

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

THE NARWHAL NEWS SOCIETY and AMBER BRACKEN

PLAINTIFFS

AND

ATTORNEY GENERAL OF CANADA, MINISTER OF PUBLIC SAFETY AND SOLICITOR
GENERAL FOR BRITISH COLUMBIA, HIS MAJESTY THE KING IN RIGHT OF THE
PROVINCE OF BRITISH COLUMBIA, RCMP CHIEF SUPERINTENDENT JOHN
BREWER, UNKNOWN RCMP OFFICER #1 and UNKNOWN RCMP OFFICER #2

DEFENDANTS

APPLICATION RECORD

<p>The Narwhal News Society and Amber Bracken: Counsel: Alison Latimer, K.C. & Sean Hern, K.C. 1200 – 1111 Merville St., Vancouver, BC V6E 3V6</p>	<p><u>Hearing Information</u></p> <p>Location: 800 Smith St., Vancouver, BC</p> <p>Date: 27 May, 2024; 9.45am</p> <p>Before:</p> <p>Estimate: 20 minutes</p> <p>This Record filed by: Applicant</p>
<p>Attorney General of Canada Per: Craig Cameron Department of Justice Canada British Columbia Region National Litigation Sector 900-840 Howe Street Vancouver, BC V6Z 2S9</p>	
<p>British Columbia Civil Liberties Association Counsel: Noah Ross & Erica Olmstead 3305 Kirk Road, Denman Island, BC, V0R 1T0</p>	

INDEX

Tab	Document	Filing Party	Filed Date
1.	Notice of Application	Applicant	30 April, 2024
2.	Affidavit #1 of Vibert Jack	Applicant	29 April, 2024
3.	The Narwhal News Society & Amber Bracken Application Response	Plaintiffs	30 April, 2024
4.	Attorney General of Canada Application Response	Defendant	7 May, 2024
5.	Draft Order		



Form 32 Rule 8-1(4)

No. S231039
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE NARWHAL NEWS SOCIETY and AMBER BRACKEN

PLAINTIFFS

AND:

**ATTORNEY GENERAL OF CANADA, MINISTER OF PUBLIC SAFETY AND
SOLICITOR GENERAL FOR BRITISH COLUMBIA, HIS MAJESTY THE KING IN
RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, RCMP CHIEF
SUPERINTENDENT JOHN BREWER, UNKNOWN RCMP OFFICER #1 and
UNKNOWN RCMP OFFICER #2**

DEFENDANTS

NOTICE OF APPLICATION

Name of Applicant: British Columbia Civil Liberties Association (the “BCCLA” or the “applicant”)

To: The Plaintiffs and the Defendants

TAKE NOTICE that an application will be made by the applicant to the presiding judge or associate judge at the courthouse at 800 Smithe Street, Vancouver, British Columbia on the chambers list on May 27, 2024 at 9:45 a.m. for the orders set out in Part 1 below.

The applicant estimates that the application will take 45 minutes.

This matter is within the jurisdiction of an associate judge.

Part 1: ORDERS SOUGHT

1. The British Columbia Civil Liberties Association (“BCCLA”) be granted leave to intervene and make written and oral submissions in these proceedings.

2. That the style of cause in these proceedings be amended to add the BCCLA as “Intervener”.
3. The BCCLA:
 - a. Will receive copies of all pleadings, submissions and lists of documents exchanged or produced by the parties;
 - b. May apply for access to specific documents from the list of documents exchanged or produced by the parties;
 - c. may submit legal argument at the hearing of this action in a form and with such limits as are determined by the Court.
4. That no costs be awarded for or against the BCCLA in respect of this application, the hearing or the proceeding generally.
5. Such further and other relief as this Court deems just.

Part 2: FACTUAL BASIS

A. Overview

1. This case raises issues of public importance regarding the ability of journalists and more broadly media producers to document land-based Indigenous assertions of sovereignty in opposition to resource extraction projects supported by the Canadian state and an injunction issued by the judiciary.
2. Amber Bracken was arrested for civil contempt of court while on assignment in November 2021 for Narwhal News on Wet’suwet’en territory covering Indigenous-led resistance to the Coastal GasLink pipeline.
3. The main issues raised by the parties in the proceeding are as follows:
 - a. Ms. Bracken claims that her respective s. 7 *Charter* right to liberty and her s. 9 *Charter* right to not be arbitrarily detained were infringed by her wrongful arrest and subsequent detention. The Defendants deny that Ms. Bracken’s ss. 7 and 9 rights were breached and, in the alternative, that any breaches she experienced were justified by s. 1 of the *Charter*.
 - b. In addition, the Plaintiffs claim that their respective s. 2(b) rights to freedom of the press were breached by the Defendants in the course of Ms. Bracken’s arrest and continued detention. The Defendants contest that the Narwhal’s *Charter* rights have been engaged and deny that Ms. Bracken’s s. 2(b) rights were breached and, in the alternative, that any breaches she experienced were justified by s. 1 of the *Charter*.

B. The Proposed Intervener

4. The BCCLA is a non-profit, non-partisan, unaffiliated advocacy group. It was incorporated in 1963 pursuant to the British Columbia Society Act, with its registered office at 306-268 Keefer Street, Vancouver, British Columbia, V6A 1X5.

Affidavit #1 of Vibert Jack, para 5.

5. The objectives of the BCCLA include the promotion, defence, sustainment, and extension of civil liberties and human rights throughout British Columbia and Canada. For over 50 years, the BCCLA has worked in the field of civil liberties with significant focus on protecting freedom of expression as well as police accountability. The BCCLA has worked specifically on police accountability in relation to freedom of the press at sites of Indigenous resistance.

Affidavit #1 of Vibert Jack, paras 3 and 5.

6. The BCCLA engages in a wide range of advocacy activities, including policy submissions to all levels of government, bringing complaints and litigating test cases for breaches of civil liberties, and frequently intervening in cases that raise civil liberties and/or human rights issues. The Supreme Court of Canada has granted the BCCLA leave to intervene in more than 100 appeals, making the BCCLA one of the Court's more frequent non-governmental interveners.

Affidavit #1 of Vibert Jack, paras 8 and 18; list of Supreme Court of Canada interventions at Appendix "A" to Vibert Jack's Affidavit #1.

7. The BCCLA has experience litigating and intervening in many cases pertaining to relevant civil liberties issues, including freedom of the press and the open court principle, police accountability, and respect for Indigenous rights.

Affidavit #1 of Vibert Jack, paras 12-18.

8. For example, the BCCLA has intervened in several important Supreme Court of Canada decisions regarding freedom of expression and the open court principle, as freedom of expression also protects the right to receive information. The BCCLA has also intervened before this court on multiple occasions, including in *International Forest Products Ltd. v. Kern*, 2000 BCSC 888, and *City of Vancouver v. Maurice et al.*, 2002 BCSC 1421, both cases involving the use of injunctions against protest activities. In *Kern*, the BCCLA argued that the injunction should be restricted so that it would not restrain the lawful activities of non-parties. In *Maurice*, the BCCLA argued that the court should exercise its discretion in enforcement of bylaws in a manner consistent with *Charter* values.

Affidavit #1 of Vibert Jack, paras 12-13.

9. The BCCLA has been involved in significant litigation against the RCMP, including bringing a successful lawsuit against RCMP Commissioner Brenda Lucki for delays preventing the release of a Civilian Review and Complaints Commission (CRCC) report into RCMP spying on Indigenous and climate advocates in *British Columbia Civil Liberties Association v. RCMP Commissioner Brenda Lucki et al*, 2021 FC 1475. The BCCLA has also filed three separate complaints against the RCMP and the RCMP's Community Industry Response Group unit regarding the use of exclusion zones and other unlawful conduct and arrests.

Affidavit #1 of Vibert Jack, para 14.

10. The BCCLA has also engaged in significant advocacy regarding government and RCMP policing impacts on Indigenous rights and in addition to participating in public inquiries on policing generally.

Affidavit #1 of Vibert Jack, paras 15-17.

Part 3: LEGAL BASIS

11. This Application to intervene is based on the discretionary inherent jurisdiction of the Court to permit interveners.

Beaudoin v. British Columbia, 2021 BCSC 226, para. 9.

12. Applicants must demonstrate either a direct interest in the litigation or that “the case raises public law issues, legitimately engages the applicant’s interests and the applicant represents a perspective or point of view that will assist the court in resolving them.”

Beaudoin v. British Columbia, 2021 BCSC 226, para. 9.

13. In the exercise of this Court’s inherent jurisdiction in assessing a trial intervener application, judges have regard to the considerations applied in appellate intervention applications tempered by the reality that, unlike in the Court of Appeal, evidence and submissions are not yet fully known.

Beaudoin v. British Columbia, 2021 BCSC 226, para. 15.

14. In addressing the public interest aspect of such an application, the Court considers the following factors:

- a. The nature of the applicant, the directness of the applicant’s interest in the matter, and the suitability of the issues in the case to an intervention.

Equustek Solutions Inc. v. Google Inc., 2014 BCCS 448, para. 10

- b. Whether the applicant offers a distinct perspective without expanding the litigation by raising issues not already part of it.

Gibraltar Mines Ltd. v. Harvey, 2021 BSC 927, para 14.

- c. Whether the applicant offers principled submissions on points of law relevant to the case as opposed to supporting the position of one party or the other.

Gibraltar Mines Ltd. v. Harvey, 2021 BCSC, para 13.

The BCCLA's Interest in this Case

15. This case raises important issues related to freedom of expression, freedom of the press, and the right to protest. The protection of these rights is at the heart of the BCCLA's mandate: the promotion, defence, sustainment, and extension of civil liberties and human rights throughout British Columbia and Canada.

Affidavit #1 of Vibert Jack, para 5.

16. The BCCLA has a longstanding interest in each of the legal rights to be considered in this case. The BCCLA also has a demonstrated interest in the impact that police activities and court orders may have on these rights.
17. The issues raised in this case take on a greater importance as they arise in the context of Indigenous resistance to resource extraction supported by the state and court-issued injunctions. The BCCLA has committed to respecting and upholding Indigenous rights and self-determination and to opposing violations of the rights and freedoms of Indigenous people.

Affidavit #1 of Vibert Jack, para 17.

18. The BCCLA has filed numerous complaints to police oversight bodies regarding police misconduct towards Indigenous individuals and groups. The BCCLA has participated in a number of inquiries related to police misconduct, often making submissions targeted at the interaction of police and Indigenous communities. And the BCCLA has regularly engaged in public advocacy specifically regarding the rights of Indigenous land and water defenders vis à vis police enforcement of court injunctions.

Affidavit of Vibert Jack, paras 14 - 16.

The BCCLA's Proposed Submissions

19. The Plaintiffs state that s. 2(b) violations have taken place in respect of journalistic

practice observing rural Indigenous communities opposing resource development projects. BCCLA's expertise and experience in respect of the s. 2(b) *Charter* violations that are alleged to have occurred will assist the Court in resolving the constitutional issues in this case.

20. The BCCLA submits that its expertise in relation to the civil liberties issues engaged by the s. 7 and 9 *Charter* violations that Ms. Bracken says have occurred will assist the Court in resolving the constitutional issues in this case.
21. In particular, if granted leave to intervene, the BCCLA expects to make submissions on the following issues, which are further developed below:
 - a. Freedom of the press as a standalone right in the context of injunction enforcement;
 - b. Additional context for s. 1 analysis of alleged *Charter* breaches as experienced by Ms. Bracken;
 - c. Legal background of injunction enforcement by the RCMP.
22. The submissions that follow are examples of the kinds of submissions that the BCCLA expects to make, bearing in mind that the BCCLA has not seen the evidence or the parties' respective arguments at trial and that any final submissions will be based on the parties' arguments at trial.

Sections 2(b) & 7 – Wrongful Arrest and Violation of Freedom of Expression of Amber Bracken

23. The Plaintiffs argue that Ms. Bracken was subject to a wrongful arrest and resulting violation of her ss. 2(b) and 7 *Charter* rights.
24. The BCCLA proposes to provide arguments that would advance the Court's understanding of the applicability of s. 2(b) *Charter* rights where an injunction order, such as the one in this case, does not itself set out exceptions for journalists and reporting activities - as noted by the Respondent. These are important rights that must be protected against government interference, regardless of the terms of an Injunction order.

Teal Cedar Products Ltd. v. Rainforest Flying Squad, 2021 BCSC 1554 at para 54; *Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII), [2009] 3 SCR 640 at para 47.

25. As Madam Justice La Forest stated for the majority of the Supreme Court of Canada in *Canadian Broadcasting Corp. v. Lessard*, 1991 CanLII 49 (SCC), [1991] 3 SCR 421,

“...freedom of the press and other media is vital to a free society. There can be no doubt, of course, that it comprises the right to disseminate news, information and

beliefs. This was the manner in which the right was originally expressed, in the first draft of s. 2(b) of the *Canadian Charter of Rights and Freedoms* before its expansion to its present form. However, the freedom to disseminate information would be of little value if the freedom under s. 2(b) did not also encompass the right to gather news and other information without undue governmental interference.”

26. The context of injunction enforcement against Indigenous communities in rural areas is a clear instance of a situation in which the special protections for freedom of the press and other media established under s. 2(b) of the *Charter* should be recognized by the courts. Courts have been slow to unambiguously recognize freedom of the press as a distinct right which has led to considerable academic criticism. This case is a clear one in which the activity of producing media should be explicitly protected.

See *R. v. Vice Media Canada Inc.*, 2018 SCC 53 (CanLII) at paras 122 and 123; Cameron, Jamie, "Section 2(b)'s Other Fundamental Freedom: The Press Guarantee, 1982-2012" (2013), *Comparative Research in Law & Political Economy*. Research Paper No. 23/2013; Benjamin Oliphant, "Freedom of the Press as a Discrete Constitutional Guarantee" (2013), 59 *McGill L.J.* 283; Benjamin Oliphant "Would Independent Protection for Freedom of the Press Make a Difference? The Case of *R. v. Vice Media Canada Inc.*" (2020), *The Supreme Court Law Review* 98 S.C.L.R. (2d) 273 – 315.

27. The BCCLA then expects to make the bulk of its submissions in respect of s. 1 in the form of assisting the parties in providing broader context regarding injunction enforcement by the RCMP against Indigenous communities and allied parties. This broader context is of particular value at the s. 1 stage because the analysis is to be applied flexibly, having regard to the factual and social context of each case.

RJR-MacDonald Inc. v. Canada (Attorney General), 1995 CanLII 64 (SCC), [1995] 3 SCR 199, para 63.

28. The role that journalists play in documenting the actions of Indigenous legal actors and their supporters engaged in land defense is relevant to the issues to be determined by the court. Ms. Bracken asserts her role in this respect is relevant to her claim of wrongful arrest and violation of her freedom of expression. The BCCLA would propose to provide a discussion of the larger context, as it exists beyond Ms. Bracken's own specific circumstances, to inform the Court's s. 1 analysis. The Court's decision in turn will likely be important to future land-based protest cases, as it will consider delineations on what constitutes an impermissible overreach on journalistic practice by enforcement authorities and provide direction for RCMP conduct and patterns to follow.
29. There is extensive international law, social science, and secondary source evidence speaking to the importance of allowing journalists to cover Indigenous communities engaged in opposing resource extraction activities which will be of assistance to the court. These sources include:

- a. Article 16 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which recognizes the importance of access to Indigenous and non-Indigenous media for Indigenous peoples and commits states to encourage media to reflect Indigenous cultural diversity without prejudice to ensure full freedom of expression.

United Nations Declaration on the Rights of Indigenous Peoples, A Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/RES/61/295 (2007); United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c 14.

- b. The Truth and Reconciliation Commission draws on Article 16 of UNDRIP in its “Calls to Action on Reconciliation and the Media”, including the importance of media coverage of issues of concern to Indigenous people and the reconciliation process for all Canadians.

Truth and Reconciliation Commission of Canada. (2015). *The Final Report of the Truth and Reconciliation Commission of Canada* (Vol 6, Ch 6), “We are all Treaty people: Canadian society and reconciliation, Media and reconciliation,” p 193-198.

- c. Submissions to the United Nations Permanent Forum on Indigenous Issues (UNPFII), such as by the Global Indigenous Media Caucus, contextualize Article 16 violations within global patterns of state police suppression of Indigenous journalism and journalism covering resource extraction projects, particularly with Indigenous resistance.

22nd Session of the United Nations Permanent Forum on Indigenous Issues (UNPFII), April 17-May 28, 2023, *Agenda Item 4: Discussion on the six mandated areas of the Permanent Forum w/ reference to the UNDRIP Intervention by the Global Indigenous Media Caucus submitted by Jenni Monet (Laguna Pueblo).*

30. The Court will also be tasked with considering the unique context created by the injunction in this case, which was issued to Coastal GasLink by the British Columbia Supreme Court (the “Coastal GasLink Injunction”), and which Ms. Bracken is alleged to have breached, leading to her arrest. Ms. Bracken was a non-party to the litigation in which the Coastal GasLink Injunction was issued so her arrest would have been enabled through the “Persons Unknown” or “Jane Doe” provisions of the injunction.

See Affidavit #1 Vibert Jack at Exhibit A.

31. The inherent power of the superior courts allows these courts to issue injunctions that bind non-parties and sanction for contempt of these court orders. This power is rooted in the superior court’s obligation to maintain the rule of law and respect for court orders.

MacMillan Bloedel Ltd. v. Simpson, 1996 CanLII 165 (SCC), [1996] 2 SCR 1048 at para 15; *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 385 (CanLII) at paras 25 and 26.

32. The arrest powers for contempt of court pursuant to such Jane Doe provisions need to be interpreted narrowly to only apply to individuals engaged in the behavior which has led to the injunction being granted, in this case obstructive behavior.

NunatuKavut Community Council Inc. v. Nalcor Energy, 2014 NLCA 46, paras 94 – 96; *Re Brake*, 2019 NLCA 17, paras 27 – 36; see the court’s reasons in granting the Coastal GasLink injunction, recorded as *Coastal GasLink Pipeline Ltd. v Huson*, 2019 BCSC 2264, at paras 1 – 38 for a description of the obstructive behaviour which Coastal GasLink relied on as the basis of the injunction being granted.

33. Media producing activity has special *Charter* protections under s. 2(b) and is not in itself an obstructive activity.

Re Brake, 2019 NLCA 17, paras 72 – 84; for importance of not interfering with media unnecessarily when enforcing injunctions see *Teal Cedar Products Ltd. v Rainforest Flying Squad*, 2021 BCSC 1554, paras 36, 82.

34. The respondent argues that Ms. Bracken was in violation of the Coastal GasLink Injunction because she was knowingly in the house as an obstruction while Ms. Bracken said she was there because she was certain she would be unlawfully removed from an observer position if she was outside. This raises the question for the Court to consider regarding the appropriate use by law enforcement of exclusion zones as a tactical enforcement strategy not expressly authorized by an injunction which may itself infringe on the s. 2(b) rights of journalists and individuals, in a manner that should not be accepted as justified under s. 1 of the *Charter*.

For background information on the limited lawfulness of exclusion zones in injunction enforcement contexts, see *Teal Cedar Products Ltd. v Rainforest Flying Squad*, 2021 BCSC 1554 (CanLII).

Section 9 – Wrongful Detention

35. Following her arrest on November 19, 2021, Ms. Bracken was held in detention for four days prior to having a release hearing before Madam Justice Church who was the judge seized or assigned to hear contempt proceedings in respect of the Coastal GasLink Injunction. This detention was authorized by section 11(d) of the Coastal GasLink Injunction. Ms. Bracken says that this continued detention was unlawful and a breach of her s. 9 *Charter* rights.

See Madam Church's injunction included in Affidavit #1 of Vibert Jack at Exhibit A.

The superior court has inherent jurisdiction to sanction for contempt of court and the court prefers having the seized judge determine bail provisions for individuals alleged to have committed contempt of court, as occurred in this case.

36. The BCCLA will, as necessary, assist the court in providing broader context to these issues by contextualizing injunctions as is necessary. This could include providing background on jurisprudence regarding enforcement clauses in injunctions to assist the court in articulating how *Charter* rights should not be infringed by these clauses.

See *MacMillan Bloedel Ltd. v Simpson*, 1996 CanLII 165 SCC, [1996] 2 S.C.R. 1048 at para 41; *West Fraser Mills v. Members of Lax Kw'Alaams*, 2004 BCSC 815 at paras 26 – 27 and *Red Chris Development Company Ltd. v. Quock*, 2014 BCSC 2399 at paras 79 – 87 for jurisprudence regarding enforcement clauses.

37. The BCCLA does not intend to make arguments concerning Narwhal News's rights in general and Ms. Bracken's detention post her bail hearing. The BCCLA will work to ensure that its submissions do not duplicate those of the parties in these and any other aspects.
38. For clarity, the BCCLA's legal submissions will be based on evidence already before the Court in this proceeding and the proposed intervenor does not seek to adduce fresh evidence.

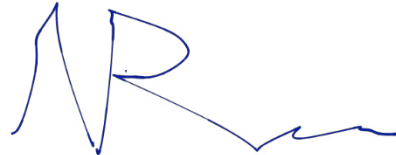
Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Vibert Jack, sworn March 21, 2024.
2. Other materials including case law, legislation and other documents as relied on by counsel and admitted by the court.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you

- intend to refer to at the hearing of this application and that has not already been served on that person;
- (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).



Dated: 29, April 2024
Signature of lawyer for the applicant

Noah Ross

To be completed by the court only:

Order made

- in the terms requested in paragraphs _____ of Part 1 of this notice of application
- with the following variations and additional terms:

Date: _____ Signature of _____ Judge Associate Judge _____

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery

- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other



No. S231039
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE NARWHAL NEWS SOCIETY and AMBER BRACKEN

PLANTIFFS

AND:

**ATTORNEY GENERAL OF CANADA,
MINISTER OF PUBLIC SAFETY AND SOLICITOR
GENERAL FOR BRITISH COLUMBIA, HIS MAJESTY
THE KING IN RIGHT OF THE PROVINCE OF BRITISH
COLUMBIA, RCMP CHIEF SUPERINTENDENT JOHN
BREWER, UNKNOWN RCMP OFFICER #1 and
UNKNOWN RCMP OFFICER #2**

DEFENDENTS

AFFIDAVIT OF VIBERT JACK

I, **VIBERT JACK**, Barrister and Solicitor, of the City of Vancouver in the Province of British Columbia, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am a barrister and solicitor and a member of good standing of the Law Society of British Columbia. I am Litigation Director at the British Columbia Civil Liberties Association (the "BCCLA"). I have personal knowledge of the matters deposed to in this Affidavit, or have received the information from others, in which case I believe it to be true.
2. The BCCLA seeks leave to intervene in *Amber Bracken v. Attorney General et al*, Court File No. S231039, and I am authorized to affirm this affidavit on its behalf.

3. Given its more than 50 years of experience in the field of civil liberties and its significant focus on protecting freedom of expression, as well as its work on police accountability in relation to freedom of the press at sites of Indigenous resistance more specifically, the BCCLA can bring a rights-based perspective that is different from that of the parties.

4. The issues raised by the Plaintiffs are substantially important to the BCCLA and its members especially given its Strategic Plan and its commitment to “the full realization of the rights of Indigenous peoples, and to the pursuit of a just, equitable and durable reconciliation between Indigenous Nations and Canada.”¹ The BCCLA's interest does not relate to the immediate outcome of this case, but rather to the development of the law surrounding police responses to Indigenous resistance and protest in a manner consistent with civil liberties. For the reasons that follow, I believe that the BCCLA can assist the Court by making useful and distinct submissions.

I. The British Columbia Civil Liberties Association

5. The BCCLA is a non-profit, non-partisan, unaffiliated advocacy group. It was incorporated in 1963 pursuant to the *British Columbia Society Act*, with its registered office at 306-268 Keefer Street, Vancouver, British Columbia, V6A 1X5. The objectives of the BCCLA include the promotion, defence, sustainment, and extension of civil liberties and human rights throughout British Columbia and Canada.

6. The BCCLA has several thousand supporters from across the country. The BCCLA has 15 staff employees, including a Litigation Director and a Policy Director. These employees are responsible for the day-to-day work of the organization, and they give the BCCLA a unique status in this country as a grassroots citizens’ organization with the resources of a full-time staff devoted exclusively to civil liberties and human rights.

7. The BCCLA has a volunteer board of directors that directs the BCCLA’s policy and agenda. Through its board, the BCCLA draws on the skills and energies of a wide range of academics, professionals and lay persons with experience and interest in the field of civil liberties. This gives

¹ “Strategic Plan: 2022-2025” (2019) at 3, online (pdf): *British Columbia Civil Liberties Association* <<https://bccla.org/wp-content/uploads/2019/06/Strategic-Plan-2020-2025-final.pdf>>

the BCCLA the benefit of their collective expertise in considering the difficult questions raised by civil liberties-related concerns.

8. The BCCLA works in furtherance of its objects in a variety of ways:
 - a. The BCCLA prepares position papers and makes submissions to governmental bodies at the federal, provincial and municipal levels concerning the advancement of civil liberties and human rights and the implications for civil liberties and human rights of proposed legislative and policy initiatives;
 - b. The BCCLA helps individuals who complain to us about violations of their civil liberties or human rights, including assistance in pursuing administrative and informal remedies;
 - c. The BCCLA engages in public education, by delivering workshops, participating in conferences and other public events at which civil liberties and human rights are discussed, by publishing newsletters and producing books and other publications regarding civil liberties and human rights issues, by commenting on current civil liberties and human rights issues in various news media, and by maintaining a website containing many of the BCCLA's position papers and other public documents; and
 - d. The BCCLA takes action in its own right when it perceives violations of civil liberties or human rights, by launching complaints with the government or other administrative agencies, or by appearing in court, sometimes as a plaintiff or applicant, but most often as an intervener in legal proceedings that raise civil liberties and/or human rights issues;

II. The BCCLA's Interest and Expertise in the Issues Raised by this Case

9. Freedom of expression, as protected by s. 2(b) of the *Charter*, is among the most fundamental of rights in Canadian law. Similarly, ss. 2(c) and (d) of the *Charter* protect historically powerful modes of collective expression, namely peaceful assembly and association. Protecting democratic discourse and participation in decision-making is a core rationale for these freedoms.

The Supreme Court of Canada has repeatedly emphasized the paramount importance of freedom of expression to Canadian society. As Chief Justice McLachlin stated in *Grant v. Torstar Corp.*, “free expression is essential to the proper functioning of democratic governance.”² In the BCCLA’s view, this concept is even more critical when it relates to the Canadian state’s policing of Indigenous peoples on their own territories. People in Canada have not just an interest but a responsibility to be well informed on this issue. The importance of protecting freedom of the press in this context cannot be overstated.

10. The BCCLA is positioned to bring a unique perspective to this case by focusing our arguments on the importance of police accountability in respecting the role freedom of the press plays in safeguarding freedom of expression and democracy. The BCCLA also has a demonstrated interest in the impact that court-orders and associated police enforcement activities may have on these rights.

A. *Freedom of Expression*

11. The BCCLA has intervened in the following Supreme Court of Canada cases in the context of freedom of expression and the open court principle:

- a. *Canadian Broadcasting Corporation, et. Al. v Aydin Coban et. al. and La Presse inc. v. Quebec*, 2023 SCC 22: the BCCLA argued that publication bans under sections 648(1) and 645(5) of the Criminal Code should be applied narrowly to protect the dual constitutional principles of the open court principle and trial fairness for the accused;
- b. *Sherman Estate v. Donovan*, 2021 SCC 25, in which the BCCLA intervened and made submissions on how to reconcile the constitutional open court principle with the quasi-constitutional status of privacy;
- c. *Canada Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 and *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, in which the BCCLA intervened and submitted that certain restrictions on media access to Quebec courts

² *Grant v. Torstar Corp.*, 2009 SCC 61 at para 48.

imposed by judges and Quebec's Minister of Justice, impinged the public's ability to access information about our courts and was in breach of s. 2(b) of the *Charter*;

- d. *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23, in which the BCCLA submitted that the open court principle guaranteed by s. 2(b) of the Charter extends to access to government information where there is a compelling public interest in disclosure.

12. The BCCLA has also intervened before this court on multiple occasions, including in *International Forest Products Ltd. v. Kern*, 2000 BCSC 888, and *City of Vancouver v. Maurice et al.*, 2002 BCSC 1421, both cases involving the seeking of injunctions against protest activities. In *Kern* the BCCLA argued that the injunction should be restricted so that it would not restrain the lawful activities of non-parties. In *Maurice* the BCCLA argued that the court should exercise its discretion in enforcement of bylaws in a manner consistent with *Charter* values.

B. *Police Accountability*

13. The BCCLA launches and litigates cases with respect to policing and criminal justice issues and has filed formal complaints against the Royal Canadian Mounted Police (RCMP). Some examples include:

- a. bringing a successful lawsuit against RCMP Commissioner Brenda Lucki for delays preventing the release of a Civilian Review and Complaints Commission (CRCC) report into RCMP spying on Indigenous and climate advocates in *British Columbia Civil Liberties Association v. RCMP Commissioner Brenda Lucki et al.*, 2021 FC 1475;
- b. filing a complaint against two RCMP Community Industry Response Group (C-IRG) officers to the CRCC regarding their enforcement of an exclusion zone within the Fairy Creek area on unceded Ditidaht territory. The BCCLA also filed this complaint in support of the CRCC's systemic investigation into the conduct of the C-IRG;

- c. filing a joint policy complaint against the RCMP's C-IRG for alleged unlawful conduct and arrests during the May 17, 2022 raid of a protest area at Argenta-Johnson's Landing. The protest camp was set up three weeks prior by Last Stand West Kootenay with the support of local Indigenous group Autonomous Sinixt in opposition to logging in the area.
 - d. filing a policy complaint to the CRCC on behalf of two individuals who were denied movement and access at an RCMP exclusion zone checkpoint in Wet'suwet'en territory, in contravention of the RCMP's own statements and their inherent Indigenous and *Charter*-protected rights.
14. The BCCLA has participated in a number of public inquiries on policing and accountability for police misconduct including:
- a. the Mass Casualty Commission examining the causes, context, and circumstances giving rise to the April 2020 mass casualty event in Nova Scotia, where the BCCLA's submissions focused on individual and systemic policing failures prior, during, and after the event, including inadequate oversight, insufficient accountability, and democratic deficits in policing;
 - b. the Cullen Commission of Inquiry into Money Laundering in BC, where the BCCLA challenged proposals that sought to increase mass surveillance and information sharing, and in particular, opposed a proposal to grant FINTRAC real time access to all financial transactions in Canada on the basis that it would undermine constitutionally recognized privacy interests;
 - c. the National Inquiry into Missing and Murdered Indigenous Women and Girls, which included hearings on police practices and relationships with Indigenous communities, where the BCCLA's recommendations focused on policing without bias and police accountability mechanisms;
 - d. the Thomas R. Braidwood, Q.C. Study and Hearing Commission, established under the *British Columbia Public Inquiry Act*, SBC 2007, c 9, to inquire into and

report on the circumstances surrounding the death of Robert Dzeikanski, who died after being tasered by the RCMP at Vancouver International Airport; and

- e. the McDonald Commission of Inquiry Concerning Certain Activities of the RCMP, specifically regarding the role of the Secret Service of Canada, where the BCCLA argued the concept of ‘security’ must include security in our basic democratic rights and freedoms, to put security threats in their proper context in relation to other threats of criminal activity and negate the accountability problems created by unique lines of authority.

15. Additionally, the BCCLA also works to educate the public and provide assistance for individuals seeking to hold police accountable for misconduct, including by:

- a. reviewing and making police complaints under the British Columbia Police Act, R.S.B.C. 1996, c. 367 and the Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10;
- b. publishing the new and expanded 2023 Arrest Handbook with updates to reflect changes in the legal landscape and new sections on heavily policed communities, mental health and involuntary treatment, protest, civil disobedience, and Indigenous resistance;
- c. preparing and distributing the factsheet: “Know Your Rights: Police Interactions at Schools” for students forced to interact with Vancouver police officers in their schools, and with information on enforcing rights or making police complaints;
- d. publishing the factsheet “Policing the Pandemic: Enforcement of Public Health Orders in B.C. during the COVID-19 Pandemic” to educate the public about new policing powers and potential legal consequences that were introduced as emergency measures;
- e. publishing, pursuant to a partially lifted confidentiality order and for purposes of transparency and accountability, thousands of redacted documents stemming from the BCCLA’s 2014 complaint into allegations that CSIS had secretly collected

information on groups and individuals protesting the Enbridge Northern Gateway Pipeline project;

- f. publishing the “Electronic Devices Privacy Handbook: A Guide to Your Rights at the Border”, describing the powers of the Canada Border Services Agency (CBSA) officers to search personal electronic devices, and describing the existing CBSA complaints process and accountability measures;
- g. publishing the report “Oversight at the Border: A Model for Independent Accountability at the Canada Border Services Agency” (2017), discussing significant gaps in accountability and oversight for CBSA officers, and describing specific recommendations for an independent civilian review and complaints body to deal with officer misconduct; and
- h. publishing the report “Police Involved Deaths: The Need for Reform” (2012), that analyzed police involved deaths and canvassed the nature of the circumstances which typically give rise to deaths in police custody.

C. Respect for Indigenous Rights

16. While the BCCLA is not an Indigenous-led organization, we strive to use our platform to respect and uphold Indigenous rights and self-determination and to oppose violations of the rights and freedoms of Indigenous people now and in the future.³ The BCCLA has published commentary and a number of open letters calling on all levels of government and police across the country to do the same. Some specific examples include:

- a. letter calling for the RCMP C-IRG to be abolished in response to significant reports of rights violations by the group. (2023);

³ “The Journey of Reconciliation: Issuing our Statement of Reconciliation at Canada’s TRC” (2013), online: *British Columbia Civil Liberties Association* < <https://bccla.org/2013/09/the-journey-of-reconciliation-issuing-our-statement-of-reconciliation-at-canadas-trc/>>

- b. publishing a commentary on the escalating intimidation and surveillance of the Tiny House Warriors (Secwepemc land and water defenders) entitled “Raising the Alarm on State and Corporate Surveillance of Tiny House Warriors” (2022);
- c. letter to the RCMP, Government of Canada and Province of British Columbia demanding that the RCMP stand down and vacate Wet’suwet’en territory after an escalation of RCMP actions (2021);
- d. letter to the RCMP and the Province of British Columbia regarding the establishment of an exclusion zone and check points near the Caycuse (Fairy Creek) old-growth logging blockade on unceded Ditidaht territory despite the associated injunction order permitting the public to freely enter and exit the area (2021);
- e. letter to the Ontario Provincial Police and the Ministry of the Attorney General regarding police actions in response to the Haudenosaunee (Six Nations) land reclamation at 1492 Land Back Lane. In particular, the arrest of two journalists who were present at 1492 Land Back Lane to report on the matter (2020);
- f. letter to the RCMP, Government of Canada, Province of British Columbia and Coastal GasLink regarding the interlocutory injunction granted to Coastal GasLink on December 31, 2019, in connection with the use of Wet’suwet’en territories, and concerns about potential imminent escalation of the use of force by the RCMP (2020);
- g. letter to the RCMP in relation to potential actions in Wet’suwet’en territories asking the Crown to proceed with the interests of respect for the constitutionally-protected title of the houses of the Wet’suwet’en, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the goal of genuine and meaningful respect and reconciliation between the Crown and Indigenous governments (2019); and
- h. letter calling on the RCMP to respect Indigenous rights and the Constitution regarding unconfirmed reports of a possible plan by RCMP to remove a group of

Wet'suwet'en people from the Unist'ot'en camp in their traditional territories against their will (2015).

17. In addition to the above, the Supreme Court of Canada has granted the BCCLA leave to intervene in more than 100 appeals, making the BCCLA one of the Court's more frequent non-governmental interveners, A list of cases in which the Court granted the BCCLA leave to intervene is set out at Appendix "A".

III. The BCCLA's Proposed Submissions

18. The Plaintiff's case arises from an arrest of Amber Bracken for civil contempt of court for allegedly breaching the terms of an injunction granted by Madam Justice Church on December 31, 2019 in litigation recorded as Coastal Gaslink Pipeline Ltd. v. Huson et al, Prince George Registry File # 1854871. See attached as Appendix A to this Affidavit.

19. If granted leave to intervene, the BCCLA expects to make submissions on the following broad issues:

- a. Freedom of the press as a standalone right in the context of injunction enforcement
- b. Additional context for s. 1 analysis of alleged *Charter* breaches as experienced by Ms. Bracken
- c. Legal background of injunction enforcement by RCMP
- d. Wrongful detention in the context of contempt of court arrests

IV: General Considerations

20. If granted leave to intervene, the BCCLA, as it has done in the past, will provide this Court with helpful and distinct submissions. The BCCLA will work with counsel to the parties and any other interveners to ensure that our respective submissions are not duplicative.

21. The BCCLA will not seek to expand the record or to raise new issues. Nor will the BCCLA take a position on the facts of the case. The BCCLA is willing and able to meet all deadlines. As such, the BCCLA would not cause any prejudice or delay to the parties or this Court.

22. The BCCLA is a non-profit organization with limited resources. The BCCLA will not seek any costs and would respectfully request that no costs be awarded against it.

23. I make this Affidavit in support of the BCCLA's motion for intervention in this appeal, and for no other or improper purpose.

SWORN BEFORE ME in the City of)
Vancouver, in the Province of British)
Columbia, this 21 day of March 2024.)



A Commissioner for taking Affidavits for)
British Columbia.)



VIBERT JACK

Elisa Penn
Mandell Pinder LLP
422 – 1080 Mainland Street
Reception Suite 300
Vancouver, BC
V6B 2T4

APPENDIX "A"

Complete List of the BCCLA's Supreme Court of Canada Interventions

1. *1704604 Ontario Limited v. Pointes Protection Association, et al.*, 2020 SCC 22, and *Maia Bent, et al. v. Howard Platnick, et al.*, 2020 SCC 23
2. *A.B. v. Bragg Communications Inc.*, 2012 SCC 46;
3. *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36;
4. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62;
5. *Babcock v. Canada (Attorney General)*, 2002 SCC 57;
6. *Breeden v. Black*, 2012 SCC 19;
7. *BC Freedom of Information and Privacy Association v. Attorney General of British Columbia*, 2017 SCC 6;
8. *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27;
9. *Canada (Attorney General) v. Bedford*, 2013 SCC 72;
10. *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45;
11. *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44;
12. *Canada (Attorney General) v. Power*, SCC File No. 40241
13. *Canada (Attorney General) v. Whaling*, 2014 SCC 20;
14. *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37;
15. *Canada (Justice) v. Khadr*, 2008 SCC 28;
16. *Canada (Prime Minister) v. Khadr*, 2010 SCC 3;
17. *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29;
18. *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2;
19. *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3;
20. *Canadian Council for Refugees, et al. v. Minister of Citizenship and Immigration, et al.*, 2023 SCC 17;
21. *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86;

22. *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9;
23. *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19;
24. *Commission des droits de la personne et des droits de la jeunesse v. Directrice de la protection de la jeunesse du CISSS de la Montérégie-Est*, SCC File No. 40602;
25. *Crookes v. Newton*, 2011 SCC 47;
26. *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47;
27. *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18;
28. *Ernst v. Alberta Energy Regulator*, 2017 SCC 1;
29. *Frank v. Canada (Attorney General)*, 2019 SCC 1;
30. *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46;
31. *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34;
32. *Greater Vancouver Transportation Authority, et al. v. Canadian Federation of Students, et al.*, 2009 SCC 31;y
33. *Groia v. Law Society of Upper Canada*, 2018 SCC 27;
34. *Henry v. Attorney General (British Columbia)*, 2015 SCC 24;
35. *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26;
36. *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62
37. *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54;
38. *La Presse inc. v. Quebec*, 2023 SCC 22;
39. *M.M. v. United States of America*, 2015 SCC 62;
40. *May v. Ferndale Institution*, 2005 SCC 82;
41. *Mission Institution v. Khela*, 2014 SCC 24;
42. *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1;
43. *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23;
44. *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19;

45. *Quebec (Attorney General) v. 9147-0732 Quebec inc.*, 2020 SCC 32;
46. *R. v. Anthony Cook*, 2016 SCC 43;
47. *R v. Ahmad*, 2020 SCC 11;
48. *R. v. Appulonappa*, 2015 SCC 59;
49. *R. v. Bissonnette*, 2022 SCC 23;
50. *R. v. Bradshaw*, 2017 SCC 35;
51. *R. v. Boudreault*, 2018 SCC 58;
52. *R. v. Butler*, [1992] 1 S.C.R. 452;
53. *R. v. Bykovets*, 2024 SCC 6;
54. *R. v. C.P.*, 2021 SCC 19;
55. *R. v. Caine* and *R. v. Malmo-Levine*, 2003 SCC 74;
56. *R. v. Campbell*, SCC File No. 40465;
57. *R. v. Cardoso*, *R. v. Yumnu*, and *R. v. Duong*, 2012 SCC 73;
58. *R. v. Carvery*, 2014 SCC 27;
59. *R. v. Charles* and *R. v. Nur*, 2015 SCC 15;
60. *R. v. Chehil*, 2013 SCC 49;
61. *R. v. Chouhan*, 2021 SCC 26;
62. *R. v. Clay*, 2003 SCC 75;
63. *R. v. Cornell*, 2010 SCC 31;
64. *R. v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43;
65. *R. v. Cuerrier*, [1998] 2 S.C.R. 371;
66. *R. v. D.C.*, 2012 SCC 48;
67. *R. v. Davey*, 2012 SCC 75;
68. *R v. Edwards, et al.*, SCC File Nos. 40103, 40065, 40046, 39822, 39820;
69. *R. v. Emms*, 2012 SCC 74;
70. *R. v. Ewert*, 2018 SCC 30;

71. *R. v. Fearon*, 2014 SCC 77;
72. *R. v. Ghotra*, 2021 SCC 12;
73. *R. v. Hart*, 2014 SCC 52;
74. *R v. Hills*, 2023 SCC 2, and *R v. Hilbach*, 2023 SCC 3;
75. *R. v. Ipeelee* and *R. v. Ladue*, 2012 SCC 13;
76. *R. v. J.F.*, 2013 SCC 12;
77. *R. v. Jones*, 2017 SCC 60;
78. *R. v. Jordan*, 2016 SCC 27;
79. *R. v. K.R.J.*, 2016 SCC 31;
80. *R. v. Kirkpatrick*, 2022 SCC 33;
81. *R. v. Khawaja*, 2012 SCC 69;
82. *R. v. Lloyd*, 2016 SCC 13;
83. *R. v. Mabior*, 2012 SCC 47;
84. *R. v. MacKenzie*, 2013 SCC 50;
85. *R. v. Manning*, 2013 SCC 1;
86. *R. v. Marakah*, 2017 SCC 59;
87. *R. v. McCrimmon*, 2010 SCC 36;
88. *R v. McGregor*, 2023 SCC 4;
89. *R. v. National Post*, 2010 SCC 16;
90. *R. v. O.N.E.*, 2001 SCC 77;
91. *R. v. Paterson*, 2017 SCC 15;
92. *R. v. Peers*, 2017 SCC 13;
93. *R. v. Pham*, 2013 SCC 15;
94. *R. v. Rafilovich*, 2019 SCC 51;
95. *R v. Ramelson*, 2022 SCC 44, *R v. Jaffer*, 2022 SCC 45, *R v. Haniffa*, 2022 SCC 46, and *R v. Dare*, 2022 SCC 47;

96. *R. v. Safarzadeh-Markhali*, 2016 SCC 14;
97. *R. v. Sharpe*, 2001 SCC 2;
98. *R v. Sharma*, 2022 SCC 39;
99. *R. v. Sinclair*, 2010 SCC 35;
100. *R. v. Smith*, 2015 SCC 34;
101. *R. v. Sullivan*, 2022 SCC 19;
102. *R. v. Summers*, 2014 SCC 26;
103. *R. v. Tse*, 2012 SCC 16;
104. *R. v. Vice Media Canada Inc.*, 2018 SCC 53;
105. *R. v. Vu*, 2013 SCC 60;
106. *R. v. Williamson*, 2016 SCC 28;
107. *R. v. Willier*, 2010 SCC 37;
108. *R. v. Zora*, 2020 SCC 14;
109. *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158;
110. *Reference re Same Sex Marriage*, 2004 SCC 79;
111. *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4;
112. *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68;
113. *Sherman Estate v. Donovan*, 2021 SCC 25;
114. *Sriskandarajah v. United States of America*, 2012 SCC 70;
115. *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50;
116. *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31;
117. *Vancouver (City) v. Ward*, 2010 SCC 27;
118. *Wakeling v. United States of America*, 2014 SCC 72;
119. *WIC Radio Ltd. v. Simpson*, 2008 SCC 40;
120. *Wood v. Schaeffer*, 2013 SCC 71;
121. *World Bank Group v. Wallace*, 2016 SCC 15;

122. *York Region District School Board v. Elementary Teachers' Federation of Ontario*,
SCC File No. 40360.



No. S231039
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE NARWHAL NEWS SOCIETY and AMBER BRACKEN

PLAINTIFFS

AND:

**ATTORNEY GENERAL OF CANADA, MINISTER OF PUBLIC SAFETY AND
SOLICITOR GENERAL FOR BRITISH COLUMBIA, HIS MAJESTY THE KING IN
RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, RCMP CHIEF
SUPERINTENDENT JOHN BREWER, UNKNOWN RCMP OFFICER #1, UNKNOWN
RCMP OFFICER #2, UNKNOWN RCMP OFFICER #3, and UNKNOWN RCMP
OFFICER #4**

DEFENDANTS

APPLICATION RESPONSE

Application Response of: The Narwhal News Society and Amber Bracken (“**application respondents**” or “**Plaintiffs**”)

THIS IS A RESPONSE TO the notice of application of British Columbia Civil Liberties Association (“**BCCLA**”) filed April 30, 2024.

Part 1: ORDERS CONSENTED TO

The application respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: **ALL**.

Part 2: ORDERS OPPOSED

The application respondents oppose the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: **NONE**.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondents take no position on the granting of the orders set out in paragraphs the following paragraphs of Part 1 of the notice of application: **NONE**.

Part 4: FACTUAL BASIS

1. On November 19, 2021, the RCMP arrested Ms. Bracken. She was detained until November 24, 2021.
2. This action stems from that arrest and detention. The arrest was predicated on the allegation that Ms. Bracken was in violation of a December 31, 2019 injunction of this Court which prevents interference with the use of the Morice Forest Services Road by Coastal GasLink Pipeline Ltd. (“CGL”) employees and contractors, or with CGL’s construction related activities at CGL worksites.
3. Ms. Bracken is a freelance photojournalist who was on assignment and the Narwhal News Society is a national online news organization. The action advances, among other things, a constitutional challenge to Ms. Bracken’s treatment at the hands of the RCMP. It further advances a claim that Ms. Bracken’s arrest and detention breached both of the Plaintiffs’ rights to freedom of the press pursuant to s. 2(b) of the *Charter* and the breach was not justified under s. 1 of the *Charter*.

Part 5: LEGAL BASIS

1. This case raises public law questions including complex *Charter* and constitutional law issues.
2. In light of these issues, the court’s interest in having ample argument from different perspectives weighs in favour of allowing intervenors.

Roberts v. British Columbia (Attorney General), 2021 BCCA 252, paras. 31-32

Part 6: MATERIAL TO BE RELIED ON

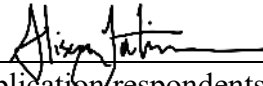
1. The pleadings filed in this action.

The application respondents estimate that the application will take 45 minutes.

[Check whichever one of the following is correct and complete any required information.]

- The application respondent has filed in this proceeding a document that contains the application respondent’s address for service.
- The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent’s ADDRESS FOR SERVICE is:

Dated: 30 Apr 2024



Signature of lawyer for the application respondents
Alison M. Latimer, K.C.

This Application Response is prepared by Solicitors for the Plaintiffs Amber Bracken & the Narwhal News Society, Alison M. Latimer, K.C., Barrister & Solicitor, whose place of business and address for service is 1200-1111 Melville Street, Vancouver, British Columbia, V6E 3V6. Telephone: 778.847.7324 / Email: alison@alatimer.ca.



No. S231039
Vancouver Registry

In the Supreme Court of British Columbia

Between

THE NARWHAL NEWS SOCIETY and AMBER BRACKEN

Plaintiffs

And

**ATTORNEY GENERAL OF CANADA, MINISTER OF PUBLIC SAFETY AND
SOLICITOR GENERAL FOR BRITISH COLUMBIA, HIS MAJESTY THE KING IN
RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, RCMP CHIEF
SUPERINTENDENT JOHN BREWER, UNKNOWN RCMP OFFICER #1, UNKNOWN
RCMP OFFICER #2, UNKNOWN RCMP OFFICER #3, and
UNKNOWN RCMP OFFICER #4**

Defendants

APPLICATION RESPONSE

Application response of: Attorney General of Canada, Minister of Public Safety and Solicitor General of British Columbia, and RCMP Chief Superintendent John Brewer (the “**application respondents**” or “**RCMP Defendants**”)

THIS IS A RESPONSE TO the notice of application of the British Columbia Civil Liberties Association (the “**BCCLA**”) filed April 30, 2024.

The application respondents estimate that the application will take 45 minutes.

Part 1: ORDERS CONSENTED TO

The application respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: **ALL** with the following additional terms imposed:

1. The BCCLA shall not make submissions that are repetitive or duplicative of the submissions made by the parties;
2. The BCCLA shall not make submissions that expand the litigation by raising matters that are not already a part of it;
3. The BCCLA shall make principled submissions on the law and shall not make submissions for the purpose of supporting the position of one party or the other; and

4. The parties shall retain the right to object to any submissions made by the BCCLA that do not comply with the terms of this order, and the Court may decline to consider any such submissions.

Part 2: ORDERS OPPOSED

The application respondents oppose the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: **NIL**

Part 3: ORDER ON WHICH NO POSITION IS TAKEN

The application respondents take no position on the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: **NIL**

Part 4: FACTUAL BASIS

1. The plaintiff Narwhal News Society (“Narwhal”) is a national online news organization. The plaintiff Amber Bracken is a freelance photojournalist who was assigned by Narwhal to document the protest concerning the construction of the Coastal GasLink (“CGL”) pipeline that traverses traditional Wet’suwet’en territory in British Columbia: a project that was the subject of an injunction order made by this Court on December 31, 2019. The injunction order, amongst other things, prohibited individuals from interfering with the use of the Morice Forest Service Road by CGL employees and contractors, or with CGL’s related construction activities on CGL worksites.
2. On November 19, 2021, Ms. Bracken was arrested by members of the RCMP for breaching the injunction order and charged with civil contempt of court. At the time of her arrest, Ms. Bracken, along with several pipeline opponents, occupied a cabin, barricaded from the inside, located on a CGL worksite.
3. The plaintiffs claim damages in tort for the alleged wrongful arrest and detention of Ms. Bracken. The plaintiffs also claim *Charter* damages for alleged breaches of Ms. Bracken’s ss. 7 and 9 rights, and Ms. Bracken and the Narwhal’s s. 2(b) rights to freedom of the press.
4. This litigation turns on the questions of whether the RCMP had reasonable and probable grounds to arrest Amber Bracken for breaching a court injunction and whether Ms. Bracken was exempted from complying with the injunction because she was on assignment as a journalist for the Narwhal at the time of her arrest.

Part 5: LEGAL BASIS

1. The application respondents consent to the BCCLA being added as an intervenor in this proceeding. However, the order granting leave to intervene should include terms that limit the scope of the intervenor’s submissions in a manner consistent with the case law. The order should include the additional terms set out in Part 1 of this application response.

Test for public interest intervention

2. Interventions in this Court, and any limitation imposed on the terms of an intervention, are granted based on the discretionary inherent jurisdiction of the Court.

Gibraltar Mines Ltd v Harvey, 2021 BCSC 927 at para [9](#).

3. Where a proposed intervention is based on the public interest, the proposed intervenor must demonstrate that it is in the court's interest or, more broadly, in the public interest, rather than their own, for them to be heard. The court will consider the following factors:
 1. Does the proposed intervenor meet the threshold requirements: the applicant group has legitimacy, is genuinely concerned about the issues in the proceeding, and raises issues that are suitable for intervention?
 2. Does the proposed intervenor have a unique and different perspective that will assist the Court in the resolution of the issues?
 3. Does the proposed intervenor seek to expand the scope of the proceeding by raising issues not raised by the parties?
 4. Does the proposed intervenor offer principled submissions on points of law relevant to the case as opposed to supporting the position of one party or the other?

Gibraltar Mines Ltd v Harvey, 2021 BCSC 927 at paras [9-14](#).

4. The scope of a public interest intervention is very limited. As stated by the British Columbia Court of Appeal in *Equustek*:

While the intervenor must be able to present a perspective that is not already before the Court, it must not expand the litigation by raising matters that are not already part of it. Further, it must not attempt to take over or "hijack" the litigation by changing its focus to an issue that is peripheral to the case as it is presented. The niche that may be occupied by an intervenor is, therefore, necessarily a very narrow one. For that reason, intervenor status is not granted as a matter of course.

Equustek Solutions Inc v Google Inc, 2014 BCCA 448 at para [9](#).

5. In a trial level proceeding, it is difficult to assess whether a proposed intervenor's submissions will fall within the proper narrow limits. Unlike in an appeal, the evidentiary record and the submissions of the parties in a trial level proceeding are still largely uncertain when an application to intervene is made.

Single Mothers' Alliance of BC Society v British Columbia (Attorney General), 2022 BCSC 1328 at para [15](#).

The order for leave to intervene should contain terms defining the scope of the intervention

6. The application respondents are satisfied that the BCCLA meets the threshold requirements for being granted intervenor status: the group has legitimacy, is genuinely concerned about the issues in the proceeding, and the proceeding raises public law issues suitable for intervention.

7. With respect to the remaining considerations, it is difficult to assess at this pre-trial stage whether the BCCLA's submissions will be unduly duplicative, raise issues that improperly broaden the scope of the proceeding, or be improperly focused on supporting the position of one of the parties.
8. In their notice of application and supporting affidavit of Vibert Jack, the BCCLA states that it will work with the parties to ensure that its submissions are not duplicative. The BCCLA also states that it will not expand the record, raise new issues, or take a position on the facts of the case.
9. In these circumstances, where the evidence and submissions of the parties are not yet known, and the proposed intervenor's submissions are only spelled out in general terms, it is appropriate to include terms in the order setting out limits for the intervenor's submissions. This will allow the parties to make principled objections, and for the Court to intervene, should the proposed intervenor attempt to make submissions that go beyond its proper role.

Schooff v Medical Services Commission, 2009 BCSC 1596, at paras [201-202](#), [207](#).

British Columbia Teachers' Federation v. British Columbia (Attorney General), 2009 BCSC 436 at paras [38-39](#).

Part 6: MATERIAL TO BE RELIED ON

1. The pleadings filed in this action.
 - The application respondent has filed in this proceeding a document that contains the application respondent's address for service.
 - The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is:

Dated: May 7, 2024



Signature of lawyer for the application respondents

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
British Columbia Region
National Litigation Sector
900 - 840 Howe Street
Vancouver, BC V6Z 2S9
Fax: (604) 666-7111

Per: Craig Cameron
Tel: (604) 666-7111
Email: Craig.Cameron@justice.gc.ca
File: LEX-500125353

THIS APPLICATION RESPONSE is prepared and served by the Attorney General of Canada whose place of business and address for service is the Department of Justice Canada, British Columbia Regional Office, 900 – 480 Howe Street, Vancouver, British Columbia, V6Z 2S9, Telephone: (604) 666-7111, Facsimile: (604) 775-5942, Attention: Craig Cameron

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

THE NARWHAL NEWS SOCIETY and AMBER BRACKEN

PLAINTIFFS

AND

ATTORNEY GENERAL OF CANADA, MINISTER OF PUBLIC SAFETY AND SOLICITOR
GENERAL FOR BRITISH COLUMBIA, HIS MAJESTY THE KING IN RIGHT OF THE
PROVINCE OF BRITISH COLUMBIA, RCMP CHIEF SUPERINTENDENT JOHN
BREWER, UNKNOWN RCMP OFFICER #1 and UNKNOWN RCMP OFFICER #2

DEFENDANTS

Consent Order

BEFORE } THE HONOURABLE }

THIS ACTION coming on for hearing at 800 Smithe St., Vancouver, British Columbia on the May 27, 2024 assize list at 9:45 AM and on hearing Noah Ross and Erica Olmstead, co-counsel for the British Columbia Civil Liberties Association, Alison Latimer, K.C. counsel for The Narwhal News Society and Amber Bracken and Craig Cameron counsel for the Attorney General of Canada.

THIS COURT ORDERS BY CONSENT that:

- 1. The British Columbia Civil Liberties Association (“BCCLA”) be granted leave to intervene and make written and oral submissions in these proceedings.
- 2. That the style of cause in these proceedings be amended to add the BCCLA as “Intervener.”

3. The BCCLA:
- a. Will receive copies of all pleadings, submissions and lists of documents exchanged or produced by the parties;
 - b. May apply for access to specific documents from the list of documents exchanged or produced by the parties;
 - c. may submit legal argument at the hearing of this action in a form and with such limits as are determined by the Court;
 - d. shall not make submissions that are repetitive or duplicative of the submission made by the parties;
 - e. shall not make submissions that expand the litigation by raising matters that are not already part of it;
 - f. shall make principled submissions on the law and shall not make submission for the purpose of supporting the position of one party or the other.
4. That no costs be awarded for or against the BCCLA in respect of this application, the hearing or the proceeding generally.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS NOTED ABOVE:

.....

Signature of [] party

[X] lawyer for the British Columbia Civil Liberties Association

Noah Ross

.....

Signature of [] party

[X] lawyer for The Narwhal News Network and Amber Bracken

Alison Latimer

.....
Signature of [] party

[X] lawyer for the Attorney General of Canada

Craig Cameron

By the Court.

.....
Registrar