

Civilian Review and
Complaints Commission
for the RCMP



Commission civile d'examen
et de traitement des plaintes
relatives à la GRC

Office of the Chairperson

Bureau de la présidente

February 13, 2020

BY MAIL AND EMAIL

British Columbia Civil Liberties Association
Wet'suwet'en Hereditary Chiefs
Union of B.C. Indian Chiefs
C/O Harsha Walia
Executive Director
British Columbia Civil Liberties Association
306-268 Keefer Street
Vancouver, BC V6A 1X5

Dear B.C. Civil Liberties Association, Wet'suwet'en Hereditary Chiefs, and Union of B.C. Indian Chiefs:

The Civilian Review and Complaints Commission for the Royal Canadian Mounted Police ("the Commission") received your correspondence dated January 29, 2020, in which you requested that the Commission "initiate a policy complaint and public interest investigation" regarding the implementation and enforcement by the Royal Canadian Mounted Police ("RCMP") of a "checkpoint and exclusion zone" on the Morice West Forest Service Road. This relates to the ongoing dispute concerning the Coastal GasLink pipeline project. The Commission also acknowledges receipt of your letter dated February 9, 2020, which you described as an urgent update regarding the situation.

Your letter of January 29, 2020, included statements from eight individuals affected by the checkpoint/exclusion zone, and you indicated that your request is supported by West Coast Environmental Law and Pivot Legal Society.

As these matters have not yet been investigated, I cannot comment in any way on the merits of the issues you raise, or on the current situation on or around Morice West Forest Service Road. However, in order to address your request that the Commission initiate a Public Interest Investigation into this matter, I will set out my understanding of the concerns you are raising, and their similarity to certain other issues examined by the Commission in previous cases.

You are raising concerns about the RCMP checkpoint/exclusion zone, which you allege is overbroad in scope and constitutes an "inconsistent and arbitrary exercise of RCMP discretion." You further state that you believe the actions of the RCMP criminalized and

impeded the movement of the Wet'suwet'en people on their territory, as well as their invited guests, media, and legal counsel. It also limited the ability of people to bring food and medical supplies past the checkpoint, potentially creating unsafe conditions.

Your correspondence also expresses concern that these RCMP actions:

- constitute a significant restriction on individual liberties;
- are disproportionate to the RCMP's stated goal of maintaining public safety;
- are in violation of Anuk'nu'at'en (Wet'suwet'en law) and the *Canadian Charter of Rights and Freedoms* ("Charter"); and
- are "understood by Wet'suwet'en Hereditary Chiefs as a targeted, punitive, and colonial exercise of power," given the context of Crown–Wet'suwet'en relations "in light of the lethal use of force discussed by [the] RCMP in 2019."

You state that this matter is of significant public interest.

I also consider the issues raised in your correspondence to be of significant public interest. For this reason, the Commission has in the past conducted an extensive and thorough investigation into many of the same issues, in the *Chairperson-Initiated Complaint and Public Interest Investigation Into the RCMP's Response to Anti-Shale Gas Protests in Kent County, New Brunswick* ("the Kent County report"), relating to the RCMP's policing of anti-shale gas protests in New Brunswick. In that 116-page interim report, the Commission made 37 findings and 12 recommendations on a variety of topics related to the policing of protests, particularly with regard to Indigenous-led protests.

In accordance with the *Royal Canadian Mounted Police Act* ("the RCMP Act"), the Commission sent its report to the RCMP in March 2019, and is awaiting the RCMP Commissioner's response. Once this response is received and considered, the Commission will make its final findings and recommendations. The interim and final reports, as well as the RCMP's response, will then be made available to the public. The Commission also completed interim reports into 21 individual complaints related to the Kent County protests, and is awaiting responses from the RCMP.

It is in light of this previous report that, after careful consideration, I have decided not to initiate a public interest investigation into the matters you raise in your correspondence at this time. This is not because I do not consider these issues to be of significant importance. On the contrary, I have determined that it is not in the public interest at this time to commence such a process because the Commission has already provided extensive guidance to the RCMP, by way of the interim findings and recommendations made in the Kent County report and the 21 individual reports related to these events, about the very issues you raise with regard to the current situation in British Columbia. As such, it would not be in the public interest to possibly delay the resolution of the issues being raised by the individuals affected in this instance by conducting an extensive public interest process to examine the broader principles applicable, when the

guidance already provided by the Commission in the Kent County matter can be applied to the allegations raised here.

Because the Kent County report has not yet been made public, I believe it is important to inform you and the public of the issues it discusses and the findings and recommendations it makes, as these are directly related to the issues you raise in your correspondence. This summary of the Commission's prior analysis of these issues will hopefully serve to demonstrate the in-depth examination of these matters that has already been completed, and the guidance that has been provided to the RCMP by the Commission. This guidance may then be applied in the investigation and disposition of the public complaint in the present situation.

Summary of the Commission's Previous Findings and Recommendations

Among other topics, the issues examined in the Commission's Kent County report included:

- the use of arrest;
- the use of detention and search powers;
- the use of force;
- the adequacy of communication with members of the public;
- the planning, management, and execution of the arrests at the protest camp;
- the handling of spiritual items, and/or interference with the spiritual practices of Indigenous peoples involved in the protests;
- the role of the RCMP in the policing of protests by Indigenous peoples pertaining to Indigenous land rights, and whether there was differential treatment of Indigenous peoples compared to other protesters.

The Commission made numerous findings and recommendations about these issues. For instance, with respect to the arrests made during the anti-shale gas protests, the Commission found that, in general terms and with certain exceptions, RCMP members had reasonable grounds to arrest persons for various offences, and the force used was necessary and proportional in the circumstances. The Commission also found that in most cases, the RCMP members handled post-arrest and detention procedures in a reasonable manner and in compliance with policy.

The Commission found that in policing the protests, RCMP members demonstrated that they understood and applied the "measured approach," often demonstrating considerable forbearance in fulfilling their duty to keep the peace and ensure public safety while respecting individuals' right to protest. The RCMP command team and Crisis Negotiation Team made considerable efforts to bring stakeholders together to achieve a resolution to the conflict. The Commission also found that RCMP members did not demonstrate bias in general, or engage in differential treatment of Indigenous protesters when making arrests. Although the Commission made several findings and recommendations regarding the need for training and policy development with regard to

Indigenous cultural matters and the handling of sacred items, it found that RCMP members did not, either deliberately or unwittingly, unnecessarily interfere with Indigenous ceremonies or sacred items.

I note that the Commission's findings and recommendations must be considered in their full context in the Commission's interim report and upcoming final report, as this is meant only as a general overview.

Of particular relevance to the matters you raise, the Commission analyzed issues of stop checks, physical searches, and buffer zones/rerouting of traffic.

Stop checks

In your correspondence, you indicated that RCMP members were asking all drivers and passengers for names and identification as a mandatory condition for entering and exiting through the checkpoint. The information was being recorded by RCMP members and some people were not allowed through, despite providing identification. You raised concerns about the legality of these "identification checks."

In the Kent County report, the Commission found that there was no legal authority to require passengers to produce identification at stop checks in that case. The Commission reviewed the relevant jurisprudence and concluded that these types of "searches" could not be conducted absent judicial authorization or prior informed consent on the part of the individuals.

The Commission also expressed concern with the information being collected at the stop checks in the "check sheets" completed by RCMP members. The Commission concluded that there was no legal authority for RCMP members to conduct stop checks for the purposes of information gathering through a "general inquisition" of the occupants of the vehicle.

The Commission noted that the stop checks in that case went beyond the limited purposes for which courts have stated roadblocks could be established, for example, to prevent impaired driving or deal with cases of natural disasters, traffic accidents, or emergency investigations of a serious crime in progress, such as child abductions or escaped inmates.

Having examined the situation and reviewed the applicable principles, the Commission concluded that the concern for public safety related to unconfirmed information about the possible presence of weapons at the protest sites was not sufficient to rise to the level of an emergency criminal investigation necessitating a roadblock. The random stops were found to be inconsistent with the Charter rights of the vehicle occupants.

Physical searches

A statement from Molly Wickham, spokesperson of the Gidimt'en Clan of the Wet'suwet'en Nation, included in your correspondence stated that an RCMP member

asked her what she was bringing past the checkpoint and “looked through the car windows into the backseat using a flashlight.”

In another statement, David Byron Christopher Wood, a registered nurse who was present as a “legal observer,” described a separate incident in which an RCMP member “went behind our vehicle, shone a light into the back of the vehicle, and looked through the rear window at the supplies.”

In the Kent County case, the Commission found that the routine searches of vehicles and individuals entering the protesters’ campsite that were conducted by RCMP members were not authorized by law. The Commission noted that such searches cannot be conducted in the absence of Charter-compliant legislation, judicial authorization, exceptional circumstances such as search incident to arrest or “safety searches” during investigative detention, or informed consent.

While there were reasons to be concerned about the possibility of firearms and other weapons being brought into the demonstrators’ campsite, this did not amount to exigent circumstances that could have justified the physical searches conducted by the RCMP, nor was there an imminent breach of peace that could have justified the searches.

The Commission found that the practice of searching persons entering the campsite was, in the circumstances, inconsistent with the Charter rights of the individuals involved.

To avoid such situations in the future, the Commission recommended that RCMP members involved in public order policing operations be provided with a review of law and policy related to search and seizure, including the warrant requirement and the legal grounds establishing exceptions for warrantless searches.

Exclusion zone/rerouting of traffic

Using various examples, your letter described that several individuals were not permitted to pass the RCMP checkpoint. The reasons given by RCMP members for both the establishment of the checkpoint itself and the denial of entry to specific persons were reportedly inconsistent from one member to another, and from one instance to another. Some RCMP members reportedly stated that only pre-approved Hereditary Chiefs would be allowed entry, only accredited journalists were allowed access, only lawyers licensed to practice in British Columbia would be allowed in, and/or only vehicles with tire chains and two-way radios would be granted access. Of particular concern to you was the restriction of movement of Wet’suwet’en people through their territories; you described this as a “grave violation of Wet’suwet’en law and jurisdiction, and constitutionally-protected Wet’suwet’en rights and title.” You also expressed concern that some members of the media, as well as legal counsel and legal observers, were denied access past the checkpoint.

You stated that these restrictions on the movement of “certain categories of people” was unrelated to the RCMP’s public safety justification, and that no injunction order from the courts mention travel to, or residence at, the various sites or camps in Wet’suwet’en territories. You expressed that, regardless of how the RCMP characterizes their actions (i.e. as a checkpoint, not an exclusion zone), they have in effect implemented an unnecessary exclusion zone that is not authorized by law.

In the Kent County case, the Commission received several complaints relating to the allegedly unnecessary rerouting of traffic away from protest sites.

Given the lack of specific details in the allegations made in the Kent County case, there was insufficient information to conclude that the road closures and rerouting of traffic in that case were unreasonable. Nevertheless, the Commission conducted an in-depth review of the applicable legal principles to determine whether “buffer zones” could be established, and under what circumstances. The Commission set out the factors to be considered to evaluate the reasonableness of such actions, including the size of the zone, who was excluded and why, and the duration of the exclusion.

The Commission reviewed the applicable legal principles, including the case law involving roadblocks related to specific situations, such as visiting dignitaries in need of protection or searches conducted prior to entering a protest site. The Commission noted that the case law provides that police have the power to create buffer zones for specific, well-defined purposes, but that this is not a general power and instead must be temporally, geographically, and logistically responsive to the circumstances.

The Commission also conducted a comprehensive review of a specific allegation involving a protester who was prevented from returning to a demonstration site after a small group of protesters began to engage in activities that constituted a criminal offence. A separate report was issued regarding this complaint, and the applicable principles were also reviewed in the Kent County report.

The Commission found that the decision to restrict the complainant’s access to the protest site to prevent crime and ensure public safety was not unreasonable in the circumstances. However, the Commission noted that such interference with the liberty of individuals to circulate and peacefully protest would only be justified in specific, limited circumstances.

The Commission emphasized that it was the specific circumstances surrounding the complainant’s case that led to the conclusion that the police conduct was not unreasonable in that instance. In particular, protesters were blocking the roadway and impeding the work of SWN Resources employees (constituting the offence of mischief, and conduct that was specifically prohibited by the court’s injunction), and had been allowed by police to do so for a lengthy period of time. The criminal offence was ongoing at the time when the complainant’s access to the site was restricted. The Commission stated that, absent those circumstances, the restriction of the complainant’s ability to rejoin the protest site could have been found to be unreasonable. The Commission noted that there were other means to prevent the risk

that protesters would commit the offence of mischief from materializing, aside from preventing access to the protest site by newcomers.

The Commission reviewed the factors to be considered in evaluating whether restricting access to a protest site could be justified in a specific instance, including the degree of interference with the individual's liberties, the importance of the objective being pursued by police, and the balancing of these competing interests in the specific circumstances.

In this case, the Commission noted that the liberties at stake, involving participation in a peaceful protest, were both foundational common law civil liberties and fundamental constitutional freedoms. Conversely, the RCMP was seeking to prevent a specific and identifiable harm, in an instance where an offence was ongoing and the amount of time the complainant was prevented from accessing the protest site was limited and directly connected with the specific harm that the RCMP members were seeking to address. Under these circumstances, the Commission had to consider whether an invasion of individual rights was necessary for the peace officers to perform their duty. As well, the Commission noted that public safety was also a consideration in prohibiting persons such as the complainant and the complainant's children from accessing the site.

The Commission concluded that the difficult judgment call made by the RCMP members on the ground was not unreasonable, and that the members' actions were permissible in this specific situation. However, the Commission also emphasized that, particularly when policing a public protest, RCMP members must be cognizant of the limits of their powers, specifically in relation to curtailing protesters' ability to assemble and express themselves in a lawful manner.

The Commission specifically noted that other instances of blocking public access to roadways, especially when such actions may have directly or indirectly unnecessarily hindered the media's ability to report on the protests, may have been unreasonable. The Commission also emphasized that police may only establish "buffer zones" in accordance with the parameters detailed by the courts in the relevant jurisprudence and reviewed in detail in the Kent County report. The Commission stated that anything outside of these bounds is impermissible in a free and democratic society.

The Commission specified that decisions by the RCMP to restrict access to public roadways or other public sites must be made only with specific, objectively reasonable rationales for doing so, and should be done in a way that interferes with the rights of persons in as minimal a fashion as possible; for example, a buffer zone that is as limited in size as possible and an exclusion that is as short in duration as possible.

Other relevant issues

The Kent County report analyzed other issues related to the concerns you raise in your letter. For example, the Commission found that certain arrests were made based on an apparent misinterpretation of the conditions of the November 22, 2013, injunction. The Commission therefore recommended that the RCMP provide members engaged in the policing of public protests/public order policing with detailed, accurate interpretations of

the conditions of any injunction or unique legal provisions that they are expected to enforce.

The Commission also discussed the use of RCMP Emergency Response Team members in a “lethal over-watch” role during the tactical operation, and made interim findings and recommendations about RCMP members’ training in Indigenous cultural matters and sensitivity to Indigenous ceremonies and sacred items.

Next Steps

The Commission’s findings and recommendations are remedial in nature and are intended to improve policing and hold the RCMP accountable for its activities and the conduct of its members. The Commission conducts reviews of RCMP activities, and cannot direct the RCMP to take, or refrain from taking, certain actions during ongoing operations. In addition, as stated in subsection 45.74(1) of the RCMP Act, if a public interest investigation were initiated, it may be suspended until the police operation concludes if continuing the investigation would compromise or seriously hinder an ongoing criminal investigation or proceeding.

As indicated previously, the Commission takes the issues you have raised seriously. Reflecting the seriousness of these matters, the Commission has already conducted a comprehensive analysis of such issues, and other closely related issues, in its Kent County public interest investigation.

It is my understanding that the RCMP is currently reviewing the Commission’s interim findings and recommendations regarding the Kent County case, and will be providing a response explaining what actions it intends to take as a result, as required by the RCMP Act. It is my hope that the RCMP will be able to use the extensive guidance provided by the Commission in the Kent County case in order to investigate and dispose of the issues you raise regarding the current situation.

For this reason, if you are agreeable to this course of action, the Commission could treat your submission as a public complaint that would be investigated by the RCMP in the first instance. To facilitate this, the Commission requires written confirmation (third party authorization) from the individuals whose statements were included in your correspondence, if they wish to have their submissions treated as part of the public complaint. The Commission would contact you directly to obtain these approvals, or if preferable could contact the individuals involved to seek their confirmation directly.

Once the RCMP’s investigation is complete, should you be dissatisfied with its handling of your public complaint, upon your request, the Commission would be able to conduct an independent review of the file. It is my hope that the RCMP will be able to use the extensive guidance provided by the Commission in the Kent County case in order to examine the issues you raise regarding the current situation, and expedite its investigation of these allegations.

I must note that nothing I have stated in this letter regarding the importance of the issues you raise, and their similarity to the Kent County issues, should be taken as comments regarding the merits of the complaint presented in your letter. The individual facts of each allegation must be investigated and examined in light of applicable law and policy, and a disposition of each allegation must be made by the RCMP. Should you be dissatisfied with the disposition of the allegations, you may request that the Commission review the RCMP's disposition, at which time the Commission will examine the facts and make its own findings.

It should also be noted that the Commission is aware that, due to the passage of time, RCMP policies, procedures, and training may well have changed since the events examined in the Kent County report. In investigating your complaint, the RCMP will have to determine whether any such changes were consistent with the guidance provided by the Commission, and whether further changes are required. Similarly, the broad principles set out in the Kent County report will have to be applied to the specific facts of this case in order to make findings about the specific issues raised here.

Conclusion

For the reasons discussed above, I do not consider it to be in the public interest to commence a public interest investigation into this matter at this time, given the guidance already provided to the RCMP by the Commission on these serious issues.

It should be noted that, under the RCMP Act, it is open to me, as the Commission's Chairperson, to decide at any time to initiate a Chairperson-initiated complaint and/or public interest investigation. As such, it remains possible that I may decide to conduct a public interest investigation into matters related to the present situation, if at any time the evolving circumstances make it warranted in the public interest to do so.

I thank you for bringing these important issues to the attention of the Commission. We will await your decision on whether you wish to proceed with a public complaint before reaching out to obtain the additional documents necessary.

Sincerely,



Micheline Lahaie
Chairperson

cc: West Coast Environmental Law
Pivot Legal Society
RCMP Commissioner Brenda Lucki
RCMP Deputy Commissioner Jennifer Strachan