

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 INTERVENOR,
CIVILIAN REVIEW AND COMPLAINTS COMMISSION FOR THE ROYAL
CANADIAN MOUNTED POLICE**

Lesley McCoy

**Civilian Review and Complaints
Commission for the Royal Canadian
Mounted Police**

Tel: 343-548-6405

Fax: 613-952-8045

Email: Lesley.McCoy@crcc-ccetp.gc.ca

Solicitor for the Intervener

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OVERVIEW

1. The intervener, the Civilian Review and Complaints Commission for the Royal Canadian Mounted Police (CRCC), is an independent civilian review body that investigates and reviews public complaints about the Royal Canadian Mounted Police (RCMP).
2. This case raises an important issue of public interest about the length of time that the RCMP Commissioner can reasonably take to deliver a response to the CRCC's interim reports following a public interest investigation or review, as she is required to by the *Royal Canadian Mounted Police Act (RCMP Act)*. This issue is not only important to the parties in this case, but it is critical to the work and legitimacy of the CRCC. Furthermore, it affects all of the complainants, and the RCMP members who are the subjects of those complaints, in any case where the CRCC has conducted an investigation, or where it has conducted a review and made adverse findings and remedial recommendations.

PART I – FACTS

3. The CRCC is an agency of the government of Canada, distinct and independent from the RCMP, created and mandated by Parts VI to VII.2 of the *RCMP Act*. It was created by Parliament in 1988.

4. The principal mandate of the CRCC is to receive complaints from the public about the conduct of RCMP members, to conduct reviews when complainants are not satisfied with the RCMP's handling of their complaints, and to initiate complaints and investigations into RCMP conduct when it is in the public interest to do so.

5. Every year, the CRCC and the RCMP receive thousands of complaints about the RCMP. In the 2019-2020 fiscal year, the public filed 3,641 complaints. Over 2,300 of those complaints met the criteria for complaints set out at section 45.53 of the *RCMP Act*.¹

6. Depending on the circumstances of a case, the CRCC has the responsibility of investigating or independently reviewing public complaints against the RCMP.

7. In many cases, the CRCC reviews public complaints under subsection 45.71(1) of the *RCMP Act* after the RCMP has investigated the public complaint and delivered a report. This entails an independent *de novo* examination of all the evidence and subsequently the issuance of the CRCC's own report, which sets out the CRCC's findings of fact and law and may include non-binding recommendations to address any identified deficiencies.²

¹ Affidavit of Nika Joncas-Bourget, made January 18, 2021 ("Joncas-Bourget Affidavit"), at para. 5 [Intervener's Application Record ("IAR"), Tab 1, pp. 2-3].

² Joncas-Bourget Affidavit, at paras. 10-11 [IAR, Tab 1, p. 4].

8. In the other cases (as in the Applicant's public complaint here), the CRCC investigates the complaint as a public interest investigation under subsection 45.66(1) of the *RCMP Act*. It is referred to as a public interest investigation because it is conducted when the CRCC's Chairperson is of the opinion that it is in the public interest for the CRCC to investigate the complaint, instead of turning it over to the RCMP for investigation pursuant to the typical process for the investigation of public complaints prescribed by subsection 45.6(1) of the *RCMP Act*.³

9. In broad terms, a public interest investigation is an independent investigation using the CRCC's resources so that the CRCC may make factual findings and recommendations after considering the relevant evidence, law, and policy.⁴

10. The RCMP National Public Complaints Directorate (NPCD) plays a central role in both reviews and public interest investigations. It is the point of contact between the CRCC and the RCMP with respect to public complaints and it provides support to the RCMP's regions and divisions as they investigate the complaints and prepare investigation reports. It reviews and approves draft RCMP investigation reports for each public complaint.⁵

³ Joncas-Bourget Affidavit, at para. 6 [IAR, Tab 1, p. 3].

⁴ Joncas-Bourget Affidavit, at para. 7 [IAR, Tab 1, p. 3].

⁵ Joncas-Bourget Affidavit, at paras. 8-9 [IAR, Tab 1, pp. 3-4].

11. After every review or investigation, the CRCC issues a report. In the 2019-2020 fiscal year, the CRCC issued 394 reports.⁶

12. Under the *RCMP Act*, when the CRCC concludes an investigation or where the CRCC is not satisfied with a report issued by the RCMP, the CRCC must prepare a report (“interim report”) and deliver it to the RCMP Commissioner. The interim report sets out the CRCC’s factual findings about the complaint and any recommendations. Examples of the CRCC’s recommendations include changes to the RCMP’s training or policies.⁷

13. Under subsections 45.72(1) and 45.76(2) of the *RCMP Act*, the RCMP Commissioner must provide a response to each interim report setting out any action that the RCMP has taken or will take regarding the public complaint. If the RCMP Commissioner does not intend to act on any of the CRCC’s findings or recommendations, the RCMP Commissioner must provide the reasons for not doing so in the RCMP Commissioner’s response.⁸

14. Subsections 45.72(1) and 45.76(2) of the *RCMP Act* both state that the RCMP Commissioner must provide a response to the CRCC’s interim report

⁶ Joncas-Bourget Affidavit, at para. 13 [IAR, Tab 1, p. 4].

⁷ Joncas-Bourget Affidavit, at paras. 15-17 [IAR, Tab 1, p. 5].

⁸ Joncas-Bourget Affidavit, at para. 18 [IAR, Tab 1, p. 6].

“as soon as feasible,” but otherwise there is no statutory timeline for a response.⁹

15. The RCMP NPCD analyzes the CRCC’s interim reports and prepares analysis reports for the RCMP Commissioner to consider. The RCMP Commissioner then issues a written response to the CRCC interim report.¹⁰

16. Once the CRCC receives the RCMP Commissioner’s response, the CRCC must consider the RCMP Commissioner’s response and then prepare a final report setting out any findings and recommendations with respect to the complaint that the CRCC sees fit. The CRCC then provides the final report to the RCMP Commissioner and the parties to the complaint, as well as other individuals specified in the *RCMP Act*.¹¹

17. The *RCMP Act* is silent about whether the CRCC has the jurisdiction to release an interim report to the parties before the CRCC has received the RCMP Commissioner’s response. As such, the CRCC’s general practice is not to release the interim report before receiving the response, although in rare cases of high public interest it has occasionally released the interim report in advance. Once the CRCC has prepared its final report, the CRCC

⁹ Joncas-Bourget Affidavit, at para. 19 [IAR, Tab 1, p. 6].

¹⁰ Affidavit of Superintendent Michael O’Malley, made February 3, 2021 (“O’Malley Affidavit”), at paras. 11-12.

¹¹ Joncas-Bourget Affidavit, at para. 20 [IAR, Tab 1, p. 6].

includes the interim report and the Commissioner's response as appendices to the final report.¹²

18. On December 11, 2019, the CRCC Chairperson and the RCMP Commissioner signed a Memorandum of Understanding in which the RCMP Commissioner committed to providing responses to the CRCC's interim reports within six months of being provided the CRCC's interim report.¹³

19. As of January 18, 2021, a total of 156 interim reports were awaiting a response from the RCMP Commissioner, and 130 of those reports had been awaiting a response for more than six months. The oldest outstanding interim report was more than four years old. Since entering the Memorandum of Understanding, the RCMP Commissioner has not responded to any reports within the six-month period set out in that agreement.¹⁴

20. The CRCC received the Applicant's complaint on February 6, 2014, about the RCMP's activities in relation to monitoring protests and demonstrations surrounding National Energy Board hearings into the Northern Gateway Project pipeline, as well as protests and demonstrations within the larger context of the Indigenous-led "Idle No More" movement.¹⁵

¹² Joncas-Bourget Affidavit, at para. 21 [IAR, Tab 1, pp. 6-7].

¹³ Joncas-Bourget Affidavit, at para. 31 [IAR, Tab 1, p. 9]; see also para. 75 of *Memorandum of Understanding* dated December 11, 2019, Exhibit "E" of Joncas-Bourget Affidavit [IAR, Tab 1, p. 50].

¹⁴ Joncas-Bourget Affidavit, at paras. 55-56 [IAR, Tab 1, p. 15].

¹⁵ Joncas-Bourget Affidavit, at para. 22 [IAR, Tab 1, pp. 7].

21. The CRCC commenced a public interest investigation on February 20, 2014. On June 23, 2017, the CRCC delivered its interim report to the RCMP Commissioner, making 18 findings and 7 recommendations.¹⁶

22. For three years, the interim report in the Applicant's complaint sat virtually untouched within the RCMP NPCD, since no analysts were assigned to work on it until July 15, 2020.¹⁷

23. In the years since the CRCC delivered its interim report to the RCMP Commissioner, the CRCC has repeatedly expressed its serious concerns with the RCMP Commissioner and the RCMP NPCD about the delays in this and other outstanding cases.¹⁸

24. In 2018, for example, the RCMP Commissioner's response to an interim report about public complaints into firearms investigations had been outstanding for nearly two years and so the complainant in that matter made a new public complaint about this delay. The RCMP investigated the delay complaint under the typical public complaints process. The RCMP concluded that because it was working "diligently at capacity" to complete the

¹⁶ Joncas-Bourget Affidavit, at paras. 23-25 [IAR, Tab 1, pp. 7-8].

¹⁷ Transcript of the cross-examination of Superintendent Michael O'Malley, dated February 26, 2021 ("O'Malley Cross-exam"), at p. 7.

¹⁸ Joncas-Bourget Affidavit, at paras. 25-49, 54-55, 57-81, and 85-97 [IAR, Tab 1, pp. 7-14, 15-22, 23-25]; See also Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "J," "K," "L," "O," "P," "Q," "R," "S," "T," "U," "V," "W," "X," and "Y" of Joncas-Bourget Affidavit [IAR, Tab 1, pp. 29-84, 205-514].

outstanding RCMP Commissioner's responses, it did not support the allegation that the delay was unreasonable.¹⁹ The RCMP also concluded that the delay was necessary to ensure that a comprehensive assessment was conducted. The complainant asked the CRCC to review this decision.²⁰

25. In September 2018, more than two years after the CRCC had delivered its interim report regarding the firearms investigations complaints, the RCMP Commissioner provided her response to the firearms complaints.²¹ The CRCC considered whether this delay was reasonable.

26. In an interim report dated March 28, 2019, the CRCC found that the words "as soon as feasible" in the *RCMP Act* were meant to convey urgency. The CRCC concluded that the subject matter of the first complaint was not so complex that it could justify a two-year delay to the RCMP Commissioner's response. The CRCC found no other reasonable rationale for the delay.²²

27. The CRCC noted that, compared to the resources needed for the other stages in a public complaint, the resources needed by the RCMP to prepare the RCMP Commissioner's response were minimal. The CRCC also discussed the systemic nature of the delays. The CRCC wrote that public

¹⁹ Joncas-Bourget Affidavit, at paras. 85-88 [IAR, Tab 1, pp. 23-24]; see also Exhibit "AA" of Joncas-Bourget Affidavit [IAR, Tab 1, pp. 643-647].

²⁰ Joncas-Bourget Affidavit, at para. 89 [IAR, Tab 1, p. 24]; see also Exhibit "AA" of Joncas-Bourget Affidavit [IAR, Tab 1, pp. 643-647].

²¹ Joncas-Bourget Affidavit, at para. 90 [IAR, Tab 1, p. 24].

²² Joncas-Bourget Affidavit, at paras. 91-92 [IAR, Tab 1, pp. 24-25]; See also Exhibit "AB" of Joncas-Bourget Affidavit [IAR, Tab 1, pp. 648-645].

confidence in policing depends on the prompt resolution of public complaints.²³ The CRCC also wrote that an “inordinate delay by the Commissioner in assessing the [CRCC’s] findings and recommendations diminishes their potential impact, and also increases the prejudice to the complainant and [RCMP] subject members, who are entitled to a timely resolution of the matter.”²⁴

28. As of January 18, 2021, the CRCC was still awaiting the RCMP Commissioner’s response to the delay complaint interim report.²⁵

29. Historically, the RCMP Commissioner provided responses to the CRCC’s interim reports in far less time than was the case in the Applicant’s public complaint. Beginning more than a decade ago, the CRCC raised concerns when delays of more than 60 days occurred, and again as more and more RCMP Commissioner’s responses had been outstanding for more than six months. The RCMP Commissioner made some progress in addressing the backlog, but the delays soon returned. The CRCC recommended that the RCMP Commissioner adopt a 30-day service standard in the CRCC’s 2010-2011, 2011-2012, and 2012-2013 Annual Reports.²⁶

²³ Joncas-Bourget Affidavit, at paras. 93-95 [IAR, Tab 1, p. 25]. See also Exhibit “AB” of Joncas-Bourget Affidavit [IAR, Tab 1, pp. 648-645]

²⁴ Joncas-Bourget Affidavit, at para. 95 [IAR, Tab 1, p. 25].

²⁵ Joncas-Bourget Affidavit, at para. 97 [IAR, Tab 1, p. 25].

²⁶ Joncas-Bourget Affidavit, at paras. 59-74 [IAR, Tab 1, pp. 16-20]; See also Exhibits “O,” “P,” “Q,” “R,” “S,” and “T” of Joncas-Bourget Affidavit [IAR, Tab 1, pp. 205-377].

30. Subsequently, the RCMP addressed its backlog and made progress in analyzing and responding to the CRCC's interim reports. By the time of the CRCC's 2013-2014 Annual Report, the CRCC noted that only two RCMP Commissioner's responses had been outstanding for more than six months.²⁷

31. Nevertheless, by the time of the CRCC's 2016-2017 Annual Report, the RCMP's backlog had returned and many RCMP Commissioner's responses had been outstanding for more than one year. The growing delays became a recurring theme in the CRCC's Annual Reports from then on.²⁸

32. In response to the CRCC's concerns about the delay to the RCMP Commissioner's response to the interim report in the Applicant's public complaint, the RCMP NPCD essentially explained the ongoing delays as being caused by competing priorities and a lack of resources.²⁹ The NPCD has also blamed what it sees as a growing volume of increasingly complex interim reports.³⁰

PART II – ISSUES

²⁷ Joncas-Bourget Affidavit, at paras. 73-76 [IAR, Tab 1, pp. 20-21]; See also Exhibit "U" of Joncas-Bourget Affidavit [IAR, Tab 1, pp. 379-403].

²⁸ Joncas-Bourget Affidavit, at paras. 78-81 [IAR, Tab 1, pp. 21-22]; see also Exhibits "W," "X," and "Y" of Joncas-Bourget Affidavit [IAR, Tab 1, pp. 428-514].

²⁹ Joncas-Bourget Affidavit, at paras. 30, 35, 36, 45, 46, and 49 [IAR, Tab 1, pp. 9, 10, and 12-13]; see also Exhibits "D," "G," "K," and "L" of Joncas-Bourget Affidavit [IAR, Tab 1, pp. 36-38, 67-68, 80-81, and 83-84].

³⁰ O'Malley Affidavit, at paras. 15-16 and 40.

A. How should the words “as soon as feasible” within subsections 45.72(1) and 45.76(2) of the *RCMP Act* be interpreted?

B. Has the RCMP Commissioner failed to provide reasonably prompt responses to the CRCC’s interim reports in a systemic manner?

C. What is the content of the RCMP Commissioner’s duty to respond under the *RCMP Act*?

PART III – Submissions

A. How should the words “as soon as feasible” within subsections 45.72(1) and 45.76(2) of the *RCMP Act* be interpreted?

33. The Applicant’s submissions concern the interpretation of subsection 45.76(2) of the *RCMP Act*, which is the section under which the RCMP Commissioner issued her response to the CRCC’s interim report in the Applicant’s public complaint. The CRCC submits that subsection 45.72(1), which also concerns the RCMP Commissioner’s responses to interim reports (and is nearly identical word for word), should be interpreted in the same way as subsection 45.76(2).

i. A legislative history of subsections 45.72(1) and 45.76(2) of the *RCMP Act*

34. Subsections 45.72(1) and 45.76(2) of the *RCMP Act* were enacted as part of Bill C-42, the *Enhancing Royal Canadian Mounted Police Accountability Act*,³¹ which came into force on November 28, 2014.

35. The previous version of the *RCMP Act* set out the RCMP Commissioner's duty to provide a written response in one global section. The provision did not include a requirement that the RCMP Commissioner respond to the CRCC's reports "as soon as feasible." In fact, it contained no temporal limitations whatsoever:

After reviewing a complaint in accordance with subsection (1), the Commissioner shall notify the Minister and the Commission Chairman in writing of any further action that has been or will be taken with respect to the complaint, and where the Commissioner decides not to act on any findings or recommendations set out in the report, the Commissioner shall include in the notice the reasons for not so acting.³²

36. Since 2014, however, subsections 45.72(1) and 45.76(2) of the *RCMP Act* state:

45.72 (1) The Commissioner shall, as soon as feasible after receiving a report referred to in paragraph 45.71(3)(a), provide the Commission and the

³¹ *Enhancing Royal Canadian Mounted Police Accountability Act*, S.C. 2013, c. 18.

³² *Royal Canadian Mounted Police Act*, R.S., 1985, c. 8 (2nd Supp.), s. 16; 1996, c. 15, s. 23, at s. 45.46.

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.

...

45.76 (2) 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.³³

ii. Hansard evidence as to Parliamentary intent

37. In *Morgentaler*, Sopinka, J. held that Hansard evidence was admissible to assist with statutory interpretation in constitutional cases:

Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.³⁴

38. In *Rizzo*, Iacobucci, J. expanded the concept of consulting Hansard beyond the realm of purely constitutional questions to all questions of statutory interpretation.³⁵

³³ *RCMP Act*, ss. 45.72(1) and 45.76(2).

³⁴ *R v Morgentaler*, [1993] 3 SCR 463.

³⁵ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27.

39. Accordingly, limited use can be made of Ministerial statements made in the House of Commons to support a proposed statutory interpretation. In this case, Minister Vic Toews' statements establish that the intention behind Bill C-42 was to enhance the RCMP's accountability:

The proposed legislation would further enhance the RCMP's accountability by reforming the legislation in a number of key areas: First, it would strengthen the RCMP's review and complaints body. . . .

. . .

As we know, many jurisdictions contract the RCMP for policing services. They have made it very clear that they want enhanced accountability for RCMP member conduct in their communities.³⁶

40. The intention to enhance the RCMP's accountability can lead to the reasonable conclusion that the addition of "as soon as feasible" adds a constraint on the RCMP Commissioner's timeframe to respond to the CRCC's interim reports.

iii. Statutory interpretation of the words "as soon as feasible."

41. The words "as soon as feasible" as found at subsections 45.72(1) and 45.76(2) of the *RCMP Act* are not defined within the *RCMP Act* or the *Interpretation Act*. They have also not been judicially interpreted.

³⁶ *House of Commons Debates*, 41st Parl, 1st Sess, no 146 (September 17, 2012) at 1205 (Hon Vic Toews).

42. Canada's Department of Justice recommends that legislative drafters use the words "as soon as feasible" to mean "Something must be done soon – taking the circumstances into account." This means that it is permissible to do other things first "if the delay is justifiable in the circumstances" considering the nature and importance of the thing to be done.³⁷

43. In a 2018 RCMP Conduct Appeal decision, the RCMP adjudicator applied a similar interpretation to the words "as soon as feasible" as set out at subsection 43(2) of the *RCMP Act* (which concerns serving a notice of hearing as soon as feasible after the appointment of a conduct board in code of conduct cases).

44. The adjudicator noted that the *RCMP Act*, as it read before the 2014 amendments, used the word "forthwith." The adjudicator determined that the words "as soon as feasible" were a plain language modernization of the old wording, and that the terms were equivalent. The adjudicator concluded that both "forthwith" and "as soon as feasible" meant "as soon as practicable having regard to all of the circumstances of the case."³⁸

³⁷ Department of Justice Canada, *Legistics: Categorization of Time Periods*. Online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p33.html> (accessed March 26, 2021).

³⁸ *Constable Lee Brown*, 2018 RCAD 21 at paras. 49-58.

45. In addition, statutory interpretation entails examining the words of a legislative provision in their entire context and in their grammatical and ordinary sense, in harmony with the overarching act's scheme and objects.³⁹

46. The object of the public complaints provisions of the *RCMP Act* is to create an objective complaints process in which the public and subject RCMP members alike can expect a fair and expeditious process for addressing a given public complaint. At the end of that process, whether the CRCC investigates the public complaint, or whether a complainant requests that the CRCC review the RCMP's disposition of their public complaint, the parties to the complaint are entitled to receive a written final report setting out the CRCC's findings and, where appropriate, its recommendations and any corresponding actions that the RCMP Commissioner will take.

47. In the case of a CRCC interim report, the delivery of the final report depends on the CRCC first receiving the RCMP Commissioner's response. To be effective and meaningful, the CRCC's work must be timely and efficient, and its final reports must not be unduly delayed, and certainly not by inadequate staffing or bureaucratic entanglements within the RCMP.

48. In terms of the ordinary sense of the words "as soon as feasible," the *Oxford Canadian Dictionary of Current English* defines "feasible" as "easily or

³⁹ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27.

conveniently done.” The *Merriam-Webster Dictionary* defines “feasible” as meaning “capable of being done or carried out.” Synonyms of “feasible” include “practicable,” as well as “workable,” “achievable,” “attainable,” “viable,” and “realistic.”⁴⁰

49. In *R. v. Mudry*, the Alberta Court of Appeal adopted a definition of “practicable” as being synonymous with “feasible.” The Court quoted with approval the following definitions:

In 33 Words and Phrases at p. 250 it is stated:

Where something is required to be done at the earliest 'practicable' moment, the doing of the act is not required to be done at the very earliest moment, the adjective 'practicable' importing a difference according to circumstances, and meaning, ordinarily that the thing must be done as soon as reasonably can be expected.

At p. 251 of the same reference it is stated: "The word 'practicable' means feasible. An act is practicable of which conditions or circumstances permit the performance."

And at p. 252 of this reference it is said: "'Practicable' means feasible, fair, and convenient and is not synonymous with 'possible'."⁴¹

50. In *R v Kwoon*, the Ontario Superior Court of Justice considered the meaning of the words “as soon as practicable” within the *Ontario Provincial*

⁴⁰ Oxford University Press, synonyms for “feasible,” online: <https://www.lexico.com/synonyms/feasible> (accessed March 26, 2021).

⁴¹ *R v Mudry*, 1979 ABCA 286, 1979 CarswellAlta 156, at paras. 12-14.

Offences Act in the context of a court clerk issuing a notice of trial. The Superior Court made it clear that practicable was analogous to “feasible.”

The phrase 'as soon as practicable' in its ordinary meaning means as soon as an act can be done, or as soon as possible in practice. (The Canadian Oxford Dictionary, 1998). It refers to what is feasible for a clerk of the court at the particular time.... It means that the clerk is to act as soon as it is feasible at the time and in the particular circumstances to issue the notice of trial.⁴²

51. In *R. v. Phillips*, the Ontario Supreme Court, Court of Appeal (now the Ontario Court of Appeal) referred to earlier appellate and lower court decisions in confirming that the words “as soon as practicable” (in the context of a breath sample demand) meant within a reasonably prompt time under the circumstances. The Court of Appeal concluded that “The test of practicability is reasonableness.”⁴³

52. This definition was more recently reaffirmed by the Ontario Court of Appeal in *R. v. Vanderbruggen*.⁴⁴

53. The decisions above come from courts interpreting the wording of criminal or regulatory procedures. This does not mean the decisions are wholly distinguishable from the context of the *RCMP Act*. The interpretations

⁴² *R v Kwoon*, 1999 CarswellOnt 4246 (Ont SCJ), [1999] OJ No. 4989, at para. 20.

⁴³ *R v Phillips*, 1988 CarswellOnt 65, [1988] OJ No. 415, 27 OAC 380, at paras. 9-10.

⁴⁴ *R v Vanderbruggen*, 2006 CarswellOnt 1759, [2006] OJ No. 1138, 206 CCC (3d) 489, at para. 12.

establish common-sense definitions based on the ordinary meanings of the words themselves. In particular, the above interpretations emphasize that what is reasonably prompt depends on the circumstances. Whether the case is a criminal matter or a public complaint, the question should be the same.

54. In French, furthermore, sections 45.72(1) and 45.76(2) of the *RCMP Act* use the words “dans les meilleurs délais,” which translates to “as soon as possible.”⁴⁵ Given that the concepts of feasibility and possibility may be synonymous but are not necessarily so, the CRCC submits that the two versions must be read together to achieve a common meaning.⁴⁶ To the extent that the French and English versions are ambiguous, the common meaning should be derived from the narrower interpretation.⁴⁷

55. Consistent with all of the above, therefore, the CRCC submits that the words “as soon as feasible” should be interpreted as equivalent to “as soon as practicable taking the circumstances into account.” This does not mean “immediately” or even, necessarily, “as soon as possible.” However, the action must be done soon, expeditiously, or reasonably promptly.

⁴⁵ *Collins Dictionary*, translation for “dans les meilleurs délais,” online: <https://www.collinsdictionary.com/translator> (accessed April 8, 2021).

See also *Reverso Dictionary*, translation for “dans les meilleurs délais,” online: https://dictionary.reverso.net/french-english/dans+les+meilleurs+d%C3%A9lais/?utm_source=reversoweb&utm_medium=textlink&utm_campaign=resultpage (accessed April 8, 2021).

⁴⁶ *R v Daoust*, [2004] 1 SCR 217 at para 28.

⁴⁷ *R v Daoust*, [2004] 1 SCR 217 at para 29.

B. Has the RCMP Commissioner failed to provide reasonably prompt responses to the CRCC's interim reports in a systemic manner?

i. The RCMP has never met its six-month MOU target

56. The CRCC submits that the nearly three-and-a-half-year delay in providing an RCMP Commissioner's response to the interim report in the Applicant's public complaint is unacceptable and unreasonable by any measure. This delay is a failure by the RCMP Commissioner to meet her obligation under subsection 45.76(2) of the *RCMP Act* to provide a response "as soon as feasible."

57. In particular, the NPCD did not assign an analyst to the RCMP Commissioner's response to the interim report in the Applicant's public complaint for three years after receiving the report. Even then, the matter only became a priority and the assignment of an analyst took place only after the CRCC Chairperson advised the RCMP Commissioner that she would consider releasing the interim report if the RCMP Commissioner's response was not received within 90 days.⁴⁸

58. The CRCC supports the Applicant's submission that the RCMP Commissioner has breached her duty to provide a response to the interim

⁴⁸ O'Malley Cross-exam, at pp. 39-40.

report in the Applicant's public complaint as soon as feasible, as required by subsection 45.76(2) of the *RCMP Act*. This is a direct consequence of the rise of an unworkable backlog of RCMP Commissioner's responses.

59. The CRCC's submission is that the issue of delayed RCMP Commissioner's responses is systemic within the RCMP. The problem goes beyond large and complex public interest investigations (although it includes these), but it impacts every interim report issued by the CRCC. That is, since at least 2016, the RCMP has repeatedly failed in its duty to provide responses to the CRCC's interim reports as soon as feasible.

60. It is noteworthy that Superintendent O'Malley's affidavit makes the claim that, "with some limited exceptions," the RCMP was meeting the agreed-upon time limit set out in the December 2019 Memorandum of Understanding.⁴⁹

61. In fact, Superintendent O'Malley conceded in cross-examination that, since signing the December 2019 Memorandum of Understanding, the RCMP had never met the six-month target for providing the RCMP Commissioner's responses that is set out within. Instead, his affidavit was referring to unrelated timelines in the Memorandum of Understanding.⁵⁰

⁴⁹ O'Malley Affidavit, at para. 51.

⁵⁰ O'Malley Cross-exam, pp. 40-43.

62. Superintendent O'Malley's affidavit also stated that the NPCD was essentially overwhelmed by a growing number of interim reports from the CRCC from 2016 onwards. He stated that the CRCC delivered 16 reports in 2015-2016, 57 in 2016-2017, 51 in 2017-2018, 44 in 2018-2019, and 81 in 2020-2021.⁵¹ But this does not provide the full context of the delivery of interim reports.

63. Between 2007 and 2020, the CRCC delivered an average of approximately 40 interim reports in a given year. Of course, the number of investigations and requests for review varied from year to year, and so naturally the number of interim reports varied from year to year. As requests for review increased over time, the number of interim reports generally increased. However, even these increases in the NPCD workload cannot explain the years-long delays in the RCMP Commissioner's responses.⁵²

64. While the RCMP cannot control the volume and complexity of interim reports that will be delivered in a given year, it does control the resourcing, staffing, and internal processes that have substantially caused these delays.

C. What is the content of the RCMP Commissioner's duty to respond under the *RCMP Act*?

⁵¹ O'Malley Affidavit, at paras. 15-16 and 40.

⁵² CRCC Annual Reports, see Joncas-Bourget Affidavit, Exhibits "O," "P," "Q," "R," "S," "T," "U," "V," "W," "X," and "Y" [IAR, Tab 1, pp. 205-514].

i. Six months is an upper limit for a response.

65. As part of the Memorandum of Understanding, the CRCC and the RCMP have agreed to a timeline of six months for the delivery of a given RCMP Commissioner's response to a given interim report. The RCMP negotiated this timeline freely based on its own understanding of its processes and constraints. Superintendent O'Malley stated in cross-examination that this was an attainable timeline once the NPCD had hired enough staff and cleared its backlog.⁵³

66. The CRCC submits that a maximum of six months is a reasonable timeline that the RCMP Commissioner should meet well in advance in nearly all cases. Only exceptional circumstances should justify a delay.

ii. It is the RCMP's responsibility to assign sufficient resources and streamline its workflow.

67. To the credit of the RCMP NPCD, it has undertaken significant staffing measures since 2019 to address the backlog of RCMP Commissioner's responses. Superintendent O'Malley felt confident that the NPCD would begin meeting the six-month timeline going forwards from April 1, 2021.

⁵³ O'Malley Cross-exam, at p. 42.

Superintendent O'Malley also predicted that the backlog of outstanding RCMP Commissioner's responses would be cleared by the end of 2021.⁵⁴

68. An argument to the effect of, "that was then, this is now" may be superficially appealing, but the CRCC submits that this Court's guidance is still necessary in terms of the content of the RCMP Commissioner's duty to provide a response "as soon as feasible."

69. The RCMP appears to have finally allocated sufficient resources to address the backlog after years of delays. However, the problem has occurred before. As demonstrated by the historical cycle of delays set out above and in the CRCC's materials, the resources assigned today may be shifted to other pressing priorities tomorrow.

70. The CRCC seeks the guidance of this Court to clarify the RCMP Commissioner's duty to provide a response to the CRCC's interim reports as soon as feasible. In particular, feasibility should be interpreted to mean more than merely what is technically possible given the resources of the NPCD at the time. An absurd situation has arisen – and may well arise again – where a severely understaffed NPCD could require several years, or more, to assign an analyst, analyze a given interim report, and advise the RCMP Commissioner – and candidly state to the CRCC (or a reviewing court) that

⁵⁴ O'Malley Cross-exam, pp. 44, 49.

this is all that is possible in the circumstances. This perverts the plain meaning of subsections 45.72(1) and 45.76(2) of the *RCMP Act*, which require reasonable promptness in the circumstances.

71. The CRCC submits that the RCMP Commissioner's efforts to provide responses "as soon as feasible" must be reasonable. The CRCC further submits that, until new staffing and the addition of temporary personnel was undertaken in 2019-2020, these reasonable efforts had not been made.⁵⁵

72. In *Rogers Communications Inc. v. Voltage Pictures, LLC*, the Supreme Court was concerned in part with the interpretation of the copyright infringement notice regime under federal *Copyright Act*. That Act imposed an obligation on internet service providers to forward the notice of claimed copyright infringement to the service provider's customer who had allegedly infringed on a copyright owner's work. The notice had to be forwarded "as soon as feasible."

73. Brown J., writing for the majority of the Supreme Court of Canada, noted that the words "as soon as feasible" within the *Copyright Act* would be undermined if an internet service provider did not arrange its processes so as to allow it to do the work necessary to meet that requirement "quickly and

⁵⁵ O'Malley Affidavit, at paras 48-49.

efficiently.” It was not necessary to specifically interpret this part of the *Copyright Act*, but the meaning of the words was clear in context.⁵⁶

74. In this vein, this Court should conclude that the RCMP Commissioner’s duty under the *RCMP Act* would be undermined if the RCMP failed to arrange its processes so as to allow it to do the work necessary to meet the RCMP Commissioner’s statutory obligations “quickly and efficiently.” This would include an expectation that the NPCD has enough staffed positions to meet its workload. Again, the standard should be that the RCMP has made a reasonable effort in the circumstances.

75. Additionally, the wording of the *RCMP Act* makes it clear that the RCMP Commissioner’s duty is to provide a response setting out any further action that has been or will be taken, or reasons why no action will be taken. This is not a high bar to clear.⁵⁷

76. However, the RCMP has made the choice to encumber the process by second-guessing the CRCC’s findings (essentially re-litigating the findings of fact and law found by the CRCC) and consulting with different internal policy centres when analyzing the CRCC’s interim reports.⁵⁸

⁵⁶ *Rogers Communications Inc. v Voltage Pictures, LLC*, 2018 SCC 38, 2018 CSC 38, 2018 CarswellNat 5120, at paras. 30-31.

⁵⁷ *RCMP Act*, at ss. 45.72(1) and 45.76(2).

⁵⁸ O’Malley Cross-exam, at p. 24.

77. Superintendent O'Malley conceded that the input from the policy centres in the case of the Applicant's public complaint was frustrating and that it was "not useful." Similarly, many RCMP policy centres appear disinterested in the NPCD's work and are unaware of its importance.⁵⁹

78. Parliament has legislated a straightforward requirement for the RCMP Commissioner's responses. The CRCC submits that where the RCMP Commissioner requires advice from the RCMP policy centres or other subject matter experts before directing that action be taken, that advice should be appropriately prioritized. However, the process should not languish under wasteful and sometimes fruitless consultations within the bureaucracy.

D. CONCLUSION

79. Parliament has legislated a straightforward requirement. When the CRCC delivers an interim report to the RCMP Commissioner, the RCMP Commissioner is to provide a written response within a reasonably prompt time in the circumstances. The RCMP Commissioner has demonstrably failed to meet this duty in the case of the Applicant's public complaint and in the case of the CRCC's investigations and reviews more generally.

⁵⁹ O'Malley Cross-exam, pp. 55-57.

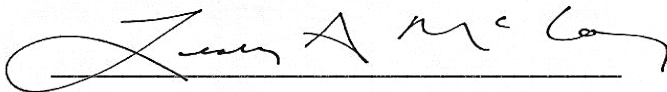
80. Even though the RCMP is finally taking steps to meet its obligations, the judicial interpretation of the legislated duty to provide responses as soon as feasible, including the content of that duty, should be made explicit.

PART IV – ORDER SOUGHT

81. The CRCC takes no position on the potential remedies sought in this matter, but the CRCC asks that the above submissions be considered by this Honourable Court when making any orders or declarations that the Court considers to be fair and appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 15, 2021

A handwritten signature in black ink, appearing to read "Lesley McCoy", written over a horizontal line.

Lesley McCoy

Civilian Review and Complaints Commission for the Royal Canadian Mounted Police

Tel: 343-548-6405

Fax: 613-952-8045

Email: Lesley.McCoy@crcc-ccetp.gc.ca

Solicitor for the Intervener

PART V – AUTHORITIES CITED**Legislation**

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