volume in the immediate vicinity of the class of plaintiffs is of the kind recognized to satisfy this factor.

***Intensity of the Interference***

The alleged interference must be of sufficient intensity to be intolerable to the ordinary citizen. To assess this factor, a court may look to public health standards and expert opinion to determine what constitutes tolerable limits. Subject to further evidence at trial, it appears that this factor is satisfied in the present context given that the noise levels (around 100 dB) exceed what would be tolerable by any ordinary citizen, and the levels exceed relevant health and safety standards (see e.g. this Ontario Noise Regulation [O Reg 381/15]; see also this helpful City of Toronto Explainer).

***Duration and Time of Day***

Persistent, long-term interference is indicative of unreasonable interference, whereas temporary, short-term interference would suggest reasonable conduct. As noted above, the noise was taking place virtually all day and night for more than a week. And this is in a context where these types of horns are meant to be used for seconds at a time. As such, this factor also points to unreasonable conduct.

***Sensitivity of Plaintiff(s)***

This factor requires that the plaintiff must not be unreasonably sensitive to the alleged interference. In the present context, while concerns have been expressed about particularly vulnerable residents, there is no evidence or even suggestion that the plaintiff is particularly sensitive. Indeed, basic understanding of decibels as sound measurement units would clearly demonstrate that any reasonable person would be troubled, if not seriously harmed, but the volume and degree of the noise in this case. As such, this factor also points to unreasonable conduct.

***Breach or Compliance with Relevant Standards or Legal Rules***

While compliance with relevant legal standards and rules points to reasonable conduct, breach of the same is indicative of unreasonable conduct. This protest appears to be in contravention of several standards, bylaws, and other legislated requirements. As noted above, the noise from the honking exceeds well-established safety standards (see this chart). It also appears to violate City of Ottawa noise by-laws. It has also been reported that the organizers did not obtain a permit for

the protest. There are likely more, but this is ample basis to demonstrate that this factor also points to unreasonable conduct.

***Nature of the Defendants' Conduct***

If the conduct is motivated by a desire to annoy, cause discomfort, or inconvenience the plaintiff(s), then it is indicative of unreasonable conduct. This appears to be the case in the present context where protestors seem to be intent on harassing local residents with the honking.

***Utility of the Conduct***

If the defendant's conduct has some utility in the community, it may shift the balance away from the behaviour being unreasonable. In the present context, it is necessary to distinguish between the protesters' general messages on the one hand and the honking on the other. It is difficult to see the utility in deafening honking at all hours. As noted by Justice McLean in the Court proceedings (see the point-by-point summary in this thread), limiting the honking does not preclude other means of peaceful protest. We discuss this further below.

***Defences***

If the plaintiff successfully establishes a private nuisance on a balance of probabilities, the onus then shifts to the defendant to establish one of the available defences. This includes statutory authorization, statutory immunity, consent, and prescription. None of these appear applicable here. At best, the protestors may have been able to invoke the defence of statutory authorization *if* they had obtained a permit, but they did not.

***Charter* Dimensions**

Because protest is protected expression under s 2 of the *Charter*, its effect on this litigation has been raised from time to time. To our knowledge, there is no case directly on point; however, the general proposition in Canadian law is that the *Charter* does not apply to litigation between private parties that is predicated on common law rights rather than legislation (see e.g. *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 1986 CanLII 5 at para 33). Notwithstanding friction in the present context arising from formal rules and restrictions put in place by government, this nuisance suit is between private parties and not any government, and so there is a persuasive argument to be made that the *Charter* does not apply. At the same time, Canadian courts have "frequently pointed to the need to develop the common law in accordance with *Charter* values" (see *WIC Radio Ltd v Simpson*, 2008 SCC 40 (CanLII) at para 16), meaning that *Charter* values would inform the above analysis and the result ought to be consistent with the constitutional values enshrined in the *Charter*, including freedom of expression. In that regard, a *Charter* values approach to the tort of private nuisance would require consideration of limits on expression (see *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 (CanLII) (stating that the common law protects secondary picketing given its expressive value, unless it is tortious or criminal, at paras 36-37 and 73). It is important to note, however, that even if the *Charter* were to somehow directly apply in the present context, say in relation to the defendants' s 2(b) freedom of expression, that freedom is

subject to s 1 – i.e., reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. In the present context, and further to the above analysis, it is hard to see how curtailing one form of expression (excessive, harmful honking), while many other less intrusive forms of expressions and ways to protest remain, would not be justified under s 1. As such, and subject to diving deeper into this dimension, in our view the application of the *Charter* or influence of *Charter* values in the present context would actually *strengthen* the arguments of the plaintiff.

**Conclusion**

In a context with a surprising dearth of government and law enforcement responses, residents of Ottawa turned to tort law for relief from the horn blasting tactic of the protestors. Now that the injunction has been won (and note that we have not discussed the legal tests and analysis for securing this injunction), attention will turn to the private nuisance suit for damages. As explained above, the plaintiffs have very strong arguments in this regard. This is on one hand yet another example of shortcomings in common law approaches to modern problems, i.e., that the common law is relatively slow and reactive, and often lags to an extent that is not responsive to urgent societal issues. However, this is also an example of the common law and the judicial branch being a very important backstop when other institutional responses, including regulatory and policing regimes, fail. On a pragmatic level, this lawsuit is poised to send a strong signal to protestors of the future who may be contemplating using the extreme, harmful, tortious tactics seen in Ottawa this week and last. Finally, on the doctrinal level, if this lawsuit proceeds in full, the Court may provide further, helpful guidance on the application of the *Charter* and *Charter* values in the private nuisance context.

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This post may be cited as: David V Wright and Martin Olszynski, "Rig in a Parlour: The Freedom Convoy and the Law of Private Nuisance" (February 9, 2022), online: ABlawg, http://ablawg.ca/wp-content/uploads/2022/02/Blog_DVW_MO_Private_Nuisance_Convoy.pdf