



No. S211602  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Between:

**TEAL CEDAR PRODUCTS LTD.**

Plaintiff

And:

**UNKNOWN PERSONS OPERATING AS  
THE "RAINFOREST FLYING SQUAD",  
ROBERT ARBESS (ALSO KNOWN AS REUBEN GARBANZO),  
JOHN DOE, JANE DOE, AND PERSONS UNKNOWN**

Defendants

**APPLICATION RESPONSE**

Application response of: the Attorney General of Canada (**Canada**)

THIS IS A RESPONSE TO the Notice of Application of the Applicants, Canadian Association of Journalists/L'Association Canadienne des Journalistes, Ricochet Media English, Overstory Media Inc. (Capital Daily News), The Narwhal News Society, Aboriginal Peoples Television Network Incorporated, Canada's Observer Media Group, Inc. (National Observer), Canadian Journalists for Free Expression, Discourse Media Inc. filed on June 10, 2021

**Part 1: ORDERS CONSENTED TO**

NIL

**Part 2: ORDERS OPPOSED**

Canada opposes the granting of the orders set out in paragraph 1 of Part 1 of the Notice of Application.

**Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

NIL

**Part 4: FACTUAL BASIS**

1. On April 1, 2021 an injunction was granted to the Plaintiff to prohibit anyone from obstructing, impeding or otherwise interfering with road use, road construction, road construction sites, planned road construction sites, or timber harvest activities, or threatening, harassing, intimidating, assaulting, physically obstructing, or physically interfering with the Plaintiff's employees, agents, contractors or suppliers or their families (**Injunction Order**).

2. The Injunction Order included provisions authorising police to enforce the order while maintaining their operational discretion regarding that enforcement.

## Enforcement Planning

3. After the issuance of the Injunction Order, the Royal Canadian Mounted Police (**RCMP**) began planning for its enforcement. This included planning for media access during enforcement.<sup>1</sup>

4. The environment of the area covered by the Injunction Order (**Injunction Area**) provided significant challenges for enforcement.<sup>2</sup> In particular:

- a) Narrow forest service roads and bridges, sometimes only one lane and often with dense vegetation on either side, which are easily blocked and only provide limited work area for police to clear obstacles and deal with individuals breaching the Injunction Order;
- b) Switch-backs and steep terrain on forest service roads coupled with industrial traffic, including logging trucks, create potential for accidents, make passage difficult for many vehicles, and make hazards difficult to see from a distance;
- c) Rough forest service roads that can cause vehicle damage such as flat tires, which can also result in blocking the road;
- d) No cell phone coverage in much of the area and a lack of reliable radio or satellite communications in some areas resulting in communication between sites, or to those outside the Injunction Area often not being possible; and
- e) The lack of cell phone coverage combined with the network of forest service roads covering a large area could result in people getting lost.

5. In addition, the protest activity provided significant challenges for enforcement of the Injunction Order.<sup>3</sup> For example:

- a) Specially trained Obstruction Removal Teams would be required to remove individuals locked to structures and vehicles. This work requires sufficient space to safely work with a selection of power tools such as grinders and jackhammers; and
- b) Specially trained High Angle Rescue Teams would be required to safely remove individuals from positions high in trees and other structures.

6. There was also concern, based on past experience with the enforcement of similar injunction orders, that protestor tactics would be dynamic, unpredictable, and could potentially include violent resistance.<sup>4</sup>

---

<sup>1</sup> Affidavit of Dawn Roberts, sworn on June 9, 2021 [**Roberts Affidavit**] at para 3.

<sup>2</sup> Affidavit of Dave Attfield, affirmed on June 9, 2021 [**Attfield Affidavit #1**] at paras 4, 8.

<sup>3</sup> Attfield Affidavit #1 at paras 5, 8.

<sup>4</sup> Attfield Affidavit #1 at para 8.

7. As a result of all these factors, and in order to allow police officers to safely enforce the Injunction Order, temporary exclusion zones were created, in combination with access control points, in order to manage access to areas where enforcement activity was taking place.<sup>5</sup>

### **General Approach to Media Access**

8. The protocol with respect to media access can be summarized as follows:

a) When there is no active enforcement action occurring, journalists are free to access the entire Injunction Area without escort;<sup>6</sup> and

b) When there is active enforcement within an exclusion zone, journalists may only access the exclusion zone by checking in with an RCMP Media Relations Officer (**MRO**) who escorts journalists to the site of the enforcement activity and directs journalists to areas they are permitted to gather while active enforcement is ongoing.<sup>7</sup>

9. Anyone who has requested to be on the RCMP list of media contacts is sent an email invitation indicating a time and place to meet the MRO to check in and be escorted to the active enforcement area of the day.<sup>8</sup> MROs also check in and escort any journalists who are at the access control points, or the enforcement areas, when the MROs arrive.<sup>9</sup>

10. Where enforcement operations require secrecy to be successful, media invitations are not sent. This occurred in the early morning hours of June 2, 2021.<sup>10</sup>

11. MROs, in consultation with operational commanders, determine where the media may assemble in active enforcement areas. This ensures that journalists have a clear view of enforcement operations, to the extent possible given the environment, while also ensuring that the enforcement activity can be conducted in a safe and controlled manner without interference.<sup>11</sup>

12. As enforcement activity moves, new media areas are established by MROs so that journalists can continue to observe the ongoing operations. Where it is safe to do so, and where journalists are otherwise kept some distance away from enforcement operations, MROs escort journalists one at a time closer to the operations to allow better footage to be obtained.<sup>12</sup>

13. In determining who is a journalist, MROs have taken a broad approach.<sup>13</sup> Individuals are asked to provide some evidence they are involved in journalistic activities and are not intending to

---

<sup>5</sup> Attfield Affidavit #1 at paras 9-10, Exhibit D; Affidavit of Elenore Sturko, affirmed June 18, 2021 [**Sturko Affidavit**] at para 4.

<sup>6</sup> Attfield Affidavit #1 at para 25.

<sup>7</sup> Roberts Affidavit at para 14.

<sup>8</sup> Roberts Affidavit at paras 19-22.

<sup>9</sup> Affidavit of Kristen Clark, affirmed June 9, 2021 [**Clark Affidavit #1**] at paras 5, 19, 29.

<sup>10</sup> Affidavit #2 of Dave Attfield, affirmed June 22, 2021 [**Attfield Affidavit #2**] at para 8.

<sup>11</sup> Roberts Affidavit at para 30.

<sup>12</sup> Clark Affidavit #1 at para 45.

<sup>13</sup> Roberts Affidavit at paras 24-26, Exhibit D.

breach the Injunction Order. Using this approach, a broad range of journalists, including freelance journalists, have successfully gained access to the exclusion zones during enforcement activities. This has resulted in extensive media coverage from a variety of media.<sup>14</sup>

14. However, some individuals claiming to be journalists have previously been involved in breaches of the Injunction Order, or after gaining access as a result of claiming to be journalists, have then participated in activities in breach of the Injunction Order.<sup>15</sup>

15. Further, on June 2, 2021, a MRO received a request to admit four individuals, two of whom said they were journalists from Ricochet Media, and two of whom refused to identify themselves. The MRO permitted all four entry on the basis that a journalist from Ricochet Media stated they were all journalists. However, the MRO later identified one of the individuals as someone who had previously been arrested for breaching the Injunction Order and who she understood to be on conditions not to return to the Injunction Area.<sup>16</sup>

### **Media Access**

16. On May 17, 2021, when the temporary exclusion zone was first put in place in anticipation of enforcement action the following day, journalists were not permitted access to the exclusion zone.<sup>17</sup> However, the policy was amended the following day to clarify that journalist access is only limited when active enforcement is taking place.<sup>18</sup>

17. On May 18, 2021, journalists were escorted to the active enforcement area. At points, while active enforcement was not occurring, they were permitted free access to the area. At other times, while active enforcement action was carried out, journalists were directed to remain in areas designated by the MRO, which provided them with good sight lines to the enforcement activity. The designated areas were moved as enforcement activity moved.<sup>19</sup>

18. On May 19, 2021, journalists were escorted to the active enforcement area where officers were dealing with a dangerous situation involving protestors chained to a very large, potentially unstable, block of wood on a narrow bridge, 200 feet above a river, as well as a protestor suspended from a tripod. Journalists were directed to an area some distance from the enforcement activity as a result of safety concerns. However, journalists did still have a clear view of the operations. In addition, during a lull in activity, when it was safer, journalists were permitted to get much closer to the large wood block – within approximately 15 feet.<sup>20</sup>

19. On May 21, 2021, no enforcement was originally planned and therefore no media meet up was arranged. However, there was a last minute decision to remove protestors from tree stands.

---

<sup>14</sup> Roberts Affidavit at para 34; Affidavit of Eric Doucet, affirmed June 7, 2021.

<sup>15</sup> Clark Affidavit #1 at paras 18, 30, 40; Sturko Affidavit at para 7.

<sup>16</sup> Sturko Affidavit at paras 8-13.

<sup>17</sup> Attfield Affidavit #1 at paras 20-21.

<sup>18</sup> Attfield Affidavit #1 at para 25.

<sup>19</sup> Clark Affidavit #1 at paras 5, 9-12, Exhibit B.

<sup>20</sup> Clark Affidavit #1 at paras 19-20, 23, 26-28.

While journalists were met by MROs at the north access control point, they were not escorted to the active enforcement area as the MRO was told that sensitive police tactics were being used.<sup>21</sup>

20. Since that time, it has been clarified that the information was incorrect and that the methods are not sensitive. As a result, policy changed to allow for media access during such operations.<sup>22</sup>

21. While at the north access control point MROs learned that enforcement action was being conducted at a location in the south of the Injunction Area. A MRO started to go to that location in order to escort journalists, but the enforcement action was completed before he could get there.<sup>23</sup>

22. On May 22, 2021, the MRO escorted journalists to the active enforcement area. Journalists were directed to a safe area, on the far side of the enforcement operation, with clear sight lines to the enforcement activity. Because the designated area for journalists was on the far side of the enforcement activity, once that activity commenced, journalists had to be escorted through the enforcement area in order to leave.<sup>24</sup>

23. On May 24, 2021, the MRO escorted journalists into the Injunction Area towards an enforcement site. However, the RCMP only conducted reconnaissance and no enforcement operations were conducted at that site. Those journalists were then escorted to a second enforcement site where additional journalists were already present. The MRO assessed the media access area that had been designated by operational officers, and designated an improved media access area. The MRO also escorted journalists closer to enforcement operations on an individual basis to allow for better footage without interfering with the ongoing operations.<sup>25</sup>

24. Late on May 24, 2021, journalists were told to meet up at a location near the south access control point. However, on the morning of May 25, 2021, enforcement operations changed abruptly as a large group of protestors blocked the north access control point. There was only one MRO available that day, and as a result he did not attend the meet up and instead diverted to the north to co-ordinate media access where the most enforcement activity was taking place. He was not able to notify journalists of this change due to the lack of cellular phone coverage in the area.<sup>26</sup>

25. On May 26, 2021, a MRO escorted journalists to the active enforcement area and coordinated media access. Journalists were asked to wait at a distance while the enforcement team set up equipment and were escorted to a closer area before enforcement operations began. In addition, when operations permitted, the MRO escorted journalists closer to operations to allow for better photographs and videos.<sup>27</sup>

---

<sup>21</sup> Clark Affidavit #1 at paras 33-34; Attfield Affidavit #1 at para 36.

<sup>22</sup> Attfield Affidavit #1 at para 36.

<sup>23</sup> Clark Affidavit #1 at para 35; Attfield Affidavit #1 at para 30.

<sup>24</sup> Clark Affidavit #1 at paras 36, 41, 43, Exhibits A8, F.

<sup>25</sup> Clark Affidavit #1 at paras 44-45.

<sup>26</sup> Clark Affidavit #1 at paras 47-48.

<sup>27</sup> Clark Affidavit #1 at paras 52-54, Exhibit H; Affidavit #2 of Kristen Clark, affirmed June 22, 2021 [Clark Affidavit #2] at paras 4-9.

26. On May 27, 2021, a MRO escorted journalists to the active enforcement area and coordinated media access, including, when operations permitted, escorting journalists up close to the operations individually to allow for better photographs. Some journalists arrived late and were not escorted in as the enforcement operations had concluded. At that point the Plaintiff had also closed a gate across the access road.<sup>28</sup>

27. On May 28, 2021, MROs escorted journalists to the active enforcement operations, and coordinated media access. A jackhammer, powered by a generator, was being used to remove a protester from a “sleeping dragon”. At journalists’ request the generator was moved to allow them to better capture audio. When all but one protester had been removed, it was believed that enforcement operations were concluded for the day and journalists were escorted from the area. However, there was an unexpected change in the availability of the emergency response team required to remove the last protester and that work was done. Unfortunately, by the time that was known, there was not sufficient time before the operations would be complete for the MRO to reach cell service, inform journalists, and escort them back to the area.<sup>29</sup>

## Part 5: LEGAL BASIS

1. The relief sought by the applicants is a bare declaration of law, with which Canada does not disagree. However, such declarations are meaningless and should not be granted by courts. A declaration of law will only be granted if it will have practical utility by settling a live controversy between the parties, and not where it is merely restating settled law.<sup>30</sup>

2. The proposed variation of the Injunction Order simply restates what the common law requires when the police exercise an ancillary power. As such, the variation should not be granted.

3. However, as the applicants allege that the RCMP have unreasonably limited their access to the Injunction Area, Canada also responds to those allegations.

4. The ancillary power doctrine provides police with common law powers where those powers are reasonably necessary for them to fulfill their duties.<sup>31</sup> The test set out by the Supreme Court for determining valid ancillary powers ensures that *Charter* rights are not impacted more than is reasonably necessary in the circumstances, and the exercise of valid ancillary powers therefore do not violate the *Charter*.<sup>32</sup>

5. In limiting media access to some extent, the police are exercising such a power in order to fulfill their duty to enforce the Injunction Order, preserve the peace, and protect life and property.

---

<sup>28</sup> Clark Affidavit #2 at paras 11-14.

<sup>29</sup> Clark Affidavit #2 at paras 16-19.

<sup>30</sup> *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paras 11, 53, 56.

<sup>31</sup> *Fleming v Ontario*, 2019 SCC 45 [*Fleming*] at para 45.

<sup>32</sup> *R v Clayton*, 2007 SCC 32 at para 21.

6. The variation the applicants seek to the Injunction Order simply outlines what the common law requires in the exercise of an ancillary power. As a result, it is an unnecessary addition and this application should not be granted.

### **Defining the Power Exercised and Liberty Impacted**

7. In order to determine whether police are acting pursuant to a valid common law ancillary power, the Supreme Court has instructed that it is first necessary to define both the police power and the liberty interest which is limited in the circumstances.<sup>33</sup>

8. Here, the power being exercised by the police is the ability to control access to an area where enforcement of an injunction is occurring, in order to ensure that such activity can be conducted without interference, and without undue danger to officers, those being arrested, or those observing, including journalists.

9. The liberty interest being limited in this case is the ability of journalists reporting on the protests and enforcement action to move about, unfettered, in an active enforcement area.

### **Police Actions are Reasonably Necessary to Carry out their Duties**

10. The next step in the ancillary powers doctrine analysis is to determine whether the actions of the police fall within the general scope of a statutory or common law duty and whether the action is a justifiable exercise of police power associated with that duty.<sup>34</sup>

11. Here, the Injunction Order authorises the police to enforce the order, while maintaining their operational discretion. This clearly creates a duty on the police. Enforcing the Injunction Order includes not only removing those individuals in breach of the Injunction Order, but also preventing further individuals from commencing activities breaching the Injunction Order. Furthermore, in carrying out this work, the police also have a general duty at common law to preserve the peace and protect life and property.<sup>35</sup>

12. To be justified, the action of imposing restrictions on the free movement of journalists must be “reasonably necessary for the carrying out of the particular duty in light of all the circumstances”. In determining what is reasonably necessary, the Court considers three questions:

- a) The importance of the duty to the public good;
- b) The necessity of interference with the liberty interests of individuals for the performance of that duty; and
- c) The extent of the interference with the liberty interest.<sup>36</sup>

---

<sup>33</sup> *Fleming, supra* note 31 at para 46.

<sup>34</sup> *Fleming, supra* note 31 at para 46.

<sup>35</sup> *R v MacDonald*, 2014 SCC 3 [*MacDonald*] at paras 31, 67.

<sup>36</sup> *Fleming, supra* note 31 at para 47.

***The Enforcement of Court Orders is Central to the Rule of Law***

13. The enforcement of court orders is of utmost importance to the rule of law, and to the public good.<sup>37</sup>

14. The preservation of property, and particularly of life, is also of utmost importance,<sup>38</sup> as is the safety of police officers in the course of carrying out their duties. Police officers are entitled to go about their work in a manner that minimises risks to the extent possible.<sup>39</sup>

***Restrictions on Journalists are Reasonably Necessary in the Circumstances***

15. The Injunction Order is being enforced in a very challenging environment. In addition, the tools and tactics that the police must use to extricate protestors from various positions create safety hazards and the potential for falls and other accidents that may require emergency vehicles to obtain access, or individuals to be removed from the scene for medical attention.

16. It is important that officers be in a position to control those aspects of their surroundings which they can in order to ensure, to the extent possible, access and egress, their own safety and the safety of protestors and observers, including journalists.

17. In these circumstances, having individuals who are not involved in the enforcement action move freely around an active enforcement area creates safety hazards. As a result, it was reasonably necessary for there to be restrictions on free movement within active enforcement areas. In relation to journalists, these restrictions were as limited as possible, while still allowing for the safe enforcement of the Injunction Order.

***Restrictions of the Movement of Journalists are Limited***

18. A claim of being a journalist is not, in and of itself, enough to justify unfettered access to an active injunction enforcement area. In considering whether an individual is involved in journalistic activity, the Court should consider such factors as whether:

- a) The person is engaged in apparent good faith in a news-gathering activity of a journalistic nature;
- b) The person is not actively assisting, participating with, or advocating for the protestors about whom the reports are being made; and

---

<sup>37</sup> *Larkin v Glase*, 2009 BCCA 321 at para 7; *United Nurses of Alberta v Alberta (AG)*, [1992] 1 SCR 901 at 931.

<sup>38</sup> *MacDonald*, *supra* note 35 at para 39.

<sup>39</sup> *R v Mann*, 2004 SCC 52 at para 43.

c) The person is not otherwise obstructing or interfering with those seeking to enforce the law or any order that has already been made, or is not otherwise interfering with the administration of justice.<sup>40</sup>

19. While freedom of the press is an important right, the ancillary power doctrine requires it to be balanced against other important considerations such as, in this case, maintenance of the rule of law. Such balancing exercises in relation to freedom of the press are found in other areas as well. For example, a similar balancing exercise occurs in relation to publication bans under the *Dagenais* and *Mentuk* test.<sup>41</sup>

20. Here that balancing exercise supports the ancillary power exercised by the police as the extent of the interference with the liberty of journalists to move about the active enforcement areas is minimal.

21. The liberal approach of the RCMP to who is a journalist is consistent with the Supreme Court's statements that freedom of expression rights are enjoyed by the full range of journalists involved in gathering and disseminating news.<sup>42</sup> However, the Supreme Court has also noted that, with such a broad range of individuals involved in journalism, there is "an immense variety and degree of professionalism (or the lack of it)". There is no organisation to regulate members or maintain professional standards.<sup>43</sup>

22. This "immense variety" in the range of persons involved in journalistic activities gives rise to reasonable concerns, which have materialised on more than one occasion, about the standards of conduct to which those individuals will hold themselves and justifies reasonable enforcement measures to ensure that enforcement activities will not be impeded and the safety of officers, protestors, journalists and other observers will not be jeopardised.

### **The Police Action in this Case is a Valid Exercise of an Ancillary Power**

23. The ancillary power being exercised is justified weighing the importance of the work being carried out, and the reasonable necessity of the controls, against the minimal extent of the interference. As the limits of that ancillary power are defined by being reasonably necessary to the execution of the duty, it is unnecessary to include a term in the Injunction Order which restates the same principle.

24. Furthermore, it is clear from the evidence, that the RCMP are exercising this ancillary power in an appropriate manner. While there may have been occasions where media access was not perfectly facilitated, perfection is not expected in a complex operation, and these situations were corrected as soon as possible. There is no evidence of a pattern of behaviours on the part of the RCMP which requires this Court to interfere in the exercise of their discretion to manage a challenging and fluid situation.

---

<sup>40</sup> *Re Brake; Anderson v Nalcor Engery*, 2019 NLCA 17 at para 84.

<sup>41</sup> *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835; *R v Mentuck*, 2001 SCC 76.

<sup>42</sup> *R v National Post*, 2010 SCC 16 [*National Post*] at para 40.

<sup>43</sup> *National Post*, *supra* note 42 at para 43.

**Part 6: MATERIAL TO BE RELIED ON**

1. Notice of Application filed June 10, 2021;
2. Affidavit 1 of Jerome Turner made May 25, 2021;
3. Affidavit 1 of Jimmy Thomson made May 25, 2021;
4. Affidavit 1 of Kyle Darling made May 26, 2021;
5. Affidavit 1 of Michael Simkin made May 26, 2021;
6. Affidavit 1 of Ethan Cox made May 27, 2021;
7. Affidavit 2 of Ethan Cox made June 11, 2021;
8. Affidavit 1 of Paul Johnson made June 14, 2021;
9. Affidavit 1 of Eric Doucet made June 7, 2021;
10. Affidavit 1 of Dave Attfield made June 9, 2021;
11. Affidavit 1 of Dawn Roberts made June 9, 2021;
12. Affidavit 1 of Kristen Clark made June 9, 2021;
13. Affidavit 1 of Elenore Sturko made June 18, 2021;
14. Affidavit 2 of Dave Attfield made June 22, 2021;
15. Affidavit 2 of Kristen Clark made June 22, 2021;
16. Affidavit 1 of Adrian Quiring made June 25, 2021;
17. Such further and other material as counsel may advise and this Honourable Court may allow.

Canada estimates that the application will take 3 hours.

- The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is: the Department of Justice Canada, British Columbia Regional Office, 900 – 840 Howe Street, Vancouver, British Columbia, V6Z 2S9, Telephone: 604-666-2054, Facsimile: 604-666-4399, Attention: Donnaree Nygard.

Date: June 25, 2021



Signature of

application respondent

lawyer for application respondent

**ATTORNEY GENERAL OF CANADA**

**per: Donnaree Nygard**

Tel: 604-666-2054

Email: donnaree.nygard@justice.gc.ca

Counsel for the Attorney General of Canada