

FEDERAL COURT

B E T W E E N:

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 APPLICANT,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

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TABLE OF CONTENTS

PART I – FACTS.....	641
A. Overview.....	641
B. Statement of Facts	642
(i) The RCMP Public Complaints Process	642
(ii) The Applicant’s Complaint to the CRCC.....	644
(iii) The RCMP Commissioner’s Serious and Systemic Delays	649
PART II – ISSUES	653
PART III – ARGUMENT.....	
A. Interpreting the “As Soon as Feasible” Argument.....	654
B. The RCMP Commissioner Failed to Respond “As Soon as Feasible”...	659
C. Declaratory Relief for the Breach of s. 45.76(2) of the <i>RCMP Act</i>.....	662
D. Charter Right to Freedom of Expression.....	664
E. Special Costs	667
PART IV – ORDERS SOUGHT.....	669
PART V – AUTHORITIES.....	670

PART I. FACTS

Overview

1. Freedom from police misconduct is one of the fundamental values that defines a free and democratic society.¹ In February 2014, the Applicant filed a complaint with the RCMP Civilian Review Complaints Commission (“CRCC”) alleging that the RCMP was spying on environmentalists and Indigenous people who were opposed to the Northern Gateway oil pipeline project. The CRCC launched a public interest investigation into the complaint and completed its Interim Report with findings and recommendations in June 2017. Under the *RCMP Act*, the RCMP Commissioner must provide a written response to the Interim Report before a Final Report can be prepared and disclosed to a complainant. After more than three years of waiting with no response from the RCMP Commissioner, the Applicant commenced the present application for an order compelling the RCMP Commissioner to complete her review of the Interim Report and other declaratory relief.

2. After this court application was commenced, the RCMP Commissioner finally completed her review of the Interim Report after three-and-half-years and submitted her written response to the CRCC. Unfortunately, this situation is not unusual and significant delays by the RCMP Commissioner in responding to the CRCC are routine. In the 2019-2020 CRCC Annual Report, the CRCC Chairperson expressed serious concerns about the systemic failure of the RCMP Commissioner to respond to interim reports in a timely manner. Despite repeated public commitments by the RCMP to address these delays, many interim reports still sit unanswered for years on the RCMP Commissioner’s desk.

3. Under s. 45.76(2) of the *RCMP Act*, the RCMP Commissioner has a legal obligation to respond to interim reports “as soon as feasible”. It is crucial for the proper functioning of the public complaint process that the RCMP Commissioner

¹ Josiah Wood, Q.C. Report on the *Review of the Police Complaint Process in British Columbia* (February 2007), para. 33

fulfil this statutory duty in a timely way. The RCMP Commissioner's failure to do so in this case is a denial of the BCCLA's constitutional rights and undermines public confidence in the CRCC complaint process.

The RCMP Public Complaints Process

4. The CRCC is a civilian body independent from the RCMP.² It receives complaints from the public about the conduct of RCMP members, conducts reviews when complainants are not satisfied with the RCMP's handling of their complaints, and initiates complaints and investigations into RCMP conduct when it is in the public interest to do so.³

5. Part VII of the *RCMP Act* sets out the legislative framework for the public complaints process. Under s. 45.53 of the Act, any individual may make a public complaint to the CRCC about the conduct of any RCMP member in the performance of their duties and functions.⁴

6. The vast majority of the complaints received by the CRCC are investigated by the RCMP.⁵ If the complainant is not satisfied with the RCMP's decision following the investigation, they may refer it to the CRCC for review.⁶

7. The CRCC can also investigate a complaint itself where the CRCC Chairperson is of the opinion that it is in the public interest for the CRCC, instead of the RCMP, to do so.⁷ These public interest investigations are independent and "conducted using the CRCC's resources so that the CRCC may make findings of fact

² Affidavit of Nika Joncas-Bourget, affirmed January 18, 2021 ("Affidavit of Nika Joncas-Bourget"), at para. 2; and Affidavit of Michael O'Malley, affirmed February 3, 2021 ("Affidavit of Michael O'Malley"), para. 4

³ Affidavit of Nika Joncas-Bourget, para. 3; Affidavit of Michael O'Malley, para. 4; and *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [*RCMP Act*], ss. 45.53, 45.59, 45.66, 45.7

⁴ *RCMP Act*, s. 45.53(1)

⁵ Affidavit of Nika Joncas-Bourget, para. 5; Affidavit of Michael O'Malley, para. 7; *RCMP Act*, s. 45.6(1)

⁶ *RCMP Act*, s. 45.7

⁷ *RCMP Act*, s. 45.66(1)

and law, and issue non-binding recommendations to remedy any identified deficiencies.”⁸

8. Following the completion of a public interest investigation, the CRCC sends an Interim Report setting out any findings and recommendations to the Minister of Public Safety and Emergency Preparedness (“Minister”) and the RCMP Commissioner.⁹ Recommendations in an Interim Report may include an apology to the complainant, guidance to the member, or changes to RCMP training or policies.¹⁰

9. The *RCMP Act* requires the RCMP Commissioner to respond to Interim Reports “as soon as feasible”:

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.

10. In responding to Interim Reports, the RCMP Commissioner is supported by the RCMP’s National Public Complaints Directorate (“NPCD”), which is the national policy centre responsible for public complaints about RCMP members.¹¹ The NPCD reviews Interim Reports and supporting relevant material, consults internally within the RCMP when required, and prepares an analysis report for the RCMP Commissioner.¹²

11. After considering the RCMP Commissioner’s response, the CRCC prepares a Final Report and sends it to the Minister, the RCMP Commissioner, and the affected parties, including the complainant. It may also send the Final Report to the provincial minister who has the primary responsibility for policing in the province in which the conduct complained of occurred.¹³

⁸ Affidavit of Nika Joncas-Bourget, para. 7

⁹ *RCMP Act*, s. 45.76(1)

¹⁰ Affidavit of Nika Joncas-Bourget, para. 17; Affidavit of Michael O’Malley, para. 10

¹¹ Affidavit of Michael O’Malley, para. 2

¹² Affidavit of Michael O’Malley, para. 11

¹³ *RCMP Act*, s. 45.76(3)

12. The CRCC may also issue an Interim Report when, following a review, it is not satisfied with the RCMP's handling of a public complaint.¹⁴ The *RCMP Act* also requires the RCMP Commissioner to respond to these Interim Reports "as soon as feasible."¹⁵

The Applicant's Complaint to the CRCC

13. The Applicant, the BC Civil Liberties Association, is a charitable organization that has been promoting civil liberties and human rights across Canada for over 50 years. An important part of its mandate is ensuring public accountability for police misconduct.¹⁶

14. On February 6, 2014, the Applicant submitted a complaint to the Commission for Public Complaints Against the RCMP (the predecessor of the CRCC) alleging that RCMP members had illegally spied on Indigenous and climate advocates opposed to the Northern Gateway pipeline. The complaint also alleged that the RCMP had unlawfully shared that information with other government bodies and private sector actors. The Applicant claimed the RCMP's activities violated ss. 2(b), 2(c), 2(d), and 8 of the *Canadian Charter of Rights and Freedoms*.¹⁷

15. Later that month, the CRCC Chairperson initiated a public interest investigation into the Applicant's complaint, given the nature of the issues it raised.¹⁸

16. On June 23, 2017, after performing its investigation and analysis, the CRCC completed its Interim Report and sent it to the RCMP Commissioner and the

¹⁴ *RCMP Act*, s. 45.71(3)(a)

¹⁵ *RCMP Act*, s. 45.72(1)

¹⁶ Affidavit of Harsha Walia, paras 2 and 6 [Applicant's Application Record ("AAR"), Vol. I, Tab 3, pp. 58-59]

¹⁷ Letter from P. Champ to I. McPhail, Q.C., Chairperson of the CPC, dated February 6, 2014 [AAR, Vol I, Tab 2, p. 13]

¹⁸ *RCMP Act*, s. 45.66(1); Letter from I. McPhail, Q.C., Commission for Public Complaints to P. Champ, dated February 20, 2014 [AAR, Vol. I, Tab 2, p. 19]

Minister.¹⁹ The NPCD did not assign an analyst to review the Interim Report at that time.²⁰

17. A year after the Interim Report had been provided to the RCMP Commissioner, the Applicant began to raise concerns about the delay in receiving the Final Report. Between 2018 and 2020, the Applicant's legal counsel sent numerous letters to the CRCC and the RCMP Commissioner, reiterating these serious concerns about the delay and seeking information about when the RCMP Commissioner would respond.²¹ During this period, the CRCC also repeatedly expressed its own grave concerns to the RCMP Commissioner and the NPCD about the ongoing failure to respond to the Interim Report.²²

18. In June 2019, the Director of the NPCD advised the CRCC by email that he was "not able to even approximate a date" by which the response to the Interim Report would be completed.²³

19. In August 2019, in a response to a letter from the Applicant's legal counsel, the RCMP Commissioner wrote: "Given the volume and complexity of the relevant material, it is difficult to provide a time line for completion of my response...I will provide my responses as soon as feasible."²⁴ Although the Interim Report had been

¹⁹ Affidavit of Nika Joncas-Bourget, para. 25

²⁰ Affidavit of Michael O'Malley, para. 19; Cross-Examination of Michael O'Malley Transcript, p. 6 (lines 15-21), p. 7 (lines 21-23), p. 31 (lines 3-5) [AAR, Vol II, Tab 4, p. 577]

²¹ Letter from P. Champ to G. Bujold, CRCC, dated June 25, 2018 [AAR, Vol I, Tab 2, p. 21]; Letter from P. Champ to M. Lahaie, CRCC, dated March 25, 2019 [AAR, Vol I, Tab 2, p. 27]; Letter from P. Champ to M. Lahaie, CRCC, dated May 21, 2019 [AAR, Vol I, Tab 2, p. 30]; Letter from P. Champ to RCMP Commissioner Lucki, dated August 9, 2019 [AAR, Vol I, Tab 2, p. 34]; Letter from P. Champ to M. Lahaie, CRCC, dated June 23, 2019 [AAR, Vol I, Tab 2, p. 40]; Letter from P. Champ to RCMP Commissioner Lucki, dated June 23, 2020 [AAR, Vol I, Tab 2, p. 43]; Letter from P. Champ to RCMP Commissioner Lucki, dated September 24, 2020 [AAR, Vol I, Tab 2, p. 52]

²² Affidavit of Nika Joncas-Bourget, paras. 25-26, 28-29, 34, 37-39

²³ Email from Michael O'Malley to Nika Joncas-Bourget, dated June 10, 2019 [Exhibit D to the Affidavit of N. Joncas-Bourget]

²⁴ Letter from RCMP Commissioner B. Lucki to P. Champ, dated August 16, 2019 [AAR, Vol I, Tab 2, p. 37]

received by the RCMP Commissioner over two years prior to this letter, analysis of the report had not yet begun and no analyst had even been assigned.²⁵

20. In December 2019, the RCMP Commissioner and the CRCC Chairperson signed a Memorandum of Understanding in which the RCMP Commissioner committed to responding to Interim Reports within six months.²⁶ Six months after this MOU was signed, the RCMP Commissioner still had not responded to the Interim Report for the Applicant's complaint.

21. On June 23, 2020, exactly three years after the CRCC had issued its Interim Report, counsel for the Applicant wrote to the RCMP Commissioner, stating that the Applicant was of the view that she had breached her duty to respond to the Interim Report "as soon as feasible" and that the Applicant was contemplating legal action.²⁷ Counsel for the Applicant also wrote a letter to the CRCC Chairperson, expressing concern that the "extreme" delay in receiving the Final Report was likely infringing the Applicant's *Charter* right to access government information.²⁸

22. On July 8, 2020, the CRCC Chairperson wrote to the RCMP Commissioner, advising that, in light of the egregious delay, the CRCC would take the extraordinary step of sending the Interim Report to the Applicant if the Commissioner's response was not received within 90 days.²⁹

23. Days after this letter was sent, the NPCD finally assigned the Interim Report to analysts for review.³⁰ This was over three years after the RCMP Commissioner had received the Interim Report. The RCMP Commissioner committed in writing to

²⁵ Cross-Examination of Michael O'Malley Transcript, p. 6 (lines 15-21) [AAR, Vol I, Tab 4, p. 552]

²⁶ Memorandum of Understanding between CRCC and RCMP, dated December 11, 2019 [AAR, Vol I, Tab 3, p. 254]

²⁷ Letter from P. Champ to RCMP Commissioner Brenda Lucki, dated June 23, 2020 [AAR, Vol I, Tab 1, p. 42]

²⁸ Letter from P. Champ to CRCC Chairperson M. Lahaie, dated June 23, 2020 [AAR, Vol I, Tab 2, p. 39]

²⁹ Letter from M. Lahaie, CRCC, to RCMP Commissioner B. Lucki, dated July 8, 2020 [Exhibit H to the Affidavit of Nika Joncas-Bourget]

the CRCC Chairperson to provide a response within the CRCC's 90-day deadline. In the same letter, the RCMP Commissioner objected to the CRCC releasing the Interim Report, advising that the RCMP's position was that there was no jurisdiction to do so.³¹ In another letter sent the same day to the Applicant, the RCMP Commissioner advised that she had committed to respond to the Interim Report within 90 days and acknowledged that the time taken to respond "has not been ideal."³²

24. In September 2020, the Applicant's legal counsel wrote to the RCMP Commissioner and reminded her of her duty under the *RCMP Act* to respond to interim reports "as soon as feasible" and advised that he would be seeking instructions to commence a court application for *mandamus* if she did not respond to the Interim Report by November 7, 2020.³³ The RCMP Commissioner replied to this letter and committed to providing her response by November 7, 2020.³⁴

25. The RCMP Commissioner wrote to the Applicant on November 6, 2020, advising that she would be unable to meet her commitment to provide a report by November 7, 2020. She thanked the organization for its patience.³⁵

26. On November 9, 2020, the Applicant filed its Notice of Application in this matter. The Applicant sought an order of *mandamus* to compel the RCMP Commissioner to respond to the Interim Report, as well as declarations that she had

³⁰ Cross-Examination of Michael O'Malley Transcript, p. 6 (lines 15-21), p. 7 (lines 21-23), p. 31 (lines 3-5) [AAR, Vol I, Tab 4, pp. 552-553 and 577]

³¹ Letter from RCMP Commissioner B. Lucki to CRCC Chairperson M. Lahaie, dated August 7, 2020 [Exhibit I to the Affidavit of Nika Joncas-Bourget]

³² Letter from RCMP Commissioner B. Lucki to P. Champ, dated August 7, 2020 [AAR, Vol I, Tab 2, p. 50]

³³ Letter from P. Champ to RCMP Commissioner B. Lucki, dated September 24, 2020 [AAR, Vol I, Tab 2, p. 52]

³⁴ Letter from RCMP Commissioner B. Lucki to P. Champ, dated October 13, 2020 [AAR, Vol I, Tab 2, p. 55]

³⁵ Letter from RCMP Commissioner B. Lucki to P. Champ, dated November 6, 2020 [AAR, Vol I, Tab 2, p. 57]

breached her duty under s. 45.76(2) of the *RCMP Act* and violated the Applicant's right to freedom of expression under s. 2(b) of the *Charter*.³⁶

27. On November 20, 2020, the RCMP Commissioner finally submitted her written response to the CRCC, nearly three and a half years after she had received the Interim Report. Her response was merely five pages long. She agreed with all of the CRCC's findings and substantially supported its recommendations.³⁷

28. On December 15, 2020, the CRCC Chairperson released its Final Report to the Applicant. This report was released nearly seven years after the Applicant had originally filed its complaint. The CRCC made numerous findings and recommendations of significant public interest. It found that the RCMP had engaged in many forms of surveillance of peaceful protestors opposed to the Northern Gateway pipeline. It recommended policy changes to protect the privacy and personal information of activists and protesters.³⁸ The CRCC concluded its Final Report with the following comments about the RCMP Commissioner's delay:

To be effective, a public complaint system must be timely. Delays reduce or eliminate the effectiveness of the Commission's recommendations and perpetuate the underlying problems. Moreover, years of routine delays diminish or destroy public confidence in the RCMP and in its civilian oversight. The outrageous delays in this and the many other cases still awaiting the Commissioner's response cannot continue.³⁹

29. Given that the RCMP Commissioner has now responded to the Interim Report and the CRCC has released its Final Report, the Applicant no longer seeks an order of *mandamus* in this application. However, it still seeks declaratory relief.

³⁶ Notice of Application for Judicial Review dated November 9, 2020 [AAR, Vol. I, Tab 1]

³⁷ Letter from RCMP Commissioner B. Lucki to CRCC Chairperson M. Lahaie, dated November 20, 2020 [Exhibit M to the Affidavit of Nika Joncas-Bourget]

³⁸ Final Report of the Public Investigation into the Events and Actions RCMP Members Involved in National Energy Board Hearings in British Columbia ("CRCC Final Report") at pp. 200-201 [Exhibit N to the Affidavit of Nika Joncas-Bourget]

³⁹ CRCC Final Report at p. 202 (emphasis added) [Exhibit N to the Affidavit of Nika Joncas-Bourget]

The RCMP Commissioner's Serious and Systemic Delays

30. The failure of the RCMP Commissioner to respond to interim reports in a timely manner is a serious and systemic issue. For over a decade, the CRCC and its predecessor, the Commission for Public Complaints Against the RCMP (“CPC”), have raised significant concerns about these “extensive delays”.⁴⁰ Some comments by in their annual reports include:

The CPC’s concern regarding the delay in the provision of the Commissioner’s Notices continues to grow, as these delays threaten the integrity of the public complaint process.⁴¹

As the CPC has continued to state, these delays threaten the integrity of the public complaint process...Once again, the CPC strongly encourages the RCMP to assign the necessary resources to ensure the timely delivery of response to the CPC’s Interim Reports.⁴²

Some of these interim reports have been with the RCMP for over a year. Complainants frequently contact the Commission to express their frustration over the RCMP’s delays in responding to interim reports, which prevents the timely resolution of their cases.⁴³

31. As the CRCC Chairperson wrote in her most recent Annual Report:

I join many of my predecessors in expressing my dismay about the length of time that it takes for the Commissioner to provide a response to Commission interim reports...

This issue is of significant concern, as lengthy delays serve to obscure transparency, dilute the effects of findings and reduce or eliminate the value of recommendations.

Canadians have a right to know if the Commission’s findings and recommendations have been accepted and indeed, if RCMP policies,

⁴⁰ Affidavit of Nika Joncas-Bourget, paras. 59-81; 2009-2010 CPC Annual Report, p. 121 [AAR, Vol. I, tab 3, p. 121]; 2010-2011 CPC Annual Report, pp. 22-23 [AAR, Vol. I, Tab 3, pp. 153-154]; 2011-2012 CPC Annual Report, pp. 3 and 14 [AAR, Vol. I, Tab 3, pp. 167 and 178]; 2016-2017 CRCC Annual Report, p. 6 [AAR, Vol. I, Tab 3, p. 202]; 2017-2018 CRCC Annual Report [AAR, Vol. I, Tab 3, p. 230]

⁴¹ 2010-2011 CPC Annual Report, p. 23 [AAR, Vol. I, Tab 3, p. 154]

⁴² 2011-2012 CPC Annual Report, p. 14 [AAR, Vol. I, Tab 3, p. 178]

⁴³ 2016-2017 CRCC Annual Report, p. 6 [AAR, Vol. I, Tab 3, p. 202]

procedures and training have been adjusted as a result. The old adage that justice delayed is justice denied is highly relevant in this situation.⁴⁴

32. As of January 18, 2021, 156 Interim Reports were awaiting a response from the RCMP Commissioner, with 106 waiting for over a year.⁴⁵

33. As noted above, the RCMP Commissioner signed a MOU in December 2019 committing to responding to Interim Reports within a six-month period.⁴⁶ However, since signing this MOU, the RCMP Commissioner has yet to respect this deadline in any case.⁴⁷

34. These delays have profound consequences. According to the CRCC, these delays frustrate its ability to carry out its statutory mandate and “undermines the legitimacy, fairness, and efficacy of the public complaint process.”⁴⁸ Recommendations are not implemented until the RCMP Commissioner has responded to interim reports, which means that “important lessons and systemic changes may wait for months or years past the time when they would be most useful and relevant.”⁴⁹ In many cases, the RCMP Commissioner’s delays “have led to situations where the RCMP members who are subjects of the complaint have retired or resigned before the CRCC’s report on the complaint was completed.”⁵⁰

35. The serious consequences of these delays were illustrated during the militarized policing crisis on Wet’suwet’en territories in January-March 2020. As the CRCC Chairperson explained in the CRCC 2019-2020 Annual Report:

The impact of the delay in receiving Commissioner’s responses to Commission interim reports was brought to fore in January 2020, specifically during the protests on Wet’suwet’en traditional lands.

⁴⁴ 2019-2020 CRCC Annual Report, p. 2 [AAR, Vol. I, Tab 3, p. 74]

⁴⁵ Affidavit of Nika Joncas-Bourget, para. 55

⁴⁶ Memorandum of Understanding between CRCC and RCMP, dated December 11, 2019 [AAR, Vol I, Tab 3, p. 254]

⁴⁷ Affidavit of Nika Joncas-Bourget, para. 56; Cross-Examination of Michael O’Malley, pp. 39 (line 19) - 40 (line 22) [AAR, Vol. II, Tab 4, pp. 585-586]

⁴⁸ Affidavit of Nika Joncas-Bourget, para. 99

⁴⁹ Affidavit of Nika Joncas-Bourget, para. 100

⁵⁰ Affidavit of Nika Joncas-Bourget, para. 101

At that time, the British Columbia Civil Liberties Association (BCCLA), and indeed, several third party complainants called upon the Commission to launch an investigation into the RCMP's response to protestors in the Wet'suwet'en territory. Many of the issues raised mirrored those addressed in the Commission's Chair-Initiated Complaint and Public Interest Investigation into the RCMP Response to Protests in Kent County, New Brunswick.

Rather than launching an investigation to look into matters previously contemplated by the Commission, I chose to release, in the absence of a reply from the Commissioner, select findings and recommendations from the Kent County report. The findings and recommendations made in that report had broad, far-reaching impact on policing that I determined the Canadian public should be able to access.⁵¹

36. The Final Report for the Kent County complaint was finally released in November 2020. It contained numerous findings and recommendations with respect to stop checks, physical searches, and exclusion zones that would have been highly relevant to public debate during the crisis on Wet'suwet'en territories.⁵² But they were not publically available at that time due the RCMP Commissioner's delay.

37. The criminalization and policing of Wet'suwet'en land defenders is not the only case where the failure of the RCMP Commissioner to respond to a CRCC interim report in a timely manner has had significant consequences. In May 2019, Michael Mullock died of a stroke after being thrown in an RCMP drunk tank. He had no alcohol or drugs in his system. Two years earlier, the CRCC had sent an Interim Report to the RCMP Commissioner about a very similar case at the same RCMP detachment. Sadly, the RCMP Commissioner had not yet responded to that Interim Report when Mr. Mullock died.⁵³

38. In another disturbing case, a woman arrested and detained in RCMP cell blocks had her arm broken during a struggle to forcibly remove her bra. She was left alone, topless and with a broken arm in an RCMP cell because the RCMP officers believed she was "faking". The CRCC made several adverse findings about RCMP conduct in this case, but it took the RCMP Commissioner nearly four years to

⁵¹ CRCC Annual Report 2019-2020, at pp. 2-3 [AAR, Vol. I, Tab 3, pp. 74-75]

⁵² Affidavit of Harsha Walia, para. 17 [AAR, Vol. I, Tab 3, p. 64]

respond to the Interim Report. In its Final Report, the CRCC noted that the egregious delay in that case had eliminated the value of recommendations with respect to the cell block supervisor involved in the altercation, as she had retired by the time the Final Report was released. Further, the delay prevented the serious policy deficiencies identified by the CRCC from being promptly remedied.⁵⁴

39. In 2018, a public complaint was filed with the CRCC alleging that the RCMP Commissioner had failed to respond to an Interim Report for a different complaint in a timely manner. The CRCC completed its Interim Report for this delay complaint, in which it concluded that the RCMP Commissioner had failed to respond to the previous Interim Report “as soon as feasible”. As of January 2021, almost two years after the CRCC had completed its Interim Report for the delay complaint, the RCMP Commissioner still had not provided her response.⁵⁵ When Superintendent O’Malley, Director of the RCMP NPCD, was asked on cross-examination whether he appreciated the irony of the delay in responding to an Interim Report about delay, he replied: “I don't know that I appreciate it. I’ve come into what I would say is an unenvied position.”⁵⁶

⁵³ CBC News, “This man died in RCMP custody while a report that might have saved his life sat on a desk”, November 2, 2020 [AAR, Vol. II, Tab 3, p. 524]

⁵⁴ CRCC Summary of Complaint [AAR, Vol. II, Tab 3, p. 535]

⁵⁵ Affidavit of Nika Joncas-Bourget, paras. 85-97, Exhibit AB

⁵⁶ Cross-Examination of Michael O’Malley, p. 48 (lines 1-7) [AAR, Vol. II, Tab 4, p. 594]

PART II ISSUES

40. The Applicant submits that the issues to be determined by the Court in this application are as follows:

- (a) What is the proper interpretation of the “as soon as feasible” requirement in s. 45.76(2) of the *RCMP Act*?
- (b) Did the RCMP Commissioner breach her duty under s. 45.76(2) of the *RCMP Act* to submit her written response to the CRCC Interim Report “as soon as feasible”?
- (c) Should this Court grant a declaration that the RCMP Commissioner breached her duty under s. 45.76(2) of the *RCMP Act*?
- (d) Did the RCMP Commissioner’s extensive delay in responding to the Interim Report violate the Applicant’s right to freedom of expression under s. 2(b) of the *Charter*, and if so, should this Court grant a declaration to this effect?
- (e) Does this public interest litigation warrant an award of special costs?

PART III. ARGUMENT

A. Interpreting the “As Soon as Feasible” Requirement

41. Section 45.76(2) of the *RCMP Act* requires the RCMP Commissioner to respond to Interim Reports “as soon as feasible.” This phrase is not defined in the *RCMP Act* and it appears that this provision has not been previously judicially interpreted.⁵⁷

42. The modern approach to statutory interpretation dictates that “the words of an Act are to 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.”⁵⁸

43. The Applicant submits that, applying this approach, it becomes clear that the “as soon as feasible” requirement conveys urgency. The words “as soon as feasible” mean expeditiously, without unreasonable delay. It is submitted that, absent exceptional circumstances, “as soon as feasible” under s. 45.76(2) should mean no longer than three to six months.

(i) *Grammatical and Ordinary Meaning*

44. The grammatical and ordinary meaning of “as soon as feasible” conveys urgency. Dictionaries may be of assistance in establishing ordinary meaning. The first definition of “feasible” listed in the *Oxford English Dictionary* is “[c]apable of being done, accomplished or carried out; possible, practicable.”⁵⁹ The ordinary meaning of as soon as feasible is as soon as possible.

⁵⁷ Affidavit of Nika Joncas-Bourget, para. 83

⁵⁸ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 21, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), p. 87; see also *Ewert v. Canada*, 2018 SCC 30, para. 29

⁵⁹ “feasible, adj.” OED Online, Oxford University Press, March 2021, www.oed.com/view/Entry/68798 Accessed 23 March 2021.

45. The French text fully supports this interpretation of s. 45.76(2) of the Act. The French version of the provision uses the words “dans les meilleurs délais”, which translates to “as soon as possible”. This language is consistent with “as soon as feasible”, and the French text confirms that some degree of urgency or dispatch is required. This strongly indicates that Parliament intended that the RCMP Commissioner be required to provide a response expeditiously. To the extent there is any ambiguity to “as soon as feasible”, both the English and French versions are authoritative and must be read together and given a common meaning.⁶⁰

(ii) *Legislative Context*

46. Reading s. 45.76(2) in the context of the *RCMP Act* as a whole also indicates that the RCMP Commissioner must respond to interim reports expeditiously. Section 45.76(2) is found within Part VII of the *RCMP Act*, which sets out the CRCC complaints process. Interpreting this provision in a manner that would allow the RCMP Commissioner to sit on an interim report for years on end would completely frustrate this process. It would give her the power to single-handedly stall the resolution of a complaint. It could also allow her to strategically delay the release of a Final Report that is critical of the RCMP.

47. Public confidence in policing is diminished when complaints are not resolved expeditiously.⁶¹ Unreasonable delays in responding to Interim Reports reduce and sometimes eliminate the power of the CRCC’s recommendations, which are only implemented once the Final Report is released.⁶² Such delays also cause prejudice to the complainant and the subject members, who are entitled to the timely resolution of their matter and must face the uncertainty of an unresolved complaint.⁶³

48. Furthermore, unreasonable delays prevent the complainant and the public from accessing information about police misconduct, which may be of significant public interest. To preserve the proper functioning of the public complaints process,

⁶⁰ *R. v. Daoust*, [2004] 1 SCR 217 at para 28

⁶¹ Affidavit of Nika Joncas-Bourget, para. 95

⁶² Affidavit of Nika Joncas-Bourget, para. 100

“as soon feasible” must be interpreted to mean promptly, without unreasonable delay.

(iii) Legislative Purpose

49. The purpose of the legislation that introduced s. 45.76(2) of the *RCMP Act*, and Parliament’s intention in enacting this provision, demonstrate that “as soon as feasible” means without unreasonable delay.

50. Section 45.76(2) was introduced into the *RCMP Act* by the adoption of Bill C-42, the *Enhancing Royal Canadian Mounted Police Accountability Act*.⁶⁴ Prior to the adoption of this law, the RCMP Commissioner was under no statutory obligation to respond to a report concerning a public complaint within a particular timeframe.⁶⁵

51. The introduction of Bill C-42 was precipitated by a crisis of public confidence in the RCMP following several public inquiries and scandals.⁶⁶ As the title of the legislation indicates, the purpose of this law was to enhance the accountability of the RCMP, notably by strengthening civilian review.⁶⁷

52. The preamble of this law underscores that effective civilian review enhances the accountability of and public confidence in the RCMP:

Whereas Canadians should have confidence in their national police force;

Whereas civilian review is vital to promoting transparency and public accountability of law enforcement; [...]

53. Many courts, international bodies and public inquiry reports have emphasized that an effective police complaints mechanism is a prerequisite for police

⁶³ Affidavit of Nika Joncas-Bourget, para. 99

⁶⁴ *Enhancing Royal Canadian Mounted Police Accountability Act*, SC 2013, c 18

⁶⁵ *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 (in force between Jun 19, 2013 and Nov 27, 2014), s. 45.46 <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-r-10/106592/rsc-1985-c-r-10.html#sec45.42subsec3_smooth>

⁶⁶ See House of Commons Debates, 41st Parl, 1st Sess, Vol 146 No 146, (17 September 2012) at 1200, 1230 (Vic Toews), 1230 (Randall Garrison); House of Commons Debates, 41st Parl, 1st Sess, Vol 146 No 216, (28 February 2013) at 1125 (Andrew Cash)

⁶⁷ *Enhancing Royal Canadian Mounted Police Accountability Act*, SC 2013, c 18

accountability, the sound administration of justice, and public trust in the police.⁶⁸ The Supreme Court of Canada highlighted the crucial importance of public trust in police in *Wood v. Schaeffer*:

Police officers are entrusted by the communities they serve with significant legal authority, including, in some circumstances, the power to use deadly force against their fellow citizens. The indispensable foundation for such authority is the community's steadfast trust in the police.⁶⁹

54. Bill C-42 was intended to promote and protect such public trust. During the legislative process, the importance of the timely resolution of public complaints was discussed on numerous occasions, and significant concerns were raised about the backlog of complaints with the RCMP Commissioner.⁷⁰ Paul Kennedy, the previous Chair of the CPC, provided the following testimony:

Inordinate and unjustifiable delay was the hallmark of the RCMP during the four-plus years that I was chair of the Commission for Public Complaints Against the RCMP ...When I was there I inherited a situation where there were backlogs of five years. The first case I signed was 10 years old. It was a cell death case and I was writing a letter to the family members of someone who had died 10 years before. It was not a very good situation. I believe that an essential role of civilian review is to restore and maintain the public's confidence in the police. Delay in resolving complaints erodes the review

⁶⁸ *United Nations Handbook on Police Accountability, Oversight and Integrity* (UNODC Criminal Justice Handbook Series, 2011), pp. 2-3; *Anishinabek Police Service v. Public Service Alliance of Canada*, 2012 ONSC 4583, para. 44; Patrick J. Lesage, *Report on the Police Complaints System in Ontario. Toronto: Ministry of the Attorney General, 2005; Canada (Commissioner of the Royal Canadian Mounted Police) (Re) (C.A.)*, [1994] 3 F.C. 562, para. 11; *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92, para. 38; *Kyle v Stewart*, 2017 BCSC 522, paras. 52-54; *Wood v. Schaeffer*, 2013 SCC 71, paras. 1-5.

⁶⁹ *Wood*, para. 1.

⁷⁰ See, e.g.,: House of Commons, Standing Committee on Public Safety and National Security, Evidence, 41st Parl, 1st Sess, No 50 (3 October 2012) at 1620 (Bob Paulson); House of Commons, Standing Committee on Public Safety and National Security, Evidence, 41st Parl, 1st Sess, No 52 (17 October 2012) at 1545, 1625 (Ian McPhail), 1615 (Jean Rousseau); House of Commons, Standing Committee on Public Safety and National Security, Evidence, 41st Parl, 1st Sess, No 53 (22 October 2012) at 1530, 1545 (Paul Kennedy); and House of Commons Debates, 41st Parl, 1st Sess, Vol 146 No 209, (12 February 2013) at 1110 (Francis Scarpaleggia).

body's ability to fulfill that function.⁷¹

55. It was in this context that Parliament introduced s. 45.76(2) of the *RCMP Act* and required the RCMP Commissioner to provide a written response to CRCC interim reports “as soon as feasible”. The provision is clearly meant to enhance the RCMP’s accountability by requiring the RCMP Commissioner to act with dispatch in responding to interim reports.

(iv) *External Context*

56. Section 45.76(2) also takes its meaning from the external context in which the *RCMP Act* operates. From the outset, the RCMP viewed a six-month timeframe as feasible. In the RCMP’s *National Public Complaints Guidebook*, dated August 2017, the RCMP states that it will “make best efforts to respond to the Chair within 180 days” of the receipt of an interim report.⁷²

57. The Applicant further submits that the MOU concluded by the CRCC Chairperson and the RCMP Commissioner in December 2019 informs the proper interpretation of this provision. The MOU says it was created to “establish procedures that will support the implementation of the public complaints regime set out under the *RCMP Act*”.⁷³ Under the MOU, the RCMP Commissioner committed to responding to Interim Reports issued under ss. 45.71(3)(a) and 45.76(1) within six months.⁷⁴ This demonstrates that a six-month timeframe is imminently “feasible” in the eyes of the RCMP Commissioner.

58. Notably, the CRCC has previously taken the position that a 30-day service standard would provide the RCMP Commissioner with adequate time to respond to

⁷¹ House of Commons, Standing Committee on Public Safety and National Security, Evidence, 41st Parl, 1st Sess, No 53 (22 October 2012) at 1530 (Paul Kennedy). (emphasis added)

⁷² RCMP National Public Complaints Guidebook, dated August 2017 [Exhibit Z to the Affidavit of Nika Joncas-Bourget]

⁷³ Memorandum of Understanding between CRCC and RCMP, dated December 11, 2019, preamble [AAR, Vol I, Tab 3, p. 254]

an Interim Report. It called for the adoption of this service standard in its 2010-2011, 2011-2012 and 2012-2013 Annual Reports.⁷⁵ Under the circumstances, a three-to-six month timeline will be feasible in almost every case.

(v) *Jurisprudence*

59. While s. 45.76(2) of the *RCMP Act* has not been previously judicially interpreted, jurisprudence interpreting the phrase “as soon as feasible” in other statutes is of assistance in making sense of this provision. In *Rogers Communications*, the Supreme Court of Canada noted that a statutory requirement in the *Copyright Act* to perform obligations “as soon as feasible” will be undermined where steps have not been taken to enable these obligations to be met “quickly and efficiently.”⁷⁶

60. In conclusion, when the “as soon as feasible” requirement in s. 45.76(2) of the *RCMP Act* is interpreted in accordance with the modern approach, the obligation must be understood to require the RCMP Commissioner to respond to interim reports swiftly and expeditiously. Further, the provision can be fairly interpreted to mean that the time taken to respond should be reasonable in the circumstances of the case.

B. The RCMP Commissioner Failed to Respond “As Soon As Feasible”

61. The Applicant submits that the RCMP Commissioner clearly breached her duty to respond to the Interim Report “as soon as feasible.” Indeed, the delay in this case was extreme and unconscionable. It took her nearly three and a half years to provide her written response. This delay far exceeds the six-month timeline she committed to in the December 2019 MOU,⁷⁷ as well as the average response time of

⁷⁴ Memorandum of Understanding between CRCC and RCMP, dated December 11, 2019, No. 75 [AAR, Vol I, Tab 3, p. 261]

⁷⁵ Affidavit of Nika Joncas-Bourget, paras. 69, 72, 74, Exhibits R, S, T.

⁷⁶ *Rogers Communications Inc. v. Voltage Pictures, LLC*, 2018 SCC 38, para. 31.

⁷⁷ Memorandum of Understanding between CRCC and RCMP, dated December 11, 2019, No. 75 [AAR, Vol I, Tab 3, p. 261]

17 months.⁷⁸ As the CRCC Chairperson wrote in the Final Report for the Applicant's complaint:

A three-and-a-half-year delay would be egregious and unacceptable in any case. In the case of a matter of national public interest that recommended significant changes to the RCMP's policies, it is incomprehensible.⁷⁹

62. Superintendent O'Malley provided evidence that the RCMP Commissioner's delay in this case was attributable to several factors: the complexity of the Interim Report and the need to consult internally, the volume of interim reports received in recent years, the prioritization of another interim report, and staffing issues.⁸⁰ The Applicant submits that these factors cannot justify or excuse the RCMP Commissioner's egregious delay in this case.

63. The evidence revealed that the real problem was that the RCMP did not even start analyzing the Interim Report until over three years after it was received. Superintendent O'Malley confirmed that the NPCD did not assign analysts to review the report until July 2020,⁸¹ shortly after the Applicant communicated that it was contemplating legal action.⁸²

64. Once the NPCD began its analysis of the Interim Report, the RCMP Commissioner was able to provide her response in just over four months. This demonstrates that it would have been feasible for the RCMP Commissioner to provide her response three years earlier if steps had been taken to actually review and analyze the report when it was received.

65. Superintendent O'Malley provided evidence that the written response could have been completed even more quickly had the internal consultation process gone

⁷⁸ 2019-2020 CRCC Annual Report, p. 2 [AAR, Vol. I, Tab 3, p. 74]

⁷⁹ CRCC Final Report, para 45 [Exhibit N to the Affidavit of Nika Joncas-Bourget].

⁸⁰ Affidavit of Michael O'Malley, paras. 39-51

⁸¹ Cross-Examination of Michael O'Malley Transcript, p. 6 (lines 15-21), p. 7 (lines 21-23), p. 31 (lines 3-5) [AAR, Vol. II, Tab 4, pp. 552-553]

⁸² Letter from P. Champ to RCMP Commissioner Lucki, dated June 23, 2020 [AAR, Vol. I, Tab 2, p. 43]

smoothly. However, his evidence revealed that the relevant RCMP policy centres did not provide any meaningful responses to the NPCD's questions about the CRCC's recommendations.⁸³ In other words, the purported need for "significant consultation" does not explain the extreme delay in this case.⁸⁴

66. Nor can the egregious delay be justified by the volume of Interim Reports received in recent years, the prioritization of other files, and staffing issues. Superintendent O'Malley explained that the RCMP Commissioner's delays in responding to Interim Reports were attributable to "a capacity issue ... It was a lack of resources."⁸⁵ But it is ultimately the RCMP Commissioner's responsibility to ensure that she allocates sufficient resources to fulfill her statutory obligations.

67. Importantly, the alleged "capacity issue" is longstanding and well known. While Superintendent O'Malley suggests that the delay in this case was due to a *recent* increase in the number of interim reports from the CRCC,⁸⁶ the reality is that the CRCC has repeatedly raised serious concerns about these inexcusable delays for over a decade.⁸⁷ It is somewhat comforting to learn that the RCMP conducted staffing processes in 2019 and 2020 to increase the capacity of the NPCD.⁸⁸ However, these changes were long overdue, and there is no real evidence yet that the systemic delays have been resolved. The RCMP's tolerance for extreme delays for over a decade reflects the organization's indifference to the public complaint process.

⁸³ Cross-Examination of Michael O'Malley, pp. 55 (line 6) – 59 (line 19) [AAR, Vol. II, Tab 4, p. 601; Email from M. O'Malley to D. Savard, September 22, 2020 [AAR, Vol. II, Tab 4, p. 632]; Email from M. O'Malley to D. Savard and G. Levesque, dated September 23, 2020 [AAR, Vol. II, tab 4, p. 633]

⁸⁴ Affidavit of Michael O'Malley, para 44

⁸⁵ Cross-Examination of Michael O'Malley, p. 21 (lines 24-25) [AAR, Vol. II, Tab 4, p. 567]

⁸⁶ Affidavit of Michael O'Malley, para. 40

⁸⁷ See all annual reports referred to at paragraphs 30-31 of this Memorandum of Fact and Law; and Affidavit of Nika Joncas-Bourget, paras. 59-81

⁸⁸ Affidavit of Michael O'Malley, para. 48

C. Declaratory Relief for the Breach of s. 45.76(2) of the *RCMP Act*

68. The Applicant submits that this Court should grant a declaration that the RCMP Commissioner breached her duty under s. 45.76(2) of the *RCMP Act* to respond to the Interim Report “as soon as feasible.” Declaratory relief is an important public law remedy that will ensure the RCMP Commissioner is held accountable for her unconscionable delay and will convey to the organization that respect for the *RCMP Act* and the timeliness of the public complaint process is a mandatory legal requirement.

69. The Supreme Court of Canada has held that a declaration may be granted where (a) the court has jurisdiction to hear the issue, (b) the dispute before the court 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.”⁸⁹ In exercising its discretion to order a declaration, a court must consider if the remedy has “practical utility, that is, if it will settle a ‘live controversy’ between the parties.”⁹⁰

70. The Applicant submits that these criteria are all met in the present case. Assessing whether the RCMP Commissioner breached her duty under s. 45.76(2) of the *RCMP Act* is primarily a question of statutory interpretation and thus is clearly a justiciable issue that falls within the jurisdiction of this Court.⁹¹ This question is real, not theoretical. In that regard, there is a full factual foundation upon which the court can assess whether the RCMP Commissioner provided a written response “as soon as feasible” in the present case.

71. The Applicant is a charitable organization committed to civil liberties and human rights. Police accountability is an integral part of its mandate and it has an

⁸⁹ *Ewert*, para. 81; see also *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, paras. 60-61

⁹⁰ *S.A.*, para. 61

⁹¹ *Federal Courts Act*, RSC 1985, c F-7, s. 18

extensive history of engaging with police complaint bodies.⁹² The Applicant was not only impacted by the extreme delay in this case, as recently as last year the Applicant engaged the CRCC over the RCMP's militarized policing response to Indigenous land defenders in the Wet'suwet'en territories. It was subsequently learned that the RCMP Commissioner had been sitting on a highly relevant CRCC Interim Report into policing of anti-shale gas protests by Indigenous land defenders in New Brunswick from 2013. The Applicant has a genuine interest in the resolution of this issue by way of a court declaration that holds the RCMP Commissioner accountable for extreme delays in the public complaint process and promotes future compliance.

72. Finally, a declaration would have significant practical utility in this case. While declarations lack a coercive effect, declaratory relief is "available to condemn, in a way that binds all, specific public acts, decisions or legislative provisions as being contrary to law."⁹³ Declaring that the RCMP Commissioner's delay in this case was contrary to the law will promote public accountability for her actions, provide clarity on her legal obligations, and address a longstanding culture of complacency.

73. The CRCC has been raising concerns about these delays for many years, all with little practical effect in changing RCMP behaviour. The RCMP's failure to address this problem over such a prolonged period should be condemned by this Honourable Court in order to promote future compliance and alleviate the serious consequences caused by the delays. In the words of the CRCC Chairperson, "lengthy delays serve to obscure transparency, dilute the effects of findings and reduce or eliminate the value of recommendations."⁹⁴

⁹² Affidavit of Harsha Walia, paras. 2 and 6 [AAR, Vo. I, Tab 3, pp. 58-59]

⁹³ *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, para. 105

⁹⁴ 2019-2020 CRCC Annual Report, p. 2 [AAR, Vol. I, Tab 3, p. 74]

D. *Charter* Right to Freedom of Expression

74. The RCMP Commissioner's egregious and unconscionable delay in responding to the Interim Report violated the Applicant's right to freedom of expression as protected by s. 2(b) of the *Charter*. This extreme delay prevented the Applicant from accessing the CRCC's findings and recommendations with respect to its complaint, and from commenting on these significant issues of public concern, for at least three years.

75. It is well established that access to information is a derivative right to freedom of expression that may attract s. 2(b) protection.⁹⁵ Access to information will fall within the scope of the constitutional right to freedom of expression "where it is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned."⁹⁶

76. The first inquiry is whether access to information is a necessary precondition of meaningful expression. A *prima facie* case for s. 2(b) protection will be established where "meaningful public discussion and criticism on matters of public interest would be substantially impeded"⁹⁷ without access to the information in question.

77. A *prima facie* case is undoubtedly established here. Due to the RCMP Commissioner's unconscionable delay, the Applicant was precluded from accessing and engaging in any public discussion about the CRCC's findings and recommendations in the present case. When the CRCC suggested it might release the Interim Report to the Applicant so the findings and recommendations could be known, the RCMP objected, and expressed the view that s. 45.76 of the *RCMP Act* prohibited the CRCC from doing so until the RCMP Commissioner's written

⁹⁵ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association [CLA]*, 2010 SCC 23, para. 30; see also: *ARPA Canada and Patricia Maloney v R.*, 2017 ONSC 3285

⁹⁶ *CLA*, para. 5

⁹⁷ *CLA*, para. 37

response was received.⁹⁸ In other words, the RCMP chose to rely on its own delay and failure to discharge its statutory obligation to provide a written response “as soon as feasible” as a way to block the Applicant from accessing that information and expressing its opinions about the RCMP’s conduct.

78. Harsha Walia, the Applicant’s Executive Director, provided evidence that she wanted to speak about the CRCC’s findings and recommendations with the public, journalists, and communities affected by police violence, but was unable to do so until the Final Report was released.⁹⁹ The Applicant has a long history of commenting on reports from the CRCC and the CPC.¹⁰⁰

79. The CRCC’s findings and recommendations in its Final Report were matters of significant public interest. In this report, the CRCC found that the RCMP engaged in numerous forms of surveillance of Indigenous and climate advocates opposed to the Northern Gateway pipeline. It determined that the RCMP collected and retained comments and opinions shared by protestors online¹⁰¹, created secret profiles on organizers,¹⁰² made and retained video-recordings of peaceful protests,¹⁰³ and even infiltrated a peaceful organizing workshop at the Kelowna United Church.¹⁰⁴ It also found that the RCMP lacked a clear policy on the use and retention of personal information in circumstances where there is no nexus to criminal activity.¹⁰⁵

80. The CRCC also made numerous recommendations in its Final Report, including that the RCMP should destroy all recordings and images of peaceful

⁹⁸ Letter from M. Lahaie, CRCC, to RCMP Commissioner B. Lucki, dated July 8, 2020 [Exhibit H to the Affidavit of Nika Joncas-Bourget]; and Letter from RCMP Commissioner B. Lucki to CRCC Chairperson M. Lahaie, dated August 7, 2020 [Exhibit I to the Affidavit of Nika Joncas-Bourget]

⁹⁹ Affidavit of Harsha Walia, para. 20 [AAR, Vol. I, Tab 3, p. 65]

¹⁰⁰ Affidavit of Harsha Walia, para. 21 [AAR, Vol. I, Tab 3, pp. 65-66]

¹⁰¹ CRCC Final Report, Schedule 1 Interim Report, paras 119-132, 145 [Exhibit N to Affidavit of Nika Joncas-Bourget]

¹⁰² CRCC Final Report, Schedule 1 Interim Report, paras 152-170 [Exhibit N to Affidavit of Nika Joncas-Bourget]

¹⁰³ CRCC Final Report, Schedule 1 Interim Report, paras 95-118 [Exhibit N to Affidavit of Nika Joncas-Bourget]

¹⁰⁴ CRCC Final Report, Schedule 1 Interim Report, paras 175-189 [Exhibit N to Affidavit of Nika Joncas-Bourget].

protests and demonstrations as soon as is practicable and develop clear policy on the use of open sources like social media.¹⁰⁶ The Applicant could not engage in any commentary on these matters of significant public concern until almost seven years after it made its complaint because the RCMP Commissioner failed to respond to the Interim Report in a timely manner.

81. The Supreme Court of Canada has held that a claim for constitutional protection of access to information may be denied where it encroaches on protected privileges or if it would interfere with the proper functioning of the government institution in question.¹⁰⁷ Requiring the RCMP Commissioner to fulfill her statutory duty to respond to an Interim Report expeditiously does not undermine any privilege or the functioning of the RCMP. Rather, it supports the accountability and transparency of Canada's national police force.

82. In summary, s. 2(b) of the *Charter* is triggered by this case because the Applicant required access to the Final Report in order to engage in public discussion about the CRCC's findings and recommendations, which were matters of significant public interest. This constitutional protection is not diminished by countervailing considerations.¹⁰⁸ Indeed, the RCMP Commissioner unlawfully obstructed the release of the Final Report by failing to properly discharge her duty to respond under s. 45.76 of the *RCMP Act*.

83. The Applicant submits that the RCMP Commissioner's conduct in this case infringed s. 2(b) protection, either in its purpose or in its effects.¹⁰⁹ Even if the RCMP Commissioner did not intend to stifle the Applicant's expression by failing to respond to the Interim Report for over three years, this was the effect of her actions. If government conduct only limits expression in its effects, the claimant must show

¹⁰⁵ CRCC Final Report, para 4 [Exhibit N to Affidavit of Nika Joncas-Bourget]

¹⁰⁶ CRCC Final Report [Exhibit N to Affidavit of Nika Joncas-Bourget].

¹⁰⁷ *CLA*, para. 33

¹⁰⁸ See *CLA*, paras. 33, 38

¹⁰⁹ *CLA*, para. 33; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 [CBC], para. 33

that the claim engages the values that underlie s. 2(b).¹¹⁰ That is clearly the case here. The subject matter at issue – democratic discourse about police surveillance of peaceful protesters – is precisely the type of expression that lies at the heart of the s. 2(b) guarantee.¹¹¹

84. This s. 2(b) infringement cannot be justified under s. 1 of the *Charter*. The RCMP Commissioner’s delay in responding to the Interim Report was not “prescribed by law.” Rather, her conduct was in violation of the law. It is well established that “[v]iolative conduct by government officials that is not authorized by statute is not ‘prescribed by law’ and cannot therefore be justified under s. 1.”¹¹²

85. The Applicant seeks a declaration pursuant to s. 24(1) of the *Charter* that the RCMP Commissioner violated its s. 2(b) rights. Declaratory relief is an appropriate and just remedy in this case because it will meaningfully vindicate the Applicant’s *Charter* rights in a responsive and effective manner. A declaration would publicly acknowledge the violation of the Applicant’s rights. It would be responsive and effective because “there is a tradition in Canada of state actors taking *Charter* declarations seriously.”¹¹³

86. As the Supreme Court of Canada held in *Merck Frosst*: “Broad rights of access to government information serve important public purposes. They help to ensure accountability and ultimately, it is hoped, to strengthen democracy.”¹¹⁴ Declaratory relief would vindicate these rights in this case.

E. Special Costs

87. The Applicant submits that this is a rare but appropriate case for an award of special costs. In *Carter*, the Supreme Court of Canada held that an order of special

¹¹⁰ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927, p. 976

¹¹¹ *Irwin Toy*, p. 976; *CBC*, para. 37

¹¹² *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, para. 141

¹¹³ *Association des parents de l’école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, para. 65

¹¹⁴ *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, para. 1

costs may be granted where the litigation raises public interest matters that are exceptional, the party has no proprietary or pecuniary interest in the litigation, and the case would not have gone forward with private funding.¹¹⁵

88. Public trust and confidence in the accountability of the country's national police force can only be described as a matter of significant public interest. The present litigation brought before the Court a systemic problem that has been ongoing for over a decade. The CRCC says that there are currently over 106 interim reports that have been waiting for over a year for a response, including one waiting for four years.¹¹⁶ The RCMP Commissioner's indifference to providing timely responses to public complaints into allegations of serious police misconduct is shocking.

89. Some of those cases are extremely serious, including a CRCC report on the RCMP investigation into the alleged sexual assault of a minor. That report has been waiting for well over two years for a response.¹¹⁷ In another disturbing case, the RCMP took nearly four years to respond to a CRCC interim report about an incident where a woman was left alone, topless and with a broken arm in an RCMP cell without medical attention because officers believed she was "faking" the injury.¹¹⁸ The CBC reported on the sad case of Michael Mullock, who died in an RCMP cell from a stroke while a CRCC interim report with recommendations involving a highly similar case in that same detachment sat on the RCMP Commissioner's desk.¹¹⁹

90. These delay problems have been ongoing for over a decade and have not been resolved despite repeated promises and commitments by the RCMP. Furthermore, many of these cases involve vulnerable individuals who are not in a position to legally challenge the RCMP's unlawful behaviour. Without the present application, the RCMP's broken public complaint system would not have been brought before the Court. These systemic problems are truly exceptional matters of significant public interest and the Applicant is deserving of an award of special costs.

¹¹⁵ *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 140

¹¹⁶ Affidavit of Nika Joncas-Bourget, paras 55, 57 and 58

¹¹⁷ Affidavit of Nika Joncas-Bourget, para 58

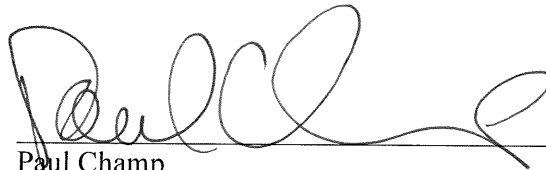
¹¹⁸ Affidavit of Harsha Walia, para. 19 [AAR, Vo. I, Tab 3, p. 65]

PART IV. ORDERS SOUGHT

91. The Applicant requests the following relief:
- (a) A declaration that the RCMP Commissioner breached her duty under s. 45.76(2) of the *RCMP Act* to submit her written response to the CRCC Interim Report “as soon as feasible”;
 - (b) A declaration that the RCMP Commissioner’s extensive and unconscionable delay in responding to the Interim Report violated the Applicant’s right to freedom of expression under s. 2(b) of the *Charter of Rights and Freedoms*;
 - (c) An award of special costs for this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: April 1, 2021



Paul Champ
Jessica Magonet
Solicitors for the Applicant

¹¹⁹ Affidavit of Harsha Walia, para. 18 [AAR, Vo. I, Tab 3, p. 64-65]

PART V. LIST OF AUTHORITIES

Legislation

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

Federal Courts Act, RSC 1985, c F-7, s. 18

Royal Canadian Mounted Police Act, RSC 1985, c R-10, sections 45.53, 45.59, 45.66, 45.7, 45.6, 45.7, 45.71, 45.72, and 45.76

Jurisprudence

Anishinabek Police Service v. Public Service Alliance of Canada, 2012 ONSC 4583

ARPA Canada and Patricia Maloney v R., 2017 ONSC 3285

Association des parents de l'école Rose-des-vents v. British Columbia (Education), 2015 SCC 21

Canada (Commissioner of the Royal Canadian Mounted Police) (Re) (C.A.), [1994] 3 F.C. 562

Canadian Broadcasting Corp. v. Canada (Attorney General), 2011 SCC 2 [CBC]

Carter v. Canada (Attorney General), 2015 SCC 5

Ewert v. Canada, 2018 SCC 30

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

Florkow v. British Columbia (Police Complaint Commissioner), 2013 BCCA 92

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 SCR 927

Kyle v Stewart, 2017 BCSC 522

Little Sisters Book and Art Emporium v. Canada (Minister of Justice), 2000 SCC

Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23

R. v. Daoust, [2004] 1 SCR 217

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27

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

S.A. v. Metro Vancouver Housing Corp., 2019 SCC 4

Wood v. Schaeffer, 2013 SCC 71

Secondary Sources

House of Commons Debates, 41st Parl, 1st Sess, Vol 146 No 146, (17 September 2012) at 1200, 1230

House of Commons Debates, 41st Parl, 1st Sess, Vol 146 No 209, (12 February 2013) at 1110

House of Commons Debates, 41st Parl, 1st Sess, Vol 146 No 216, (28 February 2013) at 1125

House of Commons, Standing Committee on Public Safety and National Security, Evidence, 41st Parl, 1st Sess, No 50 (3 October 2012) at 1620

House of Commons, Standing Committee on Public Safety and National Security, Evidence, 41st Parl, 1st Sess, No 52 (17 October 2012) at 1545, 1615 and 1625

House of Commons, Standing Committee on Public Safety and National Security, Evidence, 41st Parl, 1st Sess, No 53 (22 October 2012) at 1530, 1545

Lesage, Patrick J. *Report on the Police Complaints System in Ontario*. Toronto: Ministry of the Attorney General, 2005 (excerpts)

OED Online, Oxford University Press, “feasible”, accessed March 23, 2021, www.oed.com/view/Entry/68798

United Nations Handbook on Police Accountability, Oversight and Integrity (UNODC Criminal Justice Handbook Series, 2011) (excerpts)

Wood, Q.C., Josiah. *Review of the Police Complaint Process in British Columbia* (February 2007) (excerpts)