

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

**WRITTEN SUBMISSIONS OF
THE ATTORNEY GENERAL OF CANADA
[MEDIA ACCESS APPLICATION]**

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OVERVIEW

1. This application to vary the terms of this Court's injunction order is unnecessary. The term the applicants seek to add to the order simply restates the requirements of the common law, and as such would be an improper exercise of the Court's discretion.
2. That being said, as the applicants argue that the RCMP are restricting their movements within the area covered by the injunction more than is reasonably necessary, Canada will respond to these allegations in some detail.
3. The RCMP have a duty to enforce the injunction order and, in the course of doing so, to preserve the peace, and to protect life and property. Officers undertaking that work are also entitled to protect their own safety. In order to do so, it is necessary that some control be exerted over a fluid and unpredictable situation occurring in a challenging environment. The RCMP have taken a measured and adaptive approach.
4. The injunction applies to several hundred square kilometers of remote terrain. Where there is no active enforcement of the injunction, journalists are free to report as they see fit throughout that entire area. Where the RCMP are enforcing the injunction they have designated exclusion zones, where journalists are required to follow a reasonable protocol. That protocol provides them with advance notice of most enforcement actions, requires them to identify themselves, provides escort and in some cases transportation to the various enforcement areas, and designates areas for them to gather as close as reasonably possible to any RCMP action to enable them to observe and report.
5. Protesters have placed themselves high up in trees, dangled themselves from narrow bridges with deep ravines below, chained themselves to vehicles and embedded parts of their bodies in roadways. All of this is occurring in the remote setting of a complex natural environment. The RCMP have carried out their duty to enforce the injunction while placing the appropriate balance on the free movement of journalists.

6. The restrictions put on journalists have been as limited as possible in the circumstances. Journalists of all sorts have been provided with liberal access to the enforcement area, resulting in extensive media coverage of events.

FACTS

7. 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**).¹

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

1. Enforcement Planning

9. After the issuance of the Injunction Order, the RCMP set up a team to organise and implement its enforcement in a reasonable and adaptive manner that includes protocols to facilitate journalists' ability to gather and disseminate information on this important issue.

10. Chief Superintendent Dave Attfield was the commander in charge of setting the strategic objectives for the operational plan for the enforcement action. During the planning stage Chief Superintendent Attfield surveyed the area covered by the Injunction Order (**Injunction Area**) and set the strategic objectives for enforcement of the Injunction Order based on his review of the area and his previous experience in enforcing similar injunctions in similar environments.³

11. Planning for media access during enforcement activities was done in collaboration with Dawn Roberts, the Director of Communications for RCMP 'E' Division, who has extensive media experience, including working as a broadcast journalist with Global TV for seven years.⁴

¹ Order of Justice Verhoeven, entered April 1, 2021 [**Injunction Order**] at para 1.

² Injunction Order at para 2.

³ Affidavit of Dave Attfield, affirmed on June 9, 2021 [**Attfield Affidavit #1**] at paras 1, 3, 8.

⁴ Affidavit of Dawn Roberts, sworn on June 9, 2021 [**Roberts Affidavit**] at para 3.

12. The environment of the Injunction Area covers several hundred square kilometers and provide significant challenges for enforcement. 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 are subject to washouts during heavy rain and 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;
- 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; and
- f) Dry conditions in summer months with the risk of forest fires.⁵

13. Within the Injunction Area protestors had set up a series of camps that would require the RCMP to take enforcement action in accordance with the Injunction Order. The protest activity provided significant challenges for enforcement of the Injunction Order.⁶ For example:

- a) Specially trained Obstruction Removal Teams, who have the necessary skills and equipment, would be required to remove individuals locked to structures and vehicles. This work requires sufficient space to protect any observers from the dangers associated with working with a selection of power tools such as grinders and jackhammers; and

⁵ Attfield Affidavit #1 at paras 4, 8. For a map, see Attfield Affidavit #1 at para 2, Ex A; Affidavit of Steve Trommel, sworn June 9, 2021 [**Trommel Affidavit**] at paras 3-34.

⁶ Attfield Affidavit #1 at paras 5, 8.

b) Specially trained High Angle Rescue Teams would be required to safely remove individuals from positions high in trees and other structures.

14. 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.⁷

15. As a result of all these factors, and in order to allow police officers to safely enforce the Injunction Order at the various locations, temporary exclusion zones were created, in combination with access control points. Temporary exclusion zones and access control points were to be flexible and vary, depending on where enforcement activity was planned at any given time.⁸

2. General Approach to Media Access

16. The planning of temporary exclusion zones and access control points specifically included plans for media access in order to ensure that journalists would have the ability to gather and disseminate information to the public.⁹ The protocol with respect to media access can be summarised as follows:

a) When there is no active enforcement action occurring, journalists are free to access and move about the entire Injunction Area without needing to be escorted by a Media Relations Officer;¹⁰

b) When active enforcement is planned, in most cases, prior to that enforcement a Media Relations Officer alerts journalists to where and when they can meet and check in to be escorted to the site where enforcement operations will take place that day. A Media Relations Officer or Officers escort journalists, and if possible offer to drive them, to the

⁷ Attfield Affidavit #1 at para 8.

⁸ Attfield Affidavit #1 at paras 9-10, Ex D; Affidavit of Elenore Sturko, affirmed June 18, 2021 [**Sturko Affidavit**] at para 4. A map of some of the temporary exclusion zones is found at Ex E of the Attfield Affidavit #1.

⁹ Attfield Affidavit #1 at para 10.

¹⁰ Attfield Affidavit #1 at para 25.

site of the enforcement operations and establish areas where journalists can safely observe and report on the RCMP's enforcement actions.¹¹

17. Media Relations Officers are trained to understand and reasonably accommodate the needs of the media. Media Relations Officers Sergeant Kristen Clark and Sergeant Elenore Sturko have sworn affidavits in this matter regarding their duties in the Injunction Area. Sgt. Clark has been a Media Relations Officer for four years and has extensive experience interacting with journalists.¹² Sgt. Sturko has been a Media Relations Officer for five years, and spent twelve years working in the news media prior to joining the RCMP, including in television news production for CFJC Television in Kamloops, CHBC in Kelowna, CBC Manitoba, and CBC North.¹³

18. Initially, over 600 known media contacts were contacted by the RCMP to explain that enforcement action was going to be taken and how they could obtain access to the temporary exclusion zones to report on the enforcement activity.¹⁴

19. Anyone who then requested to be on the RCMP list of media contacts is sent the email invitations indicating a time and place to meet the RCMP Media Relations Officer to check in and be escorted to the active enforcement area of the day.¹⁵ Media Relations Officers also check in and escort any journalists who are at the access control points or the enforcement areas when the Media Relations Officers arrive.¹⁶

20. However, on occasion media invitations are not sent as secrecy is required. For example, on June 9, 2021 at approximately 5:00 am, a specialised team conducted work in the Injunction Area to prevent protestors from occupying a hanging platform under a bridge and attaching themselves to devices secured in the roadway or other objects. No arrests were conducted at that time. No notice was provided to journalists of this activity as secrecy was required in order for the

¹¹ Roberts Affidavit at para 14.

¹² Affidavit of Kristen Clark, affirmed June 9, 2021 [**Clark Affidavit #1**] at para 1.

¹³ Sturko Affidavit at para 1.

¹⁴ Roberts Affidavit at paras 16-17.

¹⁵ Roberts Affidavit at paras 19-22.

¹⁶ Clark Affidavit #1 at paras 5, 19, 29.

work to be successful. Later in the day, journalists were escorted into the Injunction Area when enforcement activities, including arrests, were being conducted.¹⁷

21. Media Relations Officers, in consultation with operational commanders, determine in which areas journalists may assemble once the active enforcement area is reached. To the extent possible given the environment, they ensure that journalists have a clear view of enforcement operations, while also ensuring that the enforcement activity can be conducted in a safe and controlled manner without interference.¹⁸

22. As enforcement activity moves, new media areas are established by Media Relations Officers so that journalists can continue to observe the ongoing operations. On some occasions, where it is safe to do so, and where journalists are otherwise kept some distance away from enforcement operations, Media Relations Officers escort journalists one at a time closer to the operations to allow better footage to be obtained.¹⁹

23. In determining who is a journalist, Media Relations Officers have taken a broad approach.²⁰ Individuals are asked to provide some evidence that they are involved in journalistic activities and are not intending to be involved in breaching the Injunction Order.

24. 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.²¹

25. 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 breaching the Injunction Order.²²

¹⁷ Affidavit #2 of Dave Attfield, affirmed June 22, 2021 [**Attfield Affidavit #2**] at para 8.

¹⁸ Roberts Affidavit at para 30.

¹⁹ Clark Affidavit #1 at para 45.

²⁰ Roberts Affidavit at paras 24-26, Ex D.

²¹ Roberts Affidavit at para 14; Affidavit of Eric Doucet, affirmed June 7, 2021.

²² Clark Affidavit #1 at paras 18, 30, 37, 40; Sturko Affidavit at para 7.

3. Use of Gates

26. The plaintiff has a number of gates installed on various forestry services roads in the Injunction Area.²³ The plaintiff also uses private security in the Injunction Area. In some cases, the gates installed by the plaintiff are at locations where the RCMP has established access control points, including some locations where the RCMP has requested that the gates be installed.²⁴

27. The RCMP sometimes requests that gates be closed as that restricts vehicle traffic in the area, preventing vehicles from being used as blockades or to supply activities in breach of the Injunction Order.²⁵

28. When the RCMP establish an access control point at a gate, the RCMP take the primary role in controlling access to the area. When there is not active enforcement the RCMP allows individuals to access the area on foot as long as they are not engaged in activities that are prohibited by the Injunction Order. In addition, journalists may pass through the gates at any time, including in their vehicles, if doing so does not create a safety concern.²⁶

29. When the plaintiff's private security control closed gates, they decide who is permitted through the gates. If private security contact the RCMP in relation to a request by journalists to pass through a gate being controlled by private security, the RCMP provides advice consistent with the approach taken when gates are controlled by the RCMP.²⁷

²³ Trommel Affidavit at para 33.

²⁴ Attfield Affidavit #2 at paras 4-5.

²⁵ Attfield Affidavit #2 at para 5.

²⁶ Attfield Affidavit #2 at para 6.

²⁷ Attfield Affidavit #2 at para 7.

4. Media Access

May 17, 2021

30. On May 17, 2021, when the temporary exclusion zones were first put in place in anticipation of enforcement action the following day, journalists were not permitted access to the exclusion zone established at Hatton Creek.²⁸

31. The policy was amended the following day to clarify that journalist only require escorts when active enforcement is taking place.²⁹

May 18, 2021

32. On May 18, 2021, 17 journalists signed in and were escorted to the active enforcement area.³⁰ At times, while active enforcement was not occurring, they were permitted free access to the area. At other times, while active enforcement action was being carried out, journalists were directed to remain in areas designated by Sgt. Clark, which provided good sight lines to the enforcement activity. The designated areas were moved as enforcement activity moved and some were as close as 15 feet from the enforcement activity.³¹

33. While a small number of journalists did not comply with the directions of Sgt. Clark or fellow Media Relations Officer Constable Alex Bérubé at the first enforcement location, they were permitted to stay in that location as they were not, at that point, in the way of enforcement activity or causing safety concerns.³²

May 19, 2021

34. On May 19, 2021, 11 journalists signed in and 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 at the edge of a narrow bridge with low side rails approximately 200 feet above a river. There was also a protestor suspended from a tripod on the

²⁸ Attfield Affidavit #1 at paras 20-21.

²⁹ Attfield Affidavit #1 at para 25.

³⁰ Clark Affidavit #1 at para 5, Ex B.

³¹ Clark Affidavit #1 at paras 9-12.

³² Clark Affidavit #1 at para 10.

far end of the bridge. When Sgt. Clark and Cst. Bérubé arrived with the group of journalists, some additional journalists were already at the location.³³

35. Journalists were directed to an area some distance from the enforcement activity as a result of the available terrain and safety concerns. However, journalists still had a clear view of the operations.³⁴ 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 - in order to be able to take closer pictures and video.³⁵

36. When enforcement activity resumed, and journalists were asked to move back to the designated area, one individual who was already at the location when Sgt. Clark and Cst. Bérubé arrived, refused and was arrested for obstruction.³⁶

May 20, 2021

37. On May 20, 2021, 13 journalists checked in and were escorted to the active enforcement area. Sgt. Clark did not permit access to one individual claiming to be a journalist as the individual refused to provide any evidence he was a journalist or say who he worked for. In addition, Sgt. Clark recognised the individual from social media as someone who had been previously arrested for trying to cross through an access control point after being refused entry.³⁷

May 21, 2021

38. 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 protesters from tree stands. Sgt. Clark and Cst. Bérubé met journalists who had gathered at the north access control point, but they were not escorted to the active enforcement area as Sgt. Clark was told that sensitive police tactics were being used to extract the protesters from the tree stands.³⁸

³³ Clark Affidavit #1 at paras 19-20.

³⁴ Clark Affidavit #1 at para 23.

³⁵ Clark Affidavit #1 at paras 26-27.

³⁶ Clark Affidavit #1 at para 28.

³⁷ Clark Affidavit #1 at paras 29-30, Ex E.

³⁸ Clark Affidavit #1 at para 34; Attfield Affidavit #1 at para 36.

39. Since that time, it has been clarified that this information was incorrect and that the methods are not sensitive. As a result, policy has been changed to allow for media access during such operations.³⁹

40. While at the north access control point Sgt. Clark and Cst. Bérubé learned that enforcement action was being conducted at a location in the south of the Injunction Area. Sgt. Clark started to go to that location in order to escort journalists, but the enforcement action was completed before he could get there.⁴⁰

May 22, 2021

41. On May 22, 2021, Sgt. Clark checked in and escorted 13 journalists to the active enforcement area, including some journalists who were met at the access control point.⁴¹ One individual who requested to join the media escort was denied as they were identified as someone who had previously been arrested for obstruction during enforcement action.⁴² In addition, one individual who was escorted in with journalists, went to sit with the protesters and was arrested.⁴³

42. Journalists were directed to a safe area, approximately 15 feet on the far side of the enforcement operation, with clear sight lines to the enforcement activity.⁴⁴ 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.⁴⁵

May 24, 2021

43. On May 24, 2021, Sgt. Clark checked in three journalists and escorted them into the Injunction Area towards an enforcement site. However, the RCMP only conducted reconnaissance and no enforcement operations were conducted at that site.⁴⁶

³⁹ Attfield Affidavit #1 at para 36.

⁴⁰ Clark Affidavit #1 at para 35; Attfield Affidavit #1 at para 30.

⁴¹ Clark Affidavit #1 at para 36, Ex F.

⁴² Clark Affidavit #1 at para 37.

⁴³ Clark Affidavit #1 at para 40.

⁴⁴ Clark Affidavit #1 at para 41, Ex A8.

⁴⁵ Clark Affidavit #1 at para 43.

⁴⁶ Clark Affidavit #1 at para 44.

44. Those journalists were then escorted to a second enforcement area where additional journalists were already present. Sgt. Clark assessed the media area that had been designated by operational officers, and determined that a closer area, with better sight lines could be designated without interfering with police operations. Sgt. Clark also escorted journalists closer to enforcement operations on an individual basis to allow for better footage without interfering with the ongoing operations.⁴⁷

May 25, 2021

45. 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.⁴⁸ Sgt. Clark was the only Media Relations Officer available on site that day, and as a result he did not attend the meet up and instead diverted to the north access control point 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.⁴⁹

46. Sgt. Clark designated an initial area for journalists and facilitated placing an audio recorder with a transmitter for journalists' use to improve the audio being collected from the protest group. Sgt. Clark then designated a new area, closer to the protestors, where journalists could engage with the protestors directly.⁵⁰

May 26, 2021

47. On May 26, 2021, Sgt. Clark checked in eight journalists, including Paul Johnson, and escorted them to the active enforcement area. When the group first arrived in the enforcement area they stopped approximately 100 meters away from where the RCMP was going to conduct enforcement and Sgt. Clark went on to speak with the enforcement team.⁵¹

⁴⁷ Clark Affidavit #1 at para 45.

⁴⁸ Clark Affidavit #1 at para 47.

⁴⁹ Clark Affidavit #1 at para 48.

⁵⁰ Clark Affidavit #1 at para 50.

⁵¹ Affidavit #2 of Kristen Clark, affirmed June 22, 2021 [**Clark Affidavit #2**] at paras 4-5; Clark Affidavit #1 at para 52, Ex H.

48. The watch commander requested that journalists be held where they were for a short time so that the enforcement team could finish setting up equipment to deal with protestors who were dug in around an excavator.⁵² This was communicated to the waiting journalists and approximately three minutes later Sgt. Clark escorted them up the road to the location of enforcement operations. While Sgt. Clark had the conversation with the watch commander, Mr. Johnson was having the conversation referred to in paragraphs 9-14 of his affidavit.⁵³

49. During enforcement operations, journalists gathered in a designated area and, when operations permitted, Sgt. Clark escorted journalists from the designated areas to other areas to allow for better photographs and videos. Once at the designated area, Mr. Johnson did not raise any issues with Sgt. Clark, and at one point told Sgt. Clark that “I got exactly what I wanted”.⁵⁴

May 27, 2021

50. On May 27, 2021, Sgt. Clark checked in and escorted 5 journalists to the active enforcement area. The RCMP were dealing with a protestor secured underneath a Jeep in a “sleeping dragon”. In order to accommodate the necessary towing of the Jeep, the area designated for journalists was some distance from the vehicle. To allow journalists to take close-up photos, Sgt. Clark provided one-on-one assistance to move closer to the Jeep.⁵⁵

51. Later that day, Sgt. Clark learned that two journalists from Ricochet Media, Jerome Turner and Michael Simkin, were at the access control point in the south of the Injunction Area. Sgt. Clark traveled to the south access control point to explain to Mr. Turner and Mr. Simkin that active enforcement operations had concluded by the time of their arrival and that they could not continue as the plaintiff had secured the road with a gate.⁵⁶

⁵² Clark Affidavit #2 at paras 6-7.

⁵³ Clark Affidavit #2 at paras 6-9.

⁵⁴ Clark Affidavit #1 at para 54; Clark Affidavit #2 at para 10.

⁵⁵ Clark Affidavit #2 at paras 11-12.

⁵⁶ Clark Affidavit #2 at paras 13-14.

May 28, 2021

52. On May 28, 2021, Sgt. Clark and Cst. Bérubé checked in and escorted 12 journalists and one legal observer to the active enforcement area where a protester had secured themselves in a “sleeping dragon” attached to the ground below the rear of a bus. An area was designated for journalists approximately 20 feet away, near the front of the bus. As a jackhammer run by a generator was being used, journalists were having difficulty capturing audio. At the request of journalists, the generator was moved to minimise its impact.⁵⁷

53. Enforcement continued until there was only a single protestor hanging in a cantilever off the side of a bridge. The assistance of the RCMP Emergency Response Team (**ERT**) was required to remove this protestor and Sgt. Clark was advised that ERT would likely not be available that day. As a result, journalists were escorted out of the area.⁵⁸

54. Later that day Sgt. Clark learned that the ERT’s availability had unexpectedly changed and that the remaining protestor would be removed. However, there was not sufficient time for Sgt. Clark to reach an area with cell service, inform journalists and escort them back to the location before the operation would be complete.⁵⁹

POINTS IN ISSUE

55. The only real issue in this application is whether the applicants’ requested variation to the Injunction Order should be granted. There is nothing to be gained in issuing the variation requested, and this Court should not do so.

56. However, as the applicants argue that the RCMP are unreasonably limiting journalists’ movements while enforcing the Injunction Order, Canada will also address the fact that the RCMP’s actions are a valid exercise of an ancillary power in the course of that enforcement.

⁵⁷ Clark Affidavit #2 at paras 16-17.

⁵⁸ Clark Affidavit #2 at para 18.

⁵⁹ Clark Affidavit #2 at para 19.

SUBMISSIONS

1. Bare Declarations of Law Should Not be Issued Where There is No Practical Utility

57. The relief sought by the applicants is a bare declaration of law, with which Canada does not disagree. 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.⁶⁰

a. *The Remedy Sought is a Restatement of the Ancillary Power Doctrine*

58. The term the applicants seek to add to the Injunction Order seeks to prevent the RCMP from restricting media access in the Injunction Area unless there “is *bone fide* operational rationale that requires it, and in those instances, as minimally as possible”.

59. The proposed term simply restates what the common law requires when the police exercise an ancillary power. The ancillary power doctrine provides police with common law powers where those powers are reasonably necessary for them to fulfill their duties.⁶¹ Any police powers under the ancillary power doctrine must be tied to a *bone fide* operational need and must be as minimal as possible.

60. Here, in limiting media access to some extent, the police are exercising power under the ancillary powers doctrine to fulfill their duty to enforce the Injunction Order, to preserve the peace, and to protect life and property.

61. As such, the RCMP’s actions are subject to the common law, and the proposed term simply restates what the common law requires. The proposed term is unnecessary, and would be an improper exercise of this Court’s discretion.

⁶⁰ *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paras 11, 53, 56.

⁶¹ *Fleming v Ontario*, 2019 SCC 45 [*Fleming*] at para 45.

2. Application of the Ancillary Power Doctrine

62. Although the applicants only seek to have the Injunction Order varied to restate settled law, in their application they argue that the RCMP have unreasonably limited their movements within the Injunction Area. As a result, Canada will respond to these allegations in detail.

63. The test set out by the Supreme Court for determining whether police are in fact exercising a valid ancillary power is context specific and ensures that *Charter* rights are not impacted more than is reasonably necessary in the circumstances. As a result, the exercise of a valid ancillary power will not violate the *Charter*.⁶²

64. In this case, the actions of the RCMP are consistent with the exercise of an ancillary power in the course of fulfilling their duty to enforce the Injunction Order.

3. Defining the Power Exercised and Liberty Impacted

65. 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.⁶³

66. Here, the power being exercised by the police is the ability to control access to an area where enforcement activity in relation to 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.

67. 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.

⁶² *R v Clayton*, 2007 SCC 32 at para 21.

⁶³ *Fleming*, *supra* note 61 at para 46.

4. Police Actions are Reasonably Necessary to Carry out their Duties

68. 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.⁶⁴

69. 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 breaching the Injunction Order, but also preventing further individuals from commencing activities in breach of the Injunction Order.⁶⁵ Furthermore, in carrying out this work, the police also have a general duty at common law to preserve the peace and to protect life and property.

70. The question then becomes whether the police action in carrying out this duty – here imposing some restrictions on free movement of journalists during active enforcement – is a justifiable exercise of police power associated with those duties. To be justified, the action must be “reasonably necessary for the carrying out of the particular duty in light of all the circumstances”.⁶⁶ In determining whether the action is reasonably necessary, the Court must consider three questions:

- a) The importance of the police 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.⁶⁷

⁶⁴ *Fleming, supra* note 61 at para 46.

⁶⁵ *R v MacDonald*, 2014 SCC 3 [*MacDonald*] at paras 31, 64.

⁶⁶ *MacDonald, supra* note 65 at para 36. Also see *Fleming, supra* note 61 at para 47.

⁶⁷ *Fleming, supra* note 61 at para 47.

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

71. The enforcement of court orders is of utmost importance to the rule of law, and to the public good. As the British Columbia Court of Appeal has noted:

Refusal to obey court orders strikes at the heart of the rule of law, at the core of the organization of our society. If court orders can be disregarded with impunity, no one will be safe. Our free society cannot be sustained if citizens can decide individually what laws to obey and what laws to disregard.⁶⁸

72. The Supreme Court commented on the importance of the rule of law in *United Nurses of Alberta v Alberta (AG)*, where the majority of the Court stated:

The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependant on the ability of the courts to enforce their process and maintain their dignity and respect.⁶⁹

73. The preservation of property, and particularly of life, is also of utmost importance,⁷⁰ 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.⁷¹

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

74. Activities in breach of the Injunction Order are being carried out in a remote area with little to no cellular phone access, limited radio and satellite radio transmission in many places, and limited access and egress on narrow, often single lane, forest service roads which are relatively easy to block.

75. These factors, in combination with the fluid, unpredictable, and sometimes extreme and dangerous nature of the protestors' actions, creates a very challenging environment in which the police must enforce the Injunction Order.

⁶⁸ *Larkin v Glase*, 2009 BCCA 321 at para 7.

⁶⁹ *United Nurses of Alberta v Alberta (AG)*, [1992] 1 SCR 901 at 931.

⁷⁰ *MacDonald*, *supra* note 65 at para 39.

⁷¹ *R v Mann*, 2004 SCC 52 at para 43.

76. In addition, the tools and tactics that the police must use to extricate protestors from various positions, including high in trees, cantilevered over large drops, and attached to vehicles, the roadway and large stumps by chains and concrete, 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.

77. As the natural environment and the actions of protestors are largely outside the control of the police, in order to safely operate in such conditions, it is important that officers be in a position to control other aspects of their surroundings in order to ensure access and egress, their own safety, and the safety of protestors and observers, including journalists, to the extent possible.

78. Having individuals not involved in the enforcement action moving freely around an active enforcement area creates safety hazards including:

- a) The possibility of roads being blocked when emergency access is required;
- b) Interfering with officers involved in fluid and unpredictable situations as they arrest individuals breaching the Injunction Order;
- c) Distracting officers who are focused on dealing with complex extraction procedures involving various power tools and other equipment; and
- d) Injury to those moving in the area as a result of natural and manmade hazards.

79. As a result of the above, 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.

c. *Restrictions on the Movement of Journalists are Limited*

80. In considering the restriction on the movement of journalists, the nature of journalistic claims must be considered.

81. A claim of being a journalist is not, in and of itself, enough to justify unfettered access to an active injunction enforcement area. Not all those who label themselves journalists act in a manner that warrants increased access.

82. In considering whether a claim to being a journalist is sufficient to impact on contempt proceedings, or the issuance of an injunction excluding access in the first place, the Newfoundland Court of Appeal enumerated a number of considerations to inform whether the individual's activities are of the sort that should be considered journalistic, including:⁷²

- 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 protesters about whom the reports are being made; and
- 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.

These considerations demonstrate that being a self-proclaimed journalist is not sufficient, on its own, to justify special treatment.

83. 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.⁷³

84. 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. When no enforcement is being carried out, journalists are free to move about the area, to interview protestors, and to gather information in any way they see fit. While active enforcement is occurring, journalists are still permitted access to the area, but are required to:

⁷² *Re Brake; Anderson v Nalcor Energy*, 2019 NLCA 17 at para 84.

⁷³ *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835; *R v Mentuck*, 2001 SCC 76.

- a) Check in and be accompanied to the location by a Media Relations Officer, to ensure that they are in fact journalists and that access and egress to the location is not blocked; and
- b) Gather information from a location within the area that is safe and does not interfere with the ongoing operations.

85. Requiring a check-in to ensure that individuals claiming to be journalists are in fact journalists is necessary to try to prevent entry of those who wish to interfere with enforcement actions and to conduct activity in breach of the Injunction Order.

86. While it can be difficult to define who is a journalist in the modern era, the RCMP have taken a liberal approach to allowing access to individuals who self-identify as journalists. Only those who have been involved in previous behaviour in breach of the Injunction Order, have previously obstructed police operations, or who are unable to provide any confirmation that they are working as a journalist in some form have been refused access as journalists.

87. The liberal approach of the RCMP to the definition of 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.⁷⁴

88. 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.⁷⁵

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

⁷⁴ *R v National Post*, 2010 SCC 16 [*National Post*] at para 40.

⁷⁵ *National Post*, *supra* note 74 at para 43.

90. These concerns have proven valid on multiple occasions during the enforcement of the Injunction Order. For example:

- a) Individuals claiming to be journalists have been denied entry because they have previously obstructed the police;
- b) Individuals claiming to be journalists have joined the protest on being provided access; and
- c) Recognised journalists have used their status to assist a protestor to enter the Injunction Area who had already been arrested and was on conditions not to return to the Injunction Area.

91. Given these concerns, limiting the movement of journalists during active enforcement of the Injunction Order is reasonable. This is particularly so given that the locations from which journalists are required to gather information during active enforcement are chosen by trained Media Relations Officers, in consultation with operational officers, to ensure that journalists have the best view of activities possible while ensuring safety and efficacy of ongoing enforcement.

92. In addition, ongoing feedback from journalists is taken into account in adjusting and improving the access provided where possible. The quality of the access provided to journalists is reflected in the significant coverage of these events which has occurred.

5. Police Action in this Case is a Valid Exercise of an Ancillary Power

93. 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.

94. 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 with complex operations, and these situations were corrected as soon as possible. The RCMP is using adaptive management and is reviewing the

work done and adjusting their practices to respond to the changing needs of enforcing the Injunction Order while ensuring that journalists are facilitated access to observe the RCMP's enforcement activities. 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.

ORDER SOUGHT

95. Canada requests that the Applicants' application be dismissed, with costs.

July 7, 2021

Date



Attorney General of Canada

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LIST OF AUTHORITIES

NO.	DESCRIPTION
Caselaw	
1.	<i>Dagenais v Canadian Broadcasting Corp</i> , [1994] 3 SCR 835
2.	<i>Daniels v Canada (Indian Affairs and Northern Development)</i> , 2016 SCC 12
3.	<i>Fleming v Ontario</i> , 2019 SCC 45
4.	<i>Larkin v Glase</i> , 2009 BCCA 321
5.	<i>R v Clayton</i> , 2007 SCC 32
6.	<i>R v MacDonald</i> , 2014 SCC 3
7.	<i>R v Mann</i> , 2004 SCC 52
8.	<i>R v Mentuck</i> , 2001 SCC 76
9.	<i>R v National Post</i> , 2010 SCC 16
10.	<i>Re Brake; Anderson v Nalcor Engery</i> , 2019 NLCA 17
11.	<i>United Nurses of Alberta v Alberta (AG)</i> , [1992] 1 SCR 901