File No. T-1347-20

FEDERAL COURT

BETWEEN:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Applicant

and

ROYAL CANADIAN MOUNTED POLICE COMMISSIONER BRENDA LUCKI and ATTORNEY GENERAL OF CANADA

Respondents

and

CIVILIAN REVIEW AND COMPLAINTS COMMISSION FOR THE ROYAL CANADIAN MOUNTED POLICE

Intervener

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, ATTORNEY GENERAL OF CANADA

PART I – STATEMENT OF FACTS

A. Overview

1. An effective public complaints process is necessary in order for the public to have confidence in the Royal Canadian Mounted Police ("RCMP"). The RCMP Commissioner ("Commissioner") acknowledged that the time required to respond to the Interim Report from the Civilian Review and Complaints Commission for the RCMP ("CRCC") at issue in this application was not ideal.

2. However, the Commissioner has since provided her response to the Interim Report, rendering the debate academic. The Applicant has obtained the core relief that it was seeking through its application so the underlying basis for the

dispute between the parties no longer exists. The RCMP has also taken concrete steps to improve its ability to respond to CRCC interim reports in a timely manner going forward. The application should therefore be dismissed on the basis of mootness.

3. As there is no longer any live dispute between the parties and there would be no practical utility served by granting the requested declarations, the Court should decline to grant the requested declarations. Further, the Applicant's section 2(b) *Charter* rights are not engaged in the circumstances of this case and, in any event, consideration of *Charter* principles is not necessary to determine this matter.

B. Facts

The RCMP Public Complaint Process:

4. The CRCC is an independent civilian review body created by the *Royal Canadian Mounted Police Act* ("*RCMP Act*").[1] Its responsibilities include receiving complaints from the public about the conduct of RCMP members and conducting reviews when complainants are not satisfied with the RCMP's handling of their complaints.[2] The CRCC also has the power to conduct investigations into complaints where the CRCC Chairperson is of the opinion that it would be in the public interest to do so ("public interest investigation").[3]

5. After completing a public interest investigation under subsection 45.66(1), the CRCC will prepare an interim report and send it to the Commissioner. The

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[1] *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 , s 45.29(1) [*RCMP Act*]; Affidavit of Michael O'Malley affirmed on February 3, 2021 ("O'Malley Affidavit"), at para 4 [Respondent's Record ("RR"), Tab 1, p 2].
[2] *RCMP Act*, ss 45.53, 45.7.
[3] *RCMP Act*, s 45.66.

interim report sets out the CRCC's findings and recommendations regarding the complaint.[4]

6. The *RCMP Act* requires the Commissioner to respond to interim reports from the CRCC "as soon as feasible". Subsection 45.76(2) provides:

> The Commissioner shall, as soon as feasible, provide the Chairperson and the Minister with a written response indicating any further action that has been or will be taken with respect to the complaint. If the Commissioner decides not to act on any findings or recommendations set out in the report, the Commissioner shall include in the response the reasons for not so acting.[5]

7. The RCMP National Public Complaints Directorate ("NPCD") is the national policy centre responsible for public complaints concerning RCMP members.[6] The NPCD has advisors who review the interim reports from the CRCC, consult internally within the RCMP when required, and prepare analysis reports for the Commissioner to consider.[7] After considering the analysis completed by NPCD, the Commissioner will issue a written response to the CRCC interim report.[8]

8. After receiving the Commissioner's written response, the CRCC must consider the response and then prepare its final report setting out its findings and recommendations regarding the complaint.[9] The CRCC then provides its final report to the Commissioner and the parties to the complaint.[10]

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[4] *RCMP Act*, s 45.76(1); Affidavit of Nika Joncas-Bourget affirmed on January 18, 2021 ("Joncas-Bourget Affidavit"), at para 17 [Intervenor's Record ("IR"), Tab 1, pp 4-5]; O'Malley Affidavit, at para 10 [RR, Tab 1, p 4].
[5] *RCMP Act*, s 45.76(2).
[6] O'Malley Affidavit, at para 2 [RR, Tab 1, p 2].
[7] O'Malley Affidavit, at para 11 [RR, Tab 1, p 4].
[8] O'Malley Affidavit, at paras 11-12 [RR, Tab 1, p 4].
[9] *RCMP Act*, s 45.76(3).
[10] *RCMP Act*, s 45.76(3).

9. A number of factors impact the time required for the RCMP to provide its response to an interim report from the CRCC. For example, the complexity of the report, the need to consult internally, available resources, and competing priorities are all factors that affect the time it takes the RCMP to respond to an interim report.[11]

The RCMP and CRCC MOU:

10. On December 11, 2019, the CRCC and the RCMP signed a Memorandum of Understanding ("MOU") to establish procedures to support the implementation of the public complaints regime set out under the *RCMP Act*.[12] Under paragraphs 6 and 75 of the MOU, the RCMP agreed to make "best efforts" to provide responses to interim reports by the CRCC within six months of receiving an interim report.[13]

11. Prior to signing the MOU, the RCMP explained to the CRCC that the existing backlog of interim reports would need to be addressed before the RCMP would be in a position to meet the 6 month timeframe for responses to interim reports moving forward.[14] The RCMP is generally meeting the other timeframes set out in the MOU, with the exception of the time required to respond to interim reports.[15]

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[11] O'Malley Affidavit, at paras 41-43 [RR, Tab 1, p 11]; Transcript of Cross-Examination of Supt Michael O'Malley dated February 26, 2021 ("O'Malley Cross-Exam"), p 23 (lines 12-25), p 24 (lines 1-2), p 47 (lines 6-16) [Applicant's Record ("AR"), Vol 2, Tab 4, pp 569-570, 593].
[12] Memorandum of Understanding dated December 11, 2019 ("MOU"), preamble, Exhibit "E" of Joncas-Bourget Affidavit [IR, Tab 1, p 40]; O'Malley Affidavit, at para 29 [RR, Tab 1, p 8].
[13] MOU, at paras 6, 75 [IR, Tab 1, pp 41, 50].
[14] O'Malley Cross-Exam, p 41 (lines 8-25), p 42 (lines 1-6) [AR, Vol 2, Tab 4, pp 587-588].
[15] O'Malley Affidavit, at para 51 [RR, Tab 1, p 14]; O'Malley Cross-Exam, p 39 (lines 19-25), p 40 (lines 1-22) [AR, Vol 2, Tab 4, pp 585-586].

The Applicant's Complaint to the CRCC:

12. On February 6, 2014, the Applicant submitted a complaint to the CRCC. The Applicant alleged that members of the RCMP had illegally monitored protests and demonstrations surrounding National Energy Board hearings into the Northern Gateway Project pipeline (the "BCCLA Complaint").[16] The CRCC commenced a public interest investigation into the BCCLA Complaint on February 20, 2014.[17]

13. On June 23, 2017, the CRCC provided its interim report to the Commissioner regarding the BCCLA Complaint (the "BCCLA Interim Report").[18]

14. When the NPCD received the BCCLA Interim Report, the RCMP was dealing with a backlog of interim reports. Nine other public interest investigation interim reports and a large number of individual complaint review interim reports were awaiting analysis.[19] An NPCD analyst was not immediately assigned to work on the BCCLA Compliant because the NPCD's practice at that time was to respond to interim reports in the order they were received.[20]

15. Between 2018 and 2020, the Applicant wrote on a number of occasions to both the CRCC and RCMP to raise concerns about the time the RCMP was taking to respond to the BCCLA Interim Report.[21] The CRCC also communicated with the

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[16] Letter from Champ to McPhail dated February 6, 2014, Exhibit "A" of Affidavit of Trudy Moore affirmed November 17, 2020 ("Moore Affidavit") [AR, Vol 1, Tab 2, p 13]; Joncas-Bourget Affidavit, at para 22 [IR, Tab 1, p 7].
[17] *RCMP Act,* s. 45.66(1); Letter from McPhail to P. Champ dated February 20, 2014, Exhibit "B" to Moore Affidavit [AR, Vol 1, Tab 2, p 19]
[18] Joncas-Bourget Affidavit, at para 25 [IR, Tab 1, pp 7-8]; O'Malley Affidavit, at para 19 [RR, Tab 1, p 6].
[19] O'Malley Affidavit, at para 40 [RR, Tab 1, p 10].
[20] O'Malley Affidavit, at para 19 [RR, Tab 1, p 6]; O'Malley Cross-Exam, p 31 (lines 23-25), p 32 (lines 1-18) [AR, Vol 2, Tab 4, pp 577-578].
[21] O'Malley Affidavit, at paras 22-37 [RR, Tab 1, pp 6-10]. See O'Malley Affidavit Exhibits "D", "E", "F", "G", "K", "L", "N", "O", "P".

RCMP on a number of occasions regarding the time it was taking for the Commissioner to respond to the BCCLA Interim Report and other outstanding cases.[22]

16. On June 28, 2019, the Commissioner met with the CRCC Chairperson. The RCMP's response to the interim report in another substantial matter, the Kent County investigation ("Kent County Interim Report"), was discussed specifically as a priority for the CRCC Chairperson and agreed to by the Commissioner.[23] The BCCLA Complaint was not specifically discussed.[24] In order to prioritize completion of the Kent County Interim Report, it was necessary for the NPCD to put the majority of its work on hold in order to direct all available resources to address that file. [25]

17. In June 2020, the Commissioner responded to the Kent County Interim Report.[26] This was the largest file that the NPCD had ever processed, containing two terabytes of relevant materials.[27] The interim report raised complicated issues regarding police treatment during Indigenous-led anti-shale gas protests in New Brunswick.[28]

18. In July 2020, after completion of work on the Kent County Interim Report, the NPCD assigned three analysts to review the BCCLA Interim Report.[29]

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[22] O'Malley Affidavit, at paras 22-37 [RR, Tab 1, pp 6-10]. See O'Malley Affidavit Exhibits "A", "B", "C", "H", "I", "J", "M".
[23] O'Malley Affidavit, at para 26 [RR, Tab 1, p 7].
[24] O'Malley Affidavit, at para 26 [RR, Tab 1, p 7].
[25] O'Malley Cross-Exam, p 33 (lines 8-25), p 34 (lines 1-25), p 35 (1-13) [AR, Vol 2, Tab 4, pp 579-581]. See also E-mail from O'Malley to Joncas-Bourget dated June 10, 2019, Exhibit "C" to O'Malley Affidavit [RR, Tab 1, p 22].
[26] O'Malley Affidavit, at para 47 [RR, Tab 1, p 12].
[27] O'Malley Affidavit, at para 45 [RR, Tab 1, p 12]; O'Malley Cross Exam, p 23 (lines 1-11) [AR, Vol 2, Tab 4, p 569].
[28] O'Malley Affidavit, at para 45 [RR, Tab 1, p 12].
[29] O'Malley Affidavit, at para 47 [RR, Tab 1, p 12].

19. On August 7, 2020, the Commissioner acknowledged that the time taken to respond to the BCCLA Interim Report "has not been ideal."[30]

The Application for Judicial Review:

20. On November 9, 2020, the Applicant commenced the present application in which it sought the following relief:

    a) a writ of *mandamus* directing the Commissioner to provide her written response within 10 days of the Court's order;

    b) a declaration that the Commissioner has breached her duty under the *RCMP Act*; and

    c) a declaration that the amount of time taken for the Commissioner's response violated the Applicant's s. 2(b) *Charter* right to freedom of expression.[31]

21. On November 20, 2020, the Commissioner provided the CRCC with her response to the BCCLA Interim Report.[32] The CRCC subsequently released its Final Report on the BCCLA Complaint to the Applicant on December 15, 2020.[33]

22. The Applicant confirmed that since the Commissioner has now provided her response to the BCCLA Interim Report, it is no longer seeking an order of *mandamus*. However, the Applicant maintains its request for declaratory relief.[34]

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[30] Letter from Commissioner to Champ dated August 7, 2020, Exhibit "K" to O'Malley Affidavit [RR, Tab 1, p 48\.
[31] Notice of Application for Judicial Review dated November 9, 2020 [AR, Vol 1, Tab 1]
[32] O'Malley Affidavit, at para 38 [RR, Tab 1, p 10].
[33] Final Report of the Public Investigation into the Events and Actions RCMP Members Involved in National Energy Board Hearings in British Columbia, Exhibit "N" to Joncas-Bourget Affidavit [IR, Tab 1, p 92].
[34] Applicant's Memorandum of Fact and Law, at para 29 [AR, Vol 3, Tab 5, p 648].

Additional NPCD Resources:

23. Since 2019, the RCMP has taken concrete steps to add additional resources in order to improve its ability to respond to CRCC interim reports in a timely manner. Specifically:

    - The RCMP conducted a staffing process in 2019 and again in 2020 resulting in the creation of 12 new positions within the NPCD. Given the lengthy administrative and security processes involved in hiring new employees within the RCMP, this did not result in immediate new resources for the NPCD.[35]

    - In the interim, the RCMP brought in analysts on temporary assignments to assist the NPCD with addressing the backlog of interim reports.[36]

    - As of February 3, 2021, four advisor positions have been filled and six new hires are pending security clearances. New hiring processes are being initiated to fill the remaining positions.[37]

    - The RCMP also created an additional 12 term positions that can be filled to provide added capacity should the need arise.[38]

24. As a result of the increased resources, the Commissioner provided 71 responses to interim reports from the CRCC between June 2020 and February 2021.[39] This included responses to three of the largest interim report files that the NPCD had ever received from the CRCC (Kent County Interim Report, the BCCLA Interim Report, and the Colten Boushie Interim Report).[40] By comparison, the Commissioner provided 18 responses to the CRCC for the entire 2019-2020 fiscal year.[41]

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[35] O'Malley Affidavit, at paras 48-51 [RR, Tab 1, pp 13-14]; O'Malley Cross-Exam pp 17-21 [AR, Vol 2, Tab 4, pp 563-567]; NPCD Organizational Chart dated November 3, 2020, Exhibit "4" to O'Malley Cross-Exam [AR, Vol 2, Tab 4, p 618].
[36] O'Malley Affidavit, at para 49 [RR, Tab 1, p 13]; O'Malley Cross-Exam p 20 (lines 1-18) [AR, Vol 2, Tab 4, p 566].
[37] O'Malley Affidavit, at para 50 [RR, Tab 1, p 13].
[38] O'Malley Cross-Exam, p 15 (line 17-25), p 16 (line 1-18) [AR, Vol 2, Tab 4, pp 561-562]; NPCD Organizational Chart dated November 3, 2020, Exhibit "4" to O'Malley Cross-Exam [AR, Vol 2, Tab 4, p 618].
[39] O'Malley Affidavit, at para 16 [RR, Tab 1, p 5].
[40] O'Malley Affidavit, at para 51 [RR, Tab 1, p 14].
[41] O'Malley Affidavit, at para 16 [RR, Tab 1, p 5].

25. The RCMP is working towards clearing the remaining backlog of interim reports from the CRCC by the end of 2021.[42] As of January 18, 2021, there was a total of 156 interim reports, including public interest investigations and individual complaint reviews, waiting for responses from the RCMP.[43] With respect to outstanding public interest investigation interim reports, as of February 26, 2021, there were only four outstanding responses and three of those responses were in the final stages of analysis.[44] The NPCD expects that it will begin meeting the six-month timeline for all new interim reports from the CRCC going forward from April 1, 2021.[45]

PART II – ISSUES

26. The issues raised by this application are:

(a) Should this application be dismissed on the basis of mootness?

(b) What is the proper interpretation of the "as soon as feasible" requirement in s. 45.76(2) of the *RCMP Act*?

(c) Should the Court grant a declaration that the Commissioner breached her duty under s. 45.76(2) of the *RCMP Act*?

(d) Is s. 2(b) of the *Charter* engaged?

(e) Is an award of special costs warranted?

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[42] O'Malley Cross-Exam, p 43 (lines 2-11), p 49 (lines 9-15) p 61 (lines 4-15) [AR, Vol 2, Tab 4, pp 589, 595, 607].
[43] Joncas-Bourget Affidavit, at para 55 [IR, Tab 1, p 15].
[44] O'Malley Cross-Exam, p 44 (lines 8-21) [AR, Vol 2, Tab 4, p 590].
[45] O'Malley Cross-Exam, p 43 (lines 12-24), p 61 (line 4-15) [AR, Vol 2, Tab 4, pp 589, 607].

PART III – ARGUMENT

A. The Application should be Dismissed on the basis of Mootness

27. The application is moot because the Commissioner has provided her response to the BCCLA Interim Report and the concrete dispute between the parties has disappeared. This is not an appropriate case for the Court to exercise its discretion to hear the application despite its mootness. Given that the declarations sought will have no practical effect, they should not be granted.

Test for Declaration:

28. The Supreme Court has confirmed that a court may only issue a declaration if the party seeking relief establishes that: a) the court has jurisdiction to hear the issue; b) the dispute is real and not theoretical; c) the party raising the issue has a genuine interest in its resolution; and d) the respondent has an interest in opposing the declaration sought.[46]

29. A court can only grant a declaration if it will have a practical effect, that is, if it will settle a "live controversy" between the parties.[47] The policy underpinning the doctrine of mootness applies equally to the availability of declaratory relief.[48] Declarations potentially available under paragraph 18(1)(a) of the *Federal Courts Act* are extraordinary remedies, granted only when necessary and of practical utility.[49]

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[46] *SA v Metro Vancouver Housing Corp*, 2019 SCC 4, at para 60; *Ewert v Canada*, 2018 SCC 30 at para 81; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 11 [*Daniels*].
[47] *Daniels*, *ibid* at para 11.
[48] *Moses v Canada*, 2003 FC 1417 at para 13 [*Moses*].
[49] *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para 105; *Daniels*, *supra* note 46 at para 11.

30. This Court has consistently held that the doctrine of mootness may not be avoided merely by seeking declaratory relief.[50] Declaratory relief, in itself, does not provide a basis to establish a live controversy.[51] This is consistent with the Supreme Court's decision in *Borowski*, where it held that where "the central issue" of a case has been resolved, the existence of "ancillary" issues does not maintain a "live controversy."[52]

Test for Mootness:

31. The mootness analysis proceeds in two stages. The first question is whether the proceeding is indeed moot: whether a live controversy remains that affects or may affect the rights of the parties. If the proceeding is moot, a second question arises: whether the court should nonetheless exercise its discretion to hear and decide it.[53]

32. The factors that a court should consider when deciding whether to exercise its discretion to hear a moot case are: a) the presence of an adversarial relationship; b) the need to promote judicial economy; and, c) the need for the court to be sensitive to its role as the adjudicative branch of the government.[54] The consideration of these factors is not a mechanical process.[55] Rather, the discretion should be exercised cumulatively, recognizing that the factors may not all point in the same direction.[56]

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[50] *Rebel News Network Ltd v Canada (Leaders' Debates Commission)*, 2020 FC 1181 at para 42 [*Rebel News*]; *0769449 BC Ltd v Vancouver Fraser Port Authority*, 2016 FC 645 at para 24 [*Vancouver Fraser Port Authority 2016*]; *Rahman v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 137 (CanLII) at paras 18, 21.
[51] *Rebel News*, *ibid* at para 42; *Vancouver Fraser Port Authority 2016*, *ibid* at para 24.
[52] *Borowski v Canada (Attorney General),* [1989] 1 SCR 342 at para 26 [*Borowski*].
[53] *Borowski*, *ibid* at para 16; *Communities and Coal Society v Vancouver Fraser Port Authority*, 2019 FCA 94 at paras 4-6; *Cardin v Canada (Attorney General)*, 2017 FCA 150 at para 9.
[54] *Borowski*, *ibid* at paras 29-42; *Yahaan v Canada*, 2018 FCA 41 at para 32; *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 at para 10 [*Democracy Watch*].
[55] *Democracy Watch*, *ibid* at para 13.
[56] *Democracy Watch*, *ibid* at para 13.

The Application is Moot:

33. The first part of the test for mootness requires the Court to decide whether the concrete dispute between the parties has disappeared such that the issues have become academic. In light of the Commissioner providing her response to the BCCLA Interim Report, there is no longer any "live controversy" or concrete dispute between the parties underpinning the application. The Applicant has obtained the core relief that it was seeking through its application so the underlying basis for the dispute between the parties no longer exists.

34. A declaration that the Commissioner breached her duty to respond "as soon as feasible" will not have a practical effect in relation to the BCCLA Complaint, which has now concluded, or in relation to future complaints. As explained below, a judicial determination of whether any given response was made "as soon as feasible" will necessarily depend on the unique facts of each case. The declarations sought by the Applicant would therefore serve no purpose or have any practical effect on any parties' rights. As such, the fact the Applicant is seeking declaratory relief does not transform this moot application into a "live" proceeding.

This Court should not exercise its discretion to decide a moot case:

35. Since there is no live controversy between the parties, it is necessary for the Court to consider the second part of the mootness test and consider whether it should exercise its discretion to hear a matter that is moot. In the present case, the relevant factors weigh against the Court hearing and deciding this moot application.

36. First, there is no remaining adversarial relationship between the Applicant and the RCMP as the Applicant has achieved the result they were seeking in this application. In these circumstances, the concrete dispute, and adversarial context, between the parties regarding the Commissioner's response to the BCCLA

Interim Report has disappeared, and the remaining declaratory relief raised by this application has become academic. Further, simply alleging a *Charter* violation does not automatically convert a moot application into a live controversy, nor does it require the Court to exercise its discretionary authority to hear a moot application.[57]

37. The second factor for the Court to consider when deciding whether to exercise its discretion to hear a matter that is moot are concerns regarding judicial economy. In the present case, this factor militates against the Court exercising its discretion to decide the application.[58] A decision by the Court on the merits of the application would have no practical effect on the rights of the parties. It would therefore be an uneconomical use of judicial resources to allow the application to proceed.[59] As recently noted by the Federal Court of Appeal:

> The mootness issue assumes greater significance following [*Vavilov*]. There, the Supreme Court underscored that courts must consider expediency and cost-efficiency when considering applications for judicial review and should not grant remedies when they serve no useful purpose. [60]

38. Given that the issues raised by the Applicant regarding the interpretation of the phrase "as soon as feasible" can and should be dealt with in the context of an actual live dispute, there is no reason for this Court to exercise its discretion to hear and decide this matter. As the Federal Court of Appeal noted in *Democracy Watch*, "[if] there may be … other similar cases, then there may well be other opportunities to bring the issue before the Court in a case that presents a live dispute."[61]

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[57] *Rebel News, supra* note 50 at para 49
[58] *Democracy Watch*, *supra* note 54 at para 18.
[59] *Borowski*, *supra* note 52 at paras 34-37.
[60] *Cupe Air Canada Component v Air Canada* 2021 FCA 67 at para 14, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 140 [*Vavilov*].
[61] *Democracy Watch*, *supra* note 54 at para 18.

39. The third factor for the Court to consider in exercising its discretion is the need for the Court to be sensitive to its role relative to that of the legislative branch of government.[62] The Supreme Court stated that "in considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role," by intruding into the legislative sphere.[63] In short, the Court's role is adjudicative not legislative; it decides live disputes between contending parties who are before the Court.

40. This factor points to the Court not deciding this matter. As explained below, Parliament specifically chose not to include a specific time frame in the *RCMP Act* for the Commissioner to respond to reports from the CRCC. In the absence of an actual dispute, the Court should be reluctant to specify a defined time limit, in the manner suggested by the Applicant, where Parliament deliberately chose not to.

41. Based on the foregoing, the application ought to be dismissed as it has now become moot and the Court should not, in the circumstances, exercise its discretion to hear and decide the matter. The submissions that follow are made in the alternative, in the event the application is not dismissed as moot.

B. Interpretation of "as soon as feasible" in s. 45.76(2) of the *RCMP Act*

42. The phrase "as soon as feasible" in subsection 45.76(2) of the *RCMP Act* should be interpreted as meaning that the Commissioner must respond reasonably soon, taking all of the circumstances into account. A flexible case by case approach, recognizing that the Commissioner has some discretion to determine when a response is feasible, is consistent with the ordinary meaning of "as soon as feasible", the scheme of the Act, and Parliament's deliberate choice not to include a fixed deadline for the Commissioner's response.

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[62] *Democracy Watch*, *ibid* at para 14.
[63] *Borowski*, *supra* note 52 at para 41.

43. The modern approach to statutory interpretation requires that the words of a statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[64]

44. Subsection 45.76(2) of the *RCMP Act* provides:

The Commissioner shall, as soon as feasible, provide the Chairperson and the Minister with a written response indicating any further action that has been or will be taken with respect to the complaint […]	Le commissaire est tenu, dans les meilleurs délais, de fournir par écrit au ministre et au président de la Commission une réponse qui fait état de toute mesure additionnelle qui a été ou sera prise relativement à la plainte […]

45. While subsection 45.76(2) requires the Commissioner to provide her response to the CRCC's interim report "as soon as feasible", there is no specific timeline specified for the response. The phrase "as soon as feasible" in subsection 45.76(2) is not defined anywhere in the *RCMP Act*. The parties agree that the provision at issue has not been judicially interpreted by the courts.

Parliament's Intent:

46. The Supreme Court has said that while legislative history evidence is admissible and can play "a limited role in the interpretation of legislation", it has many frailties with respect to its reliability and should be given limited weight.[65] Where the legislative history evidence is ambiguous, contradictory or inconclusive, it is of little assistance to the Court and may be disregarded.[66]

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[64] *Vavilov*, *supra* note 60 at paras 117, 119-121; *Rizzo & Rizzo Shoes Ltd (re),* [1998] 1 SCR 27 at para 21 [*Rizzo & Rizzo*].
[65] *Rizzo & Rizzo*, *ibid* at para 35; *R v Morgentaler*, [1993] 3 SCR 463 at para 28; *Re Canada 3000 Inc*, 2006 SCC 24 at para 57.
[66] *R v Summers*, 2014 SCC 26 at para 6; *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20 at para 39.

47. In the present case, the legislative history establishes that Parliament intended for the Commissioner to have flexibility and some degree of discretion regarding the timing of her response to interim reports from the CRCC.

48. Subsection 45.76(2) of the *RCMP Act* was enacted as part of Bill C-42, the *Enhancing Royal Canadian Mounted Police Accountability Act,* which came into force on November 28, 2014.[67] This enactment introduced the requirement that the RCMP Commissioner provide her response to the CRCC interim reports "as soon as feasible".

49. While the *Enhancing Royal Canadian Mounted Police Accountability Act* was making its way through Parliament, a desirability for firmer deadlines was suggested.[68] The Applicant refers to testimony from several groups and individuals who emphasized the importance of the timely resolution of public complaints and raised concerns about delays from the RCMP in responding to interim reports from the CRCC.[69]

50. However, in response to a proposal in committee to include prescribed timeframes in the *Enhancing Royal Canadian Mounted Police Accountability Act*, the Parliamentary Secretary to the Minister of Public Safety stated:

> If it's laid-out legislation, it's done, whereas with the RCMP, it's best done through ministerial directives and regulations to allow for greater flexibility. With the RCMP, the complexity of what they're doing—not only the investigations, but the information. I think it's important that they have some flexibility with time. Certainly, service standards in terms of time is an important concept. Where we would disagree is where those service standards are, how they are applied, and how they are regulated. We don't think, for the RCMP, they should be in legislation.[70] (emphasis added)

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[67] *Enhancing Royal Canadian Mounted Police Accountability Act*, SC 2013, c 18.
[68] Canada, House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 41st Parl, 1 Sess, No 56 (October 31, 2012) at 1705 (Randall Garrison).
[69] Applicant's Memorandum of Fact and Law, at para 54 [AR, Vol 3, Tab 5, p 657].
[70] Canada, House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 41st Parl, 1 Sess, No 56 (October 31, 2012) at 1705 (Candice Bergen).

51. The legislative history confirms that while Parliament wanted to enhance accountability, it chose not to include a fixed time limit for the Commissioner to respond to interim reports from the CRCC. Rather, Parliament decided to include a time period that was to be determined on a case-by-case basis. For example, although the CRCC had previously recommended that a 30-day deadline for the Commissioner's response would be appropriate, Parliament did not enact any fixed timeline.[71] As the Parliamentary Secretary's comments make clear, Parliament made this legislative choice in order to ensure that the Commissioner had a measure of flexibility in the timing of her response to CRCC interim reports.

52. The question of whether the Commissioner responded as soon as feasible will therefore necessarily depend on the unique facts and circumstances of each case. In light of Parliament's decision not to include a specified time limit, this Court should be reluctant to adopt the interpretation put forward by the Applicant and the CRCC that would remove the flexibility given to the Commissioner to determine the timing of her response.

Statutory Scheme:

53. The context of subsection 45.76(2) within the scheme of Part VII of the *RCMP Act* further supports an interpretation of "as soon as feasible" as connoting a measure of flexibility in the timing for providing a written response.

54. The purpose of Part VII of the *RCMP Act* is to set out the legislative framework for the RCMP public complaints process. Under Part VII, the CRCC's final report must take into account the RCMP Commissioner's response to the findings and recommendations made in the interim report. It is clear that the legislator intended to provide the Commissioner with some discretion regarding the amount of time required to respond to an interim report in order to ensure that

[71] Applicant's Memorandum of Fact and Law, at para 58 [AR, Vol 3, Tab 5, pp 658-659]; Intervenor's Memorandum of Fact and Law, at para 29 [IR, Tab 2, p 666].

the CRCC's final report in respect of a complaint are informed, justified and appropriate in the circumstances.

55. Affording the Commissioner temporal flexibility ensures that they have the opportunity to study an interim report in detail before making a decision about what further action to take. Further, this time ensures that any response given by the Commissioner is useful to the CRCC and is capable of fruitfully contributing to the content of the CRCC's final report. Avoiding strict timelines ensures the Commissioner is not hamstrung and forced to produce a hasty response which does not meet the statutory objectives of public accountability and transparency because of its lack of fulsome detail and consideration. Further, a hasty response might undermine public confidence in the RCMP by showing that the RCMP has failed to take seriously the results of CRCC's complaints process.

Meaning of "as soon as feasible":

56. When subsection 45.76(2) is read as a whole and taking into account the purpose of Part VII of the *RCMP Act,* the phrase "as soon as feasible" should be interpreted as meaning that the Commissioner must respond reasonably soon, taking all of the circumstances into account.[72] The Commissioner therefore has some discretion in determining when a response is feasible. A flexible case by case approach is consistent with the legislature's choice not to include a fixed deadline for the Commissioner's response.

57. The Commissioner is entitled to deference regarding her interpretation of the *RCMP Act* and her determination as to what is feasible in the circumstances of any particular case.[73]

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[72] See Department of Justice Canada, *Legistics: Categorization of Time Periods*: https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p33.html.
[73] *Canada Post Corporation v Canadian Union of Postal Workers*, 2019 SCC 67, at para 40, citing *Mclean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 40; *Vavilov*, *supra* note 60 at paras 23, 116; *Canada (Citizenship and Immigration) v Kassab*, 2020 FCA 10 at para 37.

58. Contrary to the Applicant's assertion, there is nothing in the language of section 45.76(2) or Part VII of the *RCMP Act* that would support an interpretation where the Commissioner is required to provide a response to interim reports within 3 to 6 months.[74] Parliament explicitly chose not to put a specific time limit in the legislation. Rather, Parliament used language that would provide the RCMP with flexibility to account for varying circumstances.

59. The phrase "as soon as feasible" should not be equated with "as soon as possible", as suggested by the Applicant. Parliament specifically chose not to use the phrase "as soon as possible" in the legislation. Further, the word "feasible" does not equate with urgency. The *Canadian Oxford Dictionary* defines the word "feasible" as "practicable; easily or conveniently done",[75] which does not convey urgency. In addition, there could be exceptional circumstances present in a particular case that could prevent the Commissioner from responding to an interim report in an urgent manner. For its part, the CRCC agrees that "as soon as feasible" does not mean "immediately" or even, necessarily, "as soon as possible."[76]

60. The decision in *Rogers Communications* relied on by the Applicant and the Intervener is of limited assistance.[77] While the Court briefly commented on the phrase "as soon as feasible", it was in the context of a completely different statutory scheme and the interpretation of the phrase was not directly in issue. The Court was not asked to determine how long "as soon as feasible" would be in any particular case.

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[74] Applicant's Memorandum of Fact and Law, at para 43 [AR, Vol 3, Tab 5, p 654].
[75] *The Canadian Oxford Dictionary*, 2nd ed, *sub verbo* "feasible".
[76] Intervenor's Memorandum of Fact and Law, at para 55 [IR, Tab 2, p 676].
[77] *Rogers Communications Inc v Voltage Pictures, LLC*, 2018 SCC 38 at para 31.

61. The French text of subsection 45.76(2) uses the phrase "dans les meilleurs délais". The phrase "dans les meilleurs délais" has been interpreted to mean an amount of time that is reasonably necessary in the circumstances, and not to mean "as soon as possible".[78] The common meaning to the English and French versions of subsection 45.76(2) is that the RCMP must respond reasonably soon taking all of the circumstances into account.[79] This interpretation accords with Parliament's intent, as expressed by the decision not to include a specific deadline in the legislation.[80]

Memorandum of Understanding:

62. The Applicant and the CRCC refer to the six-month time period for the Commissioner's response to an interim report set out in the MOU. The six-month timeframe in the MOU represents a target that the RCMP felt could be met once adequate resources were in place and the existing backlog was cleared.[81] However, timelines in the MOU cannot be determinative of the proper interpretation to be given to the requirements of subsection 45.76(2). The MOU cannot replace the requirement inherent in the words "as soon as feasible" to consider individual circumstances in order to determine whether the Commissioner could have responded sooner. In any event, the MOU specifically provides that the Commissioner is to make "best efforts" to meet the six-month timeframe which suggests an understanding that this standard might not be met in every case.[82]

63. Similarly, although the RCMP's *National Public Complaints Guidebook* states that the Commissioner will make "best efforts" to respond to a CRCC interim report within 180 days, this is a policy document that does not have the force of

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[78] *Zadrozny c R*, 2018 QCCQ 3581 at para 32.
[79] *R v Daoust,* 2004 SCC 6 at para 26 [*Daoust*].
[80] *Daoust*, *ibid* at para 30.
[81] O'Malley Cross-Exam, p 41 (lines 8-25), p 42 (lines 1-6) [AR, Vol 2, Tab 4, pp 587-588].
[82] MOU, at paras 6, 75 [IR, Tab 1, pp 41, 50].

law. It cannot and does not purport to set a legal time limit for what as soon as feasible means in any particular case.

C. The Court should not issue a Declaration that the Commissioner breached her duty under the *RCMP Act*

64. In the circumstances of this case, the Court should not issue the declarations requested by the Applicant. The Commissioner has acknowledged that the time required to respond to the BCCLA Interim Report was not ideal. As explained below, a number of factors contributed to the time required by the Commissioner to respond to the BCCLA Interim Report. However, the evidence before the Court establishes that the RCMP has taken steps to deal with resourcing issues at the NPCD such that the backlog of interim reports is expected to be dealt with by the end of the year.[83] As such, there is no practical utility in issuing the declarations sought.

65. One of the key factors contributing to the growing backlog of interim reports awaiting responses at the NPCD is that, since 2015, there has been a significant increase in the number of interim reports delivered by the CRCC.[84] In fiscal year 2015- 2016, the CRCC issued 16 interim reports. In the four subsequent fiscal years, the CRCC issued 57, 51, 44 and 81 interim reports respectively. For fiscal year 2020 - 2021, as of December 31, 2020, the CRCC had issued 41 interim reports.[85] The NPCD did not have sufficient resources to process the increased volume of interim reports from the CRCC.[86]

66. The RCMP recognized that the NPCD required additional analysts to deal with the backlog of interim reports and began taking steps in 2019 to increase the

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[83] O'Malley Cross-Exam, p 43 (lines 2-11), p 49 (lines 9-15) p 61 (lines 4-15) [AR, Vol 2, Tab 4, pp 589, 595, 607].
[84] O'Malley Affidavit, at paras 15-16, 40 [RR, Tab 1, pp 5 and 10].
[85] O'Malley Affidavit, at para 15 [RR, Tab 1, p 5].
[86] O'Malley Affidavit, at para 40 [RR, Tab 1, p 10]; O'Malley Cross-Exam, p 21 (lines 24-25) [AR, Vol 2, Tab 4, p 567].

number of positions within the NPCD.[87] The RCMP conducted a staffing process in 2019 and again in 2020 resulting in the creation of 12 new positions within the NPCD.[88] However, given the lengthy administrative and security processes involved in hiring new employees within the RCMP, this did not result in the immediate addition of new analysts to the NPCD.[89]

67. Second, in July 2019, as a result of discussions with the CRCC, the RCMP reallocated all available resources at the NPCD in order to prioritize the completion of its response to the Kent County Interim Report.[90] The Kent County investigation involved complicated issues regarding Indigenous complaints about police treatment during protests concerning natural resource development. The Kent County Interim Report and the associated material was the largest file ever received by the NPCD.[91]

68. The Commissioner provided her response to the Kent County Interim Report in June 2020. In July 2020, upon completion of the response to the Kent County Interim Report, the three available NPCD advisors were assigned to review the BCCLA Interim Report on a priority basis.[92]

69. Third, the BCCLA Interim Report required significant consultation and analysis due to its size and the complexity of issues raised.[93] Although NPCD analysts

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[87] O'Malley Affidavit, at para 48 [RR, Tab 1, p 13].
[88] O'Malley Affidavit, at paras 48-51 [RR, Tab 1, pp 13-14]; O'Malley Cross-Exam pp 17-21 [AR, Vol 2, Tab 4, pp 563-567]; NPCD Organizational Chart dated November 3, 2020, Exhibit "4" to O'Malley Cross-Exam [AR, Vol 2, Tab 4, p 618].
[89] O'Malley Affidavit, at paras 48-49 [RR, Tab 1, p 13]; O'Malley Cross-Exam p 36 (lines 1-15) [AR, Vol 2, Tab 4, p 582].
[90] O'Malley Cross-Exam, p 33 (lines 8-25), p 34 (lines 1-25), p 35 (1-13) [AR, Vol 2, Tab 4, pp 579-581]. See also E-mail from O'Malley to Joncas-Bourget dated June 10, 2019, Exhibit "C" to O'Malley Affidavit [RR, Tab 1, p 22].
[91] O'Malley Affidavit, at para 45 [RR, Tab 1, p 12]; O'Malley Cross-Exam, p 23 (lines 1-11) [AR, Vol 2, Tab 4, p 569].
[92] O'Malley Affidavit, at para 47 [RR, Tab 1, p 12]. O'Malley Cross-Exam, p 39 (lines 4-18) [AR, Vol 2, Tab 4, p 585].
[93] O'Malley Affidavit, at para 44 [RR, Tab 1, p 11].

were only assigned to the BCCLA Complaint in July 2020, portions of the Kent County Interim Report analysis were used for the BCCLA Complaint which allowed the NPCD to complete their review significantly faster than they otherwise would have.[94] Further, all three available analysts were assigned to expedite the analysis. Contrary to the assertion of the CRCC, there is no evidence that the Commissioner's response was delayed by the NPCD "second-guessing the CRCC's findings" or by "essentially re-litigating the findings of fact and law found by the CRCC".[95] Rather, the evidence confirms that internal consultation within the RCMP by the NPCD regarding interim reports from the CRCC is a necessary and usual practice.[96]

70. As explained in more detail above, the RCMP has taken concrete steps to add additional resources to the NPCD in order to improve its ability to respond to interim reports in a timely manner. Between June 2020 and February 2021, the Commissioner provided 71 responses to interim reports to the CRCC.[97] The remaining backlog of interim reports is expected to be dealt with by the end of the calendar year.[98]

71. The Applicant states that it is "somewhat comforting" to learn of the efforts taken to increase the capacity of the NPCD.[99] For its part, the CRCC noted the "RCMP is finally taking steps to meet its obligations" and to "the credit of the RCMP NPCD, it has undertaken significant staffing measures since 2019 to address the backlog of RCMP Commissioner's responses."[100] In the circumstances of this case, this Court should not grant the requested declarations.

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[94] See Commissioner's response to the BCCLA Interim Report, dated November 20, 2020, pp 3-4, Exhibit "M" to Joncas-Bourget Affidavit [IR, Tab 1, pp 88-89].
[95] Intervenor's Memorandum of Fact and Law, at para 76 [IR, Tab 2, p 683].
[96] O'Malley Cross-Exam, p 57 (lines 18-25), p 58 (lines 1-2), p 59 (lines 20-25) p 60 (lines 1-6) [AR, Vol 2, Tab 4, pp 604-606].
[97] O'Malley Affidavit, at para 16 [RR, Tab 1, p 5].
[98] O'Malley Cross-Exam, p 43 (lines 2-11), p 49 (lines 9-15) p 61 (lines 4-15) [AR, Vol 2, Tab 4, pp 589, 595, 607].
[99] Applicant's Memorandum of Fact and Law, at para 67 [AR, Vol 3, Tab 5, p 661].
[100] Intervenor's Memorandum of Fact and Law, at paras 67, 80 [IR, Tab 2, pp 680, 685].

D. There is no basis to the Applicant's allegations regarding s. 2(b) of the *Charter*

Application should be resolved using administrative law principles:

72. In the event that the Court decides not to dismiss this application on the basis of mootness, this application can, and should be, determined solely on the basis of administrative law principles. It is therefore not necessary for the Court to consider the Applicant's *Charter* arguments in deciding this application.

73. The Supreme Court has stated on numerous occasions that when a matter can be dispensed with on administrative law grounds, it should refrain from deciding the *Charter* issues.[101] This principle avoids unnecessary constitutional pronouncements, which may prejudice future cases and have unforeseen implications.[102] It applies with even greater emphasis where, such as in the present case, the foundation upon which the proceedings were launched has ceased to exist.[103] This Court very recently stated the principle as follows:

> The Supreme Court has held that courts should avoid expressing an opinion on a question of law where it is not necessary to do so to dispose of a case, especially when the question is constitutional in nature. This policy is based on the premise that unnecessary constitutional pronouncement may prejudice future cases, the implications of which have not been foreseen…[104]

74. The principle of avoiding unnecessary constitutional determinations is of particular importance in this case because the underlying dispute is now moot and the Applicant's *Charter* claims involve a novel expansion of section 2(b)

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[101] *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at paras 6-12 [*Phillips*]; *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para 11; *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para 19; *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 320 at para 105; Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2007) (2019 supplement), ch 59 at 59.5.
[102] *Phillips*, *ibid* at para 9.
[103] *Phillips*, *ibid* at paras 6, 12.
[104] *Rebel News*, *supra* note 50 at para 64.

protection to delays in an administrative process. The expansion of section 2(b) *Charter* rights to deal with delays in the administrative decision making process could have significant consequences for administrative tribunals and administrative decision makers across the country. In that regard, the Applicant has cited no cases where an administrative delay was found to limit someone's freedom of expression.

***Doré* Framework:**

75. In the event the Court decides to consider the Applicant's section 2(b) argument, it must be reviewed using the *Doré* administrative law framework.[105] Under this framework, the Court must first consider whether the administrative decision engages the *Charter* by limiting its protections.[106] If so, the court then examines whether the administrative decision unjustifiably limited the applicant's *Charter* rights on the reasonableness standard.[107]

76. The Applicant's section 2(b) *Charter* rights are not engaged in the present case. The amount of time that it took for the Commissioner to respond to the BCCLA Interim Report did not engage, or limit, the Applicant's right to freedom of expression.

77. During the period of time they were waiting for the Commissioner's response, the Applicant was free to express itself on any and all of the issues they raised in their public complaint to the CRCC. In particular, the Applicant was free to publically discuss all aspects of the merits of its complaint to the CRCC and to continue to engage in its advocacy work related to police surveillance activities. While the Applicant could not comment on the final results of their complaint during this period of time, section 2(b) has not been interpreted as imposing a

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[105] *Doré v Barreau du Québec*, 2012 SCC 12 at paras 55-58 [*Doré*]; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 3-4 [*Loyola*]; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 57 [*Trinity Western*].
[106] *Loyola*, *ibid* at para 39; *Trinity Western*, *ibid* at para 58.
[107] *Vavilov*, *supra* note 60 at para 57; *Doré*, *supra* note 105 at para 56; *Criminal Trial Lawyer's Association v Minister of Justice*, 2020 FC 1146 at para 43.

positive requirement on administrative decision makers to act within a certain amount of time.

78. The Supreme Court has consistently held that section 2(b) generally does not go so far to place the government under an obligation to facilitate expression by providing individuals with a particular means of expression.[108] As noted in *Haig*, "[t]he traditional view, in colloquial terms, is that the freedom of expression guarantee contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones."[109]

CLA Framework is not Applicable:

79. Contrary to the Applicant's submissions, the framework laid out by the Supreme Court in *Criminal Lawyers' Association* ("*CLA"*) is not applicable to this case.[110] *CLA* involved a *Charter* challenge to specific provisions of a provincial access to information statute. The *CLA* decision deals with *Charter* issues under access legislation and has not been generally applied outside of that context. The Court confirmed that section 2(b) of the *Charter* guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.[111]

80. In order to establish their section 2(b) rights are engaged under the *CLA* framework, an applicant must first establish that denial of access effectively precludes the meaningful exercise of free expression on matters of public interest. If an applicant establishes the first part of the test, they must then demonstrate that the protection is not removed by any countervailing

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[108] *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31 at para 29; *Baier v Alberta*, 2007 SCC 31 at para 20
[109] *Haig v Canada*, [1993] 2 SCR 995 at 1035.
[110] *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 [*CLA*].
[111] *CLA*, *ibid* at paras 5, 30.

considerations inconsistent with production, such as privileges or incompatibility with the proper functioning of the institution concerned.[112]

81. With respect to the first step of the *CLA* framework, the Applicant has failed to establish that the amount of time taken by the Commissioner to respond to the interim report substantially impeded it from the meaningful exercise of freedom of expression.[113] As previously stated, the Applicant was at all times free to engage in meaningful public discussion and criticism related to the merits and substance of its complaint against the RCMP. Although the Applicant may have preferred to comment on the CRCC's findings and the RCMP's response to those findings sooner, it has not established that receiving the final report at an earlier date was a necessary pre-requisite for meaningful expression on its complaint and the issues it raised.

82. In addition, the countervailing considerations in this case do not support disclosure of information pursuant to section 2(b). Unlike the situation in *CLA*, the Applicant was not denied access to information pursuant to access to information legislation. The statutory scheme at issue in this case does not provide for disclosure of the CRCC final report until after receipt of the Commissioner's response. As such, the Applicant's novel proposed use of section 2(b) is inconsistent with the statutory scheme.

E. No special costs should be awarded

83. The general rule is that costs follow the event and, absent exceptional circumstances, should be awarded to the successful litigant.[114] The Applicant's request for special costs, whether the application is allowed or not, is unjustified.

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[112] *CLA*, *ibid* at paras 32-38.
[113] *CLA*, *ibid* at para 37.
[114] *Cheung v Target Event Production Ltd*, 2010 FCA 255 at para 34; *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 182.

There are no exceptional circumstances present in this case that would warrant an award of special costs.

84. The Supreme Court in *Carter* set out the test for the awarding of special costs.[115] In *Carter*, the Supreme Court emphasized that issues of public importance will not in themselves "automatically entitle a litigant to preferential treatment with respect to costs."[116] The standard is a high one: only "rare and exceptional" cases will warrant such treatment.[117] The case must involve matters of public interest that are "truly exceptional" with "significant and widespread societal impact".[118] In addition, the public interest litigant must show that it would not have been possible to effectively pursue the litigation in question with private funding.[119]

85. This is not a rare and truly exceptional case that warrants an award of special costs. Although the efficiency of the RCMP's public complaint process is a matter of public interest, the resolution of the issues raised in this moot application will not have significant and widespread societal impact. Further, unlike the expansive constitutional challenge at issue in *Carter,* the scope of the present application is fairly contained. The Applicant is not an individual litigant and has not demonstrated that these issues could not have been pursued with private funding, or that it would be otherwise contrary to the interests of justice to deny them special costs. The mere fact that this case involves public interest litigation is insufficient to meet the high threshold required for a special costs order.

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[115] *Carter v Canada (Attorney General)* 2015 SCC 5 [*Carter*].
[116] *Carter*, *ibid* at para 139; See also *Little Sisters Book & Art Emporium v Canada (Commissioner of Customs and Revenue Agency)*, 2007 SCC 2 at para 35 [*Little Sisters*].
[117] *Carter*, *ibid* at para 139; *Little Sisters*, *ibid* at para 38.
[118] *Carter*, *ibid* at para 140.
[119] *Carter*, *ibid* at para 140.

PART IV – ORDER SOUGHT

86. The Respondent respectfully requests that this application be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa this 14th day of May, 2021.

Michael Roach
Marshall Jeske

Counsel for the Respondent
Attorney General of Canada

PART V – LIST OF AUTHORITIES

Legislation

Enhancing Royal Canadian Mounted Police Accountability Act, SC 2013, c 18

Royal Canadian Mounted Police Act, RSC 1985, c R-10, ss 45.29(1), 45.53, 45.66, 45.7, 45.76

Jurisprudence

0769449 BC Ltd v Vancouver Fraser Port Authority, 2016 FC 645

Baier v Alberta, 2007 SCC 31

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817

Borowski v Canada (Attorney General), [1989] 1 SCR 342

Canada (Citizenship and Immigration) v Kassab, 2020 FCA 10

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65

Canada Post Corporation v Canadian Union of Postal Workers, 2019 SCC 67

Cardin v Canada (Attorney General), 2017 FCA 150

Carter v Canada (Attorney General), 2015 SCC 5

Cheung v Target Event Production Ltd, 2010 FCA 255

Chieu v Canada (Minister of Citizenship and Immigration), 2002 SCC 3

Communities and Coal Society v Vancouver Fraser Port Authority, 2019 FCA 94

Criminal Trial Lawyer's Association v Minister of Justice, 2020 FC 1146

Cupe Air Canada Component v Air Canada, 2021 FCA 67

Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12

Democracy Watch v Canada (Attorney General), 2018 FCA 195

Doré v Barreau du Québec, 2012 SCC 12

Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada, 2020 FCA 100

Ewert v Canada, 2018 SCC 30

Greater Vancouver Transportation Authority v Canadian Federation of Students, 2009 SCC 31

Haig v Canada, [1993] 2 SCR 995

Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited, 2021 FCA 26

Law Society of British Columbia v Trinity Western University, 2018 SCC 32

Little Sisters Book & Art Emporium v Canada (Commissioner of Customs and Revenue Agency), 2007 SCC 2

Loyola High School v Quebec (Attorney General), 2015 SCC 12

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Re Canada 3000 Inc, 2006 SCC 24

Rebel News Network Ltd v Canada (Leaders' Debates Commission), 2020 FC 1181

Rizzo & Rizzo Shoes Ltd (re), [1998] 1 SCR 27

Rogers Communications Inc v Voltage Pictures, LLC, 2018 SCC 38

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Zadrozny c R, 2018 QCCQ 3581

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Department of Justice Canada, *Legistics: Categorization of Time Periods*

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