IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dang v. Canada (Attorney General)*, 2025 BCSC 1143

Date: 20250620
Docket: S231631
Registry: Vancouver

Between:

Arvin Singh Dang and Kristy Morgan

Plaintiffs

And

The Attorney General of Canada and Minister of Public Safety and Solicitor General of the Province of British Columbia

Defendants

Before: The Honourable Justice Giaschi

Reasons for Judgment

Counsel for the Plaintiffs:	D. Wu A. Sharon J. Riddle H. Ahmed C. Harman
Counsel for the Defendants:	A. Gatti J. Khan G. Hallson D. Nunez Q. Ahkenazy
Place and Date of Hearing:	Vancouver, B.C. May 13-15 and June 28, 2024
Place and Date of Judgment:	Vancouver, B.C. June 20, 2025

Table of Contents

Introduction

[1] Pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], the plaintiffs seek certification of a proposed class action on behalf of persons who are alleged to have been subjected to unlawful police conduct in enforcing an injunction related to logging activities in the Fairy Creek watershed on Vancouver Island.

[2] In 2020, Teal Cedar Products Ltd. (“Teal”) was granted permits to harvest timber in the Fairy Creek watershed. The area is colloquially known as “Fairy Creek” but is more formally designated in Tree Farm Licence 46. A licence granted by the Province of British Columbia to Teal.

[3] Commencing in about August 2020, Teal’s tree harvesting and related operations in Fairy Creek were impacted by sophisticated and organized protests. In response, Teal commenced action #S211602 in the Vancouver Registry and applied for an interlocutory injunction prohibiting persons from interfering with its road construction and timber harvesting activities in Fairy Creek. The injunction, including enforcement provisions, was granted by Justice Verhoeven on April 1, 2021. The policies and conduct of the RCMP in enforcing this injunction are the subject matter of this putative class action.

[4] The plaintiffs allege that, in the enforcement of the injunction, the RCMP engaged in systemic and unlawful conduct, particularly in relation to the establishment of exclusion zones and the implementation of a policy of “catch and release”. They allege that the RCMP breached the *Charter* rights of putative class members and committed torts of false imprisonment, assault and battery, and conversion and trespass. They claim damages pursuant to s. 24(1) of the *Charter*, general and special damages for the tortious conduct, including for personal injury and damage to property, aggregate damages, and punitive and aggravated damages.

[5] The plaintiffs apply for certification of this class action on behalf of:

a) all persons who had their movement impeded, were detained or arrested, or had their person or property searched by RCMP officers in connection with enforcement of the Fairy Creek injunction during the Class Period, when attempting to access or travel in the injunction zone (the "Exclusion Zone Subclass"); and

b) all persons who had their movement impeded, were detained or arrested, or had their person or property searched or seized by RCMP officers during the Class Period, in connection with the enforcement of the Fairy Creek injunction but for whom the RCMP did not recommend to bring charges (the "Catch and Release Subclass").

[6] The certification application is opposed by the defendants.

[7] For the reasons that follow the application for certification is dismissed.

The Injunctions and Court Proceedings

[8] The logging and related activities in Fairy Creek and the protests against such activities have been the subject of multiple reported decisions in this court and the Court of Appeal. There are four such decisions that are particularly relevant.

The Injunction Decision

[9] On April 1, 2021, in reasons indexed as *Teal Cedar Products Ltd. v Rainforest Flying Squad*, 2021 BCSC 605 (the "Injunction Decision"), Verhoeven J. granted the injunction that underlies the proposed class action.

[10] At paras. 25-28, of the Injunction Decision, Verhoeven J. described the nature of the protests at Ferry Creek as follows:

> [25] The road blockades began in early August 2020. There have been eight blockades at various locations throughout TFL 46 and at adjacent access roads.
>
> [26] The blockades have been erected and maintained for the specific purpose of preventing and interfering with Teal's operations and those of its contractors, such as Stone Pacific Contracting Ltd. ("Stone Pacific"), its road building contractor.

> [27] The protestors and defendants are numerous, highly organized, and well-funded. They make extensive and sophisticated use of communications platforms, such as websites and social media, including Facebook and Twitter. They raise funds with an online campaign, which has raised over $100,000 to date. [Emphasis added.]
>
> [28] The defendants and protestors refer to themselves as the "Rainforest Flying Squad". As the name implies, they use mobile blockades to disrupt logging and road building activities, and to prevent Teal and its contractors from shifting operations to other areas. Some of the blockades have remained in place for many months. In their social media posts they claim to have hundreds of active supporters. Their posts boast of their success in preventing Teal's operations. They demand that the government immediately stop all old-growth logging, or at least defer it. However, their attempts to influence the government to prohibit logging within TFL 46 have not been successful.

[11] At paras. 6-8, Verhoeven J. found that Teals' activities were lawful and that the conduct of the protesters was illegal and undermined the rule of law.

> [6] The respondents see themselves as representing a larger group of persons. Their response to civil claim and their application response state that they are acting in their capacity as members of the "Rainforest Flying Squad". The other named defendant, Robert Arbess, has not participated in the legal proceedings. The evidence shows that there are many other persons involved in the blockades, who, for the time being, are unnamed defendants. Several have expressly refused to identify themselves by name.
>
> [7] Teal's activities are lawful, and are all subject to permits issued by the Province of British Columbia.
>
> [8] On the evidence, it is clear that the defendants are dissatisfied with the forestry policies of the provincial government relating to logging of old-growth forests. Their blockades are designed to interfere with and prevent Teal's logging activities, and also to influence the government politically.
>
> [9] They are misguided. Their conduct is illegal, and undermines the rule of law, without which no one is safe, and no one is free.
>
> [Emphasis added.]

[12] Justice Verhoeven issued the injunction order on April 1, 2021(the "Injunction Order"). Paragraph 1 of the injunction Order restrained, enjoined and prohibited anyone with knowledge of the order from impeding, obstructing or interfering with Teal's access to the injunction area, its road construction activities and its timber harvesting activities within a defined area until September 26, 2021.

> 1. An interlocutory injunction lasting until midnight on September 26, 2021 is granted requiring that the Defendants … and anyone having knowledge of the Court's order, are restrained, enjoined and prohibited from:
>
> > (a) impeding, physically obstructing, or in any way interfering with any person, including any member of the public, from gaining access to or egress from, or otherwise making use of any road … situate within the [injunction area]; . . .
> >
> > (b) obstructing, impeding, or otherwise interfering with the safe passage of motor vehicles, equipment or, machinery belonging to the Plaintiff … in the Injunction Area;
> >
> > (c) obstructing, impeding or otherwise interfering with any construction activities conducted on the Roads by the Plaintiff…
> >
> > (d) obstructing, impeding, or otherwise interfering with timber harvesting activities in the Injunction Area …
> >
> > (e) threatening, harassing, intimidating, assaulting, physically obstructing, or physically interfering with the Plaintiff's employees, agents, contractors or suppliers or their families;

[13] The Injunction Order also contained an enforcement clause which, among other things, gave the police discretion as to the timing and manner of enforcement of the order and gave discretion to detain or release persons.

> 2. An order lasting until midnight on September 26, 2021 is granted:
>
> (a) authorizing any police officer with the Royal Canadian Mounted Police, and/or the appropriate police authority in the jurisdiction in question (the "Police"), to arrest and remove any person who has knowledge of this Order and who the Police have reasonable and probable grounds to believe is contravening or has contravened any provision of this Order;
>
> > (b) that the Police retain discretion as to the timing and manner of enforcement of this Order, and specifically retain discretion as to the timing and manner of arrest and removal of any person pursuant to this Order;
> >
> > (c) that the Police retain discretion to detain and release any person without arrest who the Police have reasonable and probable grounds to believe is contravening or has contravened any provisions of this Order, upon that person agreeing in writing to abide by this Order;
> >
> > (d) authorizing any peace officer and any member of the Police who arrests or arrests and removes any person pursuant to this Order to:
> >
> > > (i) release that person from arrest upon that person agreeing in writing to obey this Order;
> > >
> > > (ii) release that person from arrest upon that person agreeing in writing to obey this Order and require that person to appear before this Court at such place as may be directed by this Court, on a date to be fixed by this Court;

> (iii) bring that person forthwith before this Court at any location where the Court may sit;
>
> (iv) detain that person in custody until such time as it is possible to bring that person before this Court; and/or,
>
> (v) otherwise take steps in accordance with Part XVI of the *Criminal Code,* R.S.C. 1985, c. C-46.
>
> [Emphasis added.]

[14] Justice Verhoeven addressed the need for an enforcement clause at paras. 67-69 of the Injunction Decision. He noted the blockades were numerous and persistent, the protesters were a very militant group and there was little likelihood the injunction would be respected in the absence of such a clause.

> [67] Police enforcement terms are required in this case. There appears to be little or no likelihood that the injunction order will be respected, otherwise.
>
> [68] Through communications from counsel for the RCMP to Teal's counsel, the RCMP have indicated a preference for police enforcement terms in circumstances such as this, where the blockades are numerous and persistent. There are a large number of persons involved. Some of the locations are remote. For the most part, the protesters have refused to identify themselves.
>
> [69] The protestors are a very militant group. As noted, they claim to have hundreds of active participants. In their social media posts, supporters of the "Rainforest Flying Squad" have expressly threatened a "protracted civil disobedience struggle". They make public appeals for others to join their campaign. They refer to a "war" and "battles". They have stated that Teal's actions in seeking an injunction "will be met with resistance". These are words that may incite violence. A Facebook posting of February 20, 2021, the day after the injunction application was served, seeks involvement of "people prepared to take Bold Action in a last stand for the Ancient forest campaign". Some blockaders have already stated publicly that they will defy the Court's order and go to jail if necessary.

The Media Access Decision

[15] In June 2021, an application was brought in action #S211602 by media organizations to vary the Injunction Order by the addition of terms stipulating that the discretion given to police not be exercised to impede media access to the injunction area. A second application was also brought by two individuals to vary the Injunction Order by the addition of terms stipulating that the discretion given to police not be exercised to bar members of the public from accessing the injunction area. These applications were heard by Justice Thompson on July 14 and 15, 2021. On July 20,

2021, Thompson J. granted the applications with reasons to follow. His reasons were delivered on August 9, 2021 and are indexed as *Teal Cedar Products Ltd v Rainforest Flying Squad,* 2021 BCSC 1554 (the "Media Access Decision").

[16] The Media Access Decision addressed the use of exclusion zones and checkpoints by the RCMP in their enforcement of the Injunction Order. These are described at paras. 10 and 11:

> [10] The use of expansive exclusion zones and checkpoints was a central component of the RCMP strategy from the beginning of its enforcement operation. The strategy is set out in a "Record of Decision," a document authored by Superintendent John Brewer, and approved by Chief Superintendent Dave Attfield. The first stated purpose of exclusion zones is to "[p]revent a further escalation of efforts to block access contrary to the Supreme Court Order." The second stated purpose is to "[p]rovide safe space for police to undertake the injunction enforcement action" — "[p]olice need to set a perimeter that allows for them to safely execute their duties with as minimal an impact as possible and to ensure public safety."
>
> [11] The policy provides that access to an exclusion zone is solely at the discretion of the police. Vehicles attempting to enter an exclusion zone are to be stopped. Vehicle occupants will be required to state their purpose for entry and provide identification. When no active enforcement is occurring, individuals are permitted to access the exclusion zone, but only on foot and their bags are subject to search as a condition for entry. If individuals are granted access into the exclusion zone during active enforcement, police will accompany them to a designated protest area.

[17] I pause to note that the "Record of Decision" referred to by Thompson J. in the above quotation relates to a specific exclusion zone established at Hatton camp for a temporary period of time.

[18] Justice Thompson concluded that the manner of implementation of checkpoints and exclusion zones by the RCMP was unlawful. His conclusions are summarized at para. 82 as follows:

> [82] My conclusions are as follows:
>
> …
>
> 2. RCMP checkpoints have been established for the purpose of putting an end to public vehicle access to the injunction area, and restricting public access on foot. The checkpoints are not placed so as to minimally restrict access — either temporally or geographically — to the injunction area outside of the exclusion zones. On the contrary,

it is evident that the police are doing whatever they perceive can be done within legal bounds to prevent vehicles, persons suspected of intending to block roads, and road-blocking objects and material from entering the injunction area.

3. The police power being exercised and examined is the establishment of exclusion zones around sites where court-order violations are occurring by (1) blocking vehicle access to the public; (2) blocking pedestrian access to the public unless individuals submit to a search; and (3) restricting media access and movement including by the requirement that media members be accompanied by police.

4. These police actions have seriously and substantially impacted important liberties within the injunction area, including the ability of individuals to circulate freely, and freedoms of assembly and expression, including freedom of the press.

5. The RCMP assert that they have two duties arising from the terms of the injunction order: to arrest and remove individuals violating the order, and to prevent individuals from commencing activities that would breach the order. The terms of the order clearly give rise to the arrest and removal duty, and the exclusion zone actions of the RCMP are within the general scope of that duty, but the RCMP have not established that a preventive duty is created by the order.

6. The RCMP has not established that the police actions under examination are reasonably necessary for either of the duties they assert. It follows that the RCMP do not have legal authority for these actions. The actions are unlawful.

7. The RCMP are empowered to direct or restrict the movement of traffic in and around the injunction area, but they may take these actions only to the extent necessary to permit the safe arrest and removal of persons disobeying the court order, or to enforce the right of anyone, including any member of the public, to use these forest service roads (subject to lawful restrictions or closures, such as under legislation regulating use of forest service roads.)

8. There is merit to the complaints about police actions restricting public access. However, the order does not require amendment; the order is clear about the right of public access to forest service roads in the injunction area. The enforcement discretion provided for in the order is in the manner and timing of the arrest and removal of persons who have contravened or are contravening the order. Police discretion in this order as to the manner of enforcement does not extend to taking measures to minimize the opportunity of persons to contravene the injunction, including by barring public vehicle access.

9. With respect to media access, the RCMP media policy for the injunction area has given rise to a live controversy between the RCMP and the media. The order sought by the media and granted by the Court will have practical utility because the RCMP will be reminded by the presence of this additional language in the order to take account of the media's special role in a free and democratic society and the

> necessity of avoiding undue and unnecessary interference with the journalistic function when police make operational decisions or exercise discretion surrounding the arrest and removal of persons contravening the order.
>
> [Emphasis added.]

The Extension Decision and Appeal

[19] The next decision of relevance is *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2021 BCSC 1903, which concerned an application by Teal to extend the injunction a further 12 months beyond September 28, 2021. This application was dismissed by Thompson J. on the grounds that the balance of convenience weighed against extending the injunction. In his analysis, he weighed the harm to Teal, the likelihood of criminal remedies being employed to address the conduct of the protesters, the infringement of liberties associated with the RCMP enforcement of the injunction and the public interest in protecting the reputation of the Court.

> [87] In the balance, I attach weight to the combination of the prospect of significant harm to Teal Cedar and others, and accompanying damage to the rule of law, if the injunction is not extended. I acknowledge the risk that the police may not seek Criminal Code charges or the Crown may exercise its discretion against charge approval. However, having regard to recent escalation of tension and obstructive behaviour, I think there is every chance that criminal law remedies will be employed.
>
> [88] On the other hand, methods of enforcement of the Court's order have led to serious and substantial infringement of civil liberties, including impairment of the freedom of the press to a marked degree. And, enforcement has been carried out by police officers rendered anonymous to the protesters, many of those police officers wearing "thin blue line" badges. All of this has been done in the name of enforcing this Court's order, adding to the already substantial risk to the Court's reputation whenever an injunction pulls the Court into this type of dispute between citizens and the government.
>
> [89] In the current circumstances, I am not persuaded that the balance of convenience favours extending the injunction. The factors weighing in favour of extension do not outweigh the public interest in protecting the Court from the risk of further depreciation of its reputation. It is not just and equitable in all the circumstances of the case to make the order sought. I exercise my discretion by declining to extend the injunction. The interim extension order that I made at the close of the hearing on 17 September 2020 shall expire at 4:00 p.m. today, 28 September 2021.

[20] At para. 15, Thompson J. referred to his Media Access Decision as follows:

> [15] In ruling on the access applications (*Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2021 BCSC 1554), I concluded that an important purpose of the injunction is to maintain public access to roads in the injunction area. The RCMP were blocking vehicle access to roads that serve as the main entry points to these public lands, and this was directly at odds with this purpose. I also held that the RCMP's expansive exclusion zones, and associated checkpoints and searches, were unlawful because it had not been established that these measures were reasonable and necessary to carry out their duties. And, I granted the media consortium's application for a variation of the injunction order to add a direction intended to control interference by police with the work of journalists.

[21] At para. 19, Thompson J. observed the actions of some protesters were becoming more extreme:

> [19] The methods used by those obstructing the roads have become more extreme over time. Recently, many trenches have been dug into the road, some up to eight feet deep, in which persons are locked into devices known as "sleeping dragons." These trenches have appeared on important roads in TFL 46, including the Reid Mainline and the Granite Mainline. And, the devices which protesters attach themselves to in order to make it difficult to extract them are now sometimes encased in concrete, or covered in logs. One contraption even used an old stove. Tripods on roads with protesters perched on top have been an ongoing feature since the injunction order, but these tripods are now being built higher — they were once about eight feet tall, but recently reach 30 foot heights.

[22] At para. 78, Thompson J. noted the RCMP continued to enforce exclusion zones that are more expansive than permitted and improperly constrained media access.

> [78] The RCMP's expansive interpretation of Verhoeven J.'s order and the blockade methods used by the RCMP as part of their enforcement operation were the subject of my earlier ruling and reasons explaining why the expansive exclusion zones and checkpoints are unlawful; I considered the infringements of civil liberties to be unjustified, substantial, and serious. It goes without saying that unlawful measures imposed by those given authority to enforce the Court's order does no credit to the rule of law or the Court's reputation, especially when those measures trench on civil liberties in a substantial way. The evidence before me indicates that the RCMP have now stopped searching pedestrians, but they continue to enforce exclusion zones that are more expansive than the law permits. Moreover, the media's right of access continues to be improperly constrained. One prominent example of the difficulties journalists continue to face is the CBC camera crew that was made to hike seven kilometres in and seven kilometres out, with their heavy equipment, to an area where RCMP enforcement activity was occurring on 26 August 2021.

[23] The order of Thompson J. refusing to extend the injunction was overturned by the Court of Appeal on various grounds in *Teal Cedar Products Ltd. v Rainforest Flying Squad*, 2022 BCCA 26.

[24] First, at para. 30, the Court of Appeal held Thompson J. erred in his analysis and consideration of an enforcement gap.

> [30] In our view, the judge made two errors in this part of his analysis. First, he erred in law by considering the availability of charges and prosecution for *Criminal Code* offences as a factor weighing against the granting of an injunction to a private applicant. Second, he committed a palpable and overriding error of fact by finding that the criminal law *would* be used in this case to prevent ongoing harm to Teal Cedar. The result has been to upend the law of injunctions by considering, under the third branch of the *RJR MacDonald* test, matters unrelated to the interests of the parties before the court.

[25] Second, the Court of Appeal held that there was no basis for Thompson J.'s conclusion that the court's reputation was at stake or properly to be considered in the analysis.

> [56] There is little doubt that the type of prolonged and significant civil disobedience demonstrated in this case, and the refusal of many protesters to comply with the injunction, places great demands on the court, both in terms of recalibrating the injunction, and in overseeing criminal contempt hearings and sentencing. But, with respect, it is wrong to say that the court's role in upholding the law, which is the court's obligation, means that its reputation is being harmed. [Emphasis added.]
>
> …
>
> [62] To the extent that the judge identified a reputational concern with the court's ongoing involvement in the prohibition and sanctioning of unlawful conduct by the protesters, we respectfully conclude that he erred. The court's involvement in enjoining unlawful conduct is a necessary and fundamental aspect both of civil society and of the rule of law: *Cermaq Canada Ltd. v. Stewart*, 2017 BCSC 2526 at para. 71 [*Cermaq*].

[26] Finally, the Court of Appeal held that the conclusion the court's reputation could be harmed by police conduct was an error of law.

> [63] We turn now to the second reputational concern the judge identified—the depreciation of the court's reputation by the conduct of the RCMP in enforcing the court order. In our view the judge's conclusion that the court's reputation can be tarnished by the conduct of police officers is a clear error of law.

[27] Although the Court of Appeal referred to the Media Access Decision at paras. 14-15 of the reasons, it did not directly address whether any aspect of RCMP conduct was, in fact, illegal or unlawful. At para. 70, the Court of Appeal expressly rejected the submission that the legality of police conduct was in issue.

> [70] Counsel for the respondents submitted in argument that the rule of law concern in this case is primarily whether the police are acting "outside the law." We do not agree with that submission. The rule of law demands that everyone obey the law. Significant, organized, deliberate and persistent defiance of the law and court orders is a serious threat to the rule of law which is both the foundation of a functioning democracy and the refuge of every citizen.

[28] The decision of the Court of Appeal is notable in that it was recognized that police have an independent discretion as to when and how to enforce injunction orders and, where issues of police misconduct are raised, there are avenues to address such misconduct, including through civil claims and complaints to the Independent Civilian Review and Complaints Commission and the Independent Investigations Office.

> [68] While it was open to the judge to address some aspects of police enforcement, such as the size of exclusion zones and restrictions on media access (at para. 78) by altering terms of the injunction, the police as independent actors have discretion as to when and how to enforce court orders. The injunction contains an enforcement clause which expressly recognizes that independence by preserving police discretion on the manner and steps of enforcement. Further, as the judge recognized at para. 86, the court has no jurisdiction over police uniforms and identification. It is not the place of the court to oversee "police compliance with police policy" on such matters: *R. v. Bacon*, 2020 BCCA 140 at para. 45**.**
>
> …
>
> [72] The concerns legitimately raised by the judge about police conduct are not without remedy. Misconduct affecting the rights of protesters can be addressed both in the prosecution of contempt proceedings and in sentencing. Individuals arrested under an injunction may raise RCMP conduct in their trial and seek *Charter* remedies.
>
> [73] In addition, there are forums for the court to perform judicial oversight of RCMP enforcement of an injunction order. Members of the public who take issue with RCMP conduct and are harmed by it can bring civil claims against the RCMP. In addition, the RCMP is subject to nonjudicial oversight. Members of the public can make complaints against the RCMP to the Independent Civilian Review and Complaints Commission and the Independent Investigations Office. Although the judge was of the view that these forums would take considerable time to address concerns, they are

> tasked with accountability of the RCMP and have processes that allow for a complete investigation into allegations. In contrast, an interlocutory injunction in which the RCMP is not a party is a difficult forum within which to assess the competing allegations made by the protesters and the police.
>
> [Emphasis added.]

[29] The decision of the Court of Appeal is also of interest for its summary of the unlawful conduct of some of the protesters and for comments about the organized nature of the protests. The conduct of some protesters as described at para. 5 of the reasons is the same conduct as is repeatedly demonstrated in the evidence before me on this application.

> [5] In plain language, the conduct in issue involves protesters:
>
> • digging trenches in roads, sometimes at cliff edge, which impede emergency vehicles and put roads at risk of collapse. Protesters lock themselves into the bottom of trenches, some of which are up to eight feet deep; the occupants and the RCMP officers who remove them are at risk of being smothered should the trench walls fail;
>
> • chaining themselves into “sleeping dragon” devices, which are sometimes encased in concrete, embedded in a metal box, fortified with metal hazards, barbed wire or spikes, and filled with dry oats to prevent police use of scoping cameras;
>
> • constructing barricades to make the road impassable for vehicles. One barricade was covered with piles of human feces and jars of urine, which RCMP members had to remove;
>
> • placing objects on helicopter landing pads, which poses grave safety risks;
>
> • suspending themselves over roadways, and over and under bridges in devices called tripods, bipods, and cantilevers. The tripods reach heights of 30 feet, are hastily constructed and structurally unsafe. Occupiers armour the legs of their tripods with railroad spikes or chicken wire to prevent RCMP from using tools to dismantle the tripods from the bottom. Some tripod-sitters place nooses around their necks with climbing ropes, chains, and bicycle locks. One protester locked himself to a tripod with his face close to an array of nails, so the nails would injure him if an arresting officer touched him. Protesters have poured jars of urine down from atop of the tripods, to force the RCMP to leave them in place; and
>
> • occupying “tree sits”, which are structures suspended high in trees. To extract these protesters, specialized RCMP officers must climb the trees or conduct an aerial removal using a helicopter and a line hoist apparatus. Protesters have more recently fortified the bottoms of the trees in which they sit with barbed wire or metal structures to make extraction more difficult.

…

[30] The organized nature of the protests is addressed at para. 7:

> [7] There is no doubt that one or more of the respondents form part of a protesting group that is committed, sophisticated, and well-organized. Protesters have used social media to raise over $1 million to date. They make use of the Internet to recruit individuals for specific tasks such as camp support, obstacle construction, transportation, and occupation of obstacles. They have a command and control network, a communication system to coordinate their activities, a transportation network, and dedicated construction areas and supply camps. They use drones to surveil the police and have used helicopters to resupply their camps. The methods used by those obstructing the roads have become more extreme over time. The police have removed 350 protesters from "sleeping dragons" and at least 100 from tripods set up in the middle of the roads.

[31] Additionally, at para. 77, the protesters are described as "a highly-organized group of individuals who are intent on breaking the law to get their way".

The Joinder/Stay Decision

[32] The final decision in action S211602 that is of relevance is *Teal Cedar Products Ltd v Rainforest Flying Squad,* 2022 BCSC 1912, where Justice Baird addressed an application for joinder to stay contempt proceedings against 121 individuals on the basis of alleged systemic misconduct by the RCMP in enforcing the injunction. Justice Baird declined the application on the basis that a global stay of proceedings was not an available remedy noting that a joint hearing would be "wholly unmanageable" and "would inevitably and ignominiously collapse".

> [29] … there is no such thing as a "global" stay of proceedings in a case involving a multitude of differently situated defendants engaged with different police officers in different circumstances on different days over a span of eight months.
>
> [30] … In my view the allegation that subjective mistreatment was part of a generalised system or campaign of police misconduct does not alter the fact that, in every case, the question is whether the individual applicant is eligible to be granted a stay of proceedings.
>
> [32] … It is my strong opinion that any kind of joint hearing involving these 121 applicants, many of whom are making claims of police misconduct that are vigorously disputed, is completely out of the question. A criminal proceeding of the magnitude proposed would be wholly unmanageable by virtue of its size and complexity and would inevitably and ignominiously collapse. What the applicants propose, in effect, is a wide-ranging *ad*

> *hoc* public inquiry into the RCMP enforcement operation which is beyond the institutional competence and capacities of an ordinary criminal court.

Amended Notice of Civil Claim

[33] The notice of civil claim in this matter was filed on March 8, 2023 and amended on June 5, 2023. Paragraphs 1 and 2 of the amended notice of civil claim ("ANOCC") provide an overview of the claim:

> 1. This action concerns the wrongful and tortious conduct of the Royal Canadian Mounted Police (the "RCMP"), in relation to the enforcement of an injunction order in Fairy Creek (defined below), which infringed upon the common law rights and the rights and freedoms guaranteed to members of the public, including media personnel and protestors under the *Canadian Charter of Rights and Freedoms*, ss. 2, 7, 8, 9, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the "*Charter*").
>
> 2. This action is brought to uphold the *Charter* rights and fundamental freedoms of the public, and to hold the RCMP accountable for its unlawful and egregious conduct in relation to its enforcement activities in Fairy Creek.

[34] Paragraphs 21-24 of the ANOCC plead the Injunction Order made by Verhoeven J. on April 1, 2021.

[35] At para. 28 of the ANOCC it is pleaded that there have been more than one thousand arrests and approximately 425 convictions, primarily for contempt.

[36] Paragraphs 30-43 of the ANOCC allege the RCMP implemented a policy of exclusion zones and checkpoints in the enforcement of the injunction. The alleged "exclusion zone policy" is pleaded at para. 35:

> 35. Details of the RCMP's exclusion zone policy included the following:
>
> a) the exclusion zones would begin at certain checkpoints and operate throughout the Injunction Area, focusing on areas where Teal Cedar was engaging in its logging activity;
>
> b) the RCMP retained full discretion as to which individuals would be able to enter the exclusion zones;
>
> c) vehicles attempting to enter an exclusion zone would be stopped and searched;
>
> d) occupants in vehicles attempting to enter an exclusion zone would be required to state their purpose, provide identification, and would only be allowed entry by the Silver Commander or his/her delegate;

> e) journalists, lawyers, doctors, elected and/or government officials, and all hereditary and elected chiefs of the Pacheedaht and/or Dididaht Nations would generally be permitted to enter an exclusion zone; and
>
> f) all persons granted permission to enter an exclusion zone would be required to have a police escort accompany them to a designated protest area.
>
> Collectively, the "Exclusion Zone Policy."

[37] Paragraph 40 pleads the exclusion zone policy restricted public access, contrary to the Injunction Order and contrary to the *Charter*.

> 40. The result of the RCMP's Exclusion Zone Policy has been to severely restrict public access to roads in Fairy Creek and the Injunction Area in a manner contrary to the Injunction Order. As a consequence of this policy, members of the public have been constrained in their ability to engage in lawful activities not prohibited by the Injunction Order, including activities protected by the Charter, such as participating in peaceful protests; journalistic reporting on the events occurring at Fairy Creek and in the Injunction Area; and free access to public roads and areas to hike, camp, and study wildlife in Fairy Creek.

[38] Particulars of the RCMP's implementation of the exclusion zone policy are pleaded at para. 43 as including:

> a) setting up checkpoints at various locations within TFL 46 to cut off and/or restrict public access to and within the Injunction Area;
>
> b) subjecting individuals attempting to enter the Injunction Area or areas within the Injunction Area to mandatory and arbitrary searches of their belongings, including bags, media equipment, camping gear, etc.;
>
> c) searching, seizing, refusing retrieval of, and/or destroying the belongings and equipment of individuals present in and around the Injunction Area;
>
> d) searching, seizing, refusing retrieval of, and/or towing the vehicles of individuals visiting the Injunction Area, irrespective of whether these vehicles were obstructing roads in the Injunction Area;
>
> e) asserting increased and unlawful police search and detention powers, and abusing such powers;
>
> f) blocking entry to members of the public seeking to enter or move freely within the Injunction Area, without explanation and in an arbitrary manner;
>
> g) blocking entry to vehicles attempting to enter and move freely within the Injunction Area;
>
> h) arbitrarily permitting or denying access to or within the Injunction Area;

> i) arbitrarily restricting individuals (including media personnel and lawyers) in the Injunction Area to protest, observe, record, and/or document events occurring at Fairy Creek only in designated areas set up by the RCMP;
>
> j) arbitrarily expanding or moving exclusion zones and forcing individuals to immediately leave and/or abandon any belongings and vehicles located in the suddenly widened or altered exclusion zone area;
>
> k) creating large, militarized areas in the Injunction Area blocked from public access in areas that were previously open to the public;
>
> l) arbitrarily arresting those present in or around the Injunction Area;
>
> m) using excessive force in the process of performing arbitrary arrests leading to serious injury;
>
> n) using indiscriminate and disproportionate force to arrest and remove members of the public located in the Injunction Area, including through the use of physical assault and pepper spray;
>
> o) implementing the Exclusion Zone Policy despite knowledge and in flagrant disregard and violation of the Media Access Order (defined below); and
>
> p) such further and other particulars as may become known and counsel may advise.

[39] Paragraphs 44-47 of the ANOCC plead that the RCMP implemented a policy of “catch and release”. The policy is defined at para. 45 of the ANOCC as the issuance of command orders for the general and indiscriminate detention and arrests of persons to deter lawful protest.

> 45. To control the gathering of people at Fairy Creek, the RCMP issued command orders authorizing general and indiscriminate detention and arrests of persons within or near the vicinity of the Injunction Area with the aim of deterring lawful protest and as a means of achieving crowd control. In this regard, RCMP engaged in a systematic practice and policy of detaining putative class members only to then release them without laying any charges (the “Catch-and-Release Policy”).

[40] The particulars of the enforcement of the catch and release policy are set out at para. 47 of the ANOCC as including:

> a) herding individuals into exclusion zones and blocking access to forest service roads in the Injunction Area;
>
> b) pre-emptively detaining and arresting individuals without reasonable or probable grounds or due process;
>
> c) surrounding and forming a cordon around individuals in order to limit their movement and detain them (the practice of “kettling”);

d) arbitrarily detaining persons in or around the Injunction Area by maintaining a cordon around them for extended periods of time without explanation for their detention;

e) directing or authorizing the aggressive and forceful arrest of individuals within detained crowds, including those caught within a police cordon, in a manner including but not limited to:

i. charging at them;

ii. seizing them aggressively;

iii. pushing them violently to the ground;

iv. dragging them across the ground;

v. physically assaulting them;

vi. using pepper-spray on them indiscriminately, including removing COVID face masks to do so; and

vii. forcefully restraining them;

f) preventing nearby individuals from providing aid to those suffering from the effects of the RCMP's physical assaults and use of pepper spray on crowds and/or groups of people;

g) directing or authorizing the use of excessive force or violence to intimidate and disperse lawful and peaceful protests;

h) creating a climate of fear and intimidation at Fairy Creek and during the Protests, for the wrongful purpose of intimidating protestors and media and deterring members of the public from exercising their fundamental freedoms of assembly and expression at Fairy Creek;

i) searching arrested individuals and seizing their personal belongings;

j) placing the arrested individuals into police vans and placing them on the sides of service roads and/or in holding cells for extended periods of time and without due process;

k) transporting the arrested individuals to jails, holding cells and other locations located hours away from Fairy Creek, so as to discourage protest activity at Fairy Creek;

l) directing or authorizing the harassment and/or disproportionate use of violence against individuals;

m) releasing those arrested without explanation or laying any charges; and

n) such further and other particulars as may become known and counsel may advise.

[41] Paragraphs 48-54 of the ANOCC allege misconduct on the part of the RCMP in relation to media personnel. Paragraph 49 alleges that such persons have been "denied the ability to document and report on events". Paragraph 50 alleges the RCMP created areas "immune from the scrutiny of the media and public

accountability". Paragraph 51 alleges the RCMP have "constrained and undermined the work of media" through arbitrary detentions, confiscating and destroying equipment, and limiting the areas media can access. Paragraph 53 alleges the RCMP "has unjustifiably infringed on the media's freedom of expression and freedom of the press". Particulars of the infringement of the media's *Charter* rights are pleaded at para. 54 as including:

> a) establishing broad checkpoints and exclusion zones for the wrongful purpose of controlling and limiting the movement of people, equipment, and vehicles into the exclusion zones;
>
> b) encouraging a practice of targeting journalists for harassment and destruction of equipment and/or data;
>
> c) encouraging a practice of targeting journalists for arrest and detention;
>
> d) directing or authorizing the use of disproportionate force against media personnel without lawful justification and for the unlawful purpose of intimidating media personnel and deterring them from future attendance and reporting on events at Fairy Creek;
>
> e) refusing access to media personnel to enter into the Injunction Area, without legal authority;
>
> f) obstructing the ability of members of the media to gather information and evidence for their publications, without legal authority;
>
> g) implementing the Exclusion Zone Policy despite knowledge and in flagrant disregard and violation of the Media Access Order (defined below); and
>
> h) such further and other particulars as may become known and counsel may advise.

[42] Paragraphs 55-67 plead the Media Access Decision and order. At para. 67, it is pleaded that the RCMP flagrantly disregarded the decision and order.

[43] Paragraphs 68-103 plead particular facts related to the experiences of the named plaintiffs. (I observe that much of these paragraphs constitute pleading of evidence, not material facts.)

[44] In relation to Mr. Dang, the plaintiffs plead:

a) He began attending at Fairy Creek in September 2020;

b) In May 2021, he observed the RCMP "tear down" a protester camp and threaten all individuals with arrest;

c) He was subject to the exclusion zone policy on many occasions which involved being escorted to a designated area, restricting his access to the injunction area, requiring him to hike kilometres through the forest;

d) He was threatened with detention and arrest unless he complied with RCMP decisions limiting his access to the injunction area;

e) He was not permitted to document certain events, such as extractions of tree sitters, due to alleged safety reasons;

f) He was arrested by RCMP on May 22, 2021, for contempt, driven to the RCMP detachment at Lake Cowichan, placed in a cell for the day and released that evening with no charges and no explanation;

g) On August 21, 2021, his drone camera was seized and damaged by RCMP. When he objected, he was seized and told he was under arrest but was later released without charges.

[45] In relation to Ms. Morgan, the plaintiffs plead:

a) She first began attending at Fairy Creek April 3, 2021;

b) She was subject to the exclusion zone policy on many occasions. At times, she was denied access to the injunction area and on almost all occasions her bag and equipment was searched;

c) On May 9, 2021, she was allowed to enter the injunction area but was dropped off a significant distance from where arrests were being made and told to remain in a designated area or else she would be arrested;

d) On August 21, 2021, she observed “the violent disassembly of protesters”, members of the media being physically assaulted and threatened with arrest, the use of excessive force and violence by RCMP, and the use of pepper spray by RCMP. She was personally roughly pushed by RCMP and threatened with arrest; and

e) On one occasion, she was made to walk seven kilometres to a camp.

[46] In respect of both named plaintiffs, it is alleged that they suffered anxiety, emotional distress, physical injury, loss of dignity, loss of personal property, and loss of past and future employment.

[47] Paragraphs 104 and 105 address the class period and class definition. The class period is from April 1, 2021 to the date of certification. The proposed class definition is set out at para. 105:

> 104. "Class period" means the period from April 1, 2021 to the date this action is
>
> certified.
>
> 105. The plaintiffs bring this action on their own behalf, and on behalf of a class of those individuals who:
>
> > a) had their movement impeded, were detained or arrested, or had their person or property searched or seized by RCMP officers in connection with enforcement of the Fairy Creek injunction during the Class Period, when attempting to access or travel in the injunction zone (the "Exclusion Zone Subclass"); and
> >
> > b) had their movement impeded, were detained or arrested, or had their person or property searched or seized by RCMP officers during the Class Period, in connection with the enforcement of the Fairy Creek injunction but for whom the RCMP did not recommend to bring charges (the "Catch and Release Subclass").
> >
> > (Collectively the "Class".)

[48] Paragraph 106 of the ANOCC sets out the relief sought.

> 106. The plaintiffs seek the following remedies, on their own behalf and on behalf of the Class:
>
> > a) an order certifying this action as a class proceeding pursuant to the Class Proceedings Act, RSBC 1996, c 50;
> >
> > b) an order appointing the plaintiffs as the representative plaintiffs for the Class;
> >
> > c) a declaration that the Exclusion Zone Policy and the Catch-and-Release Policy unjustifiably infringed the plaintiffs' and Class' ss. 2(b), (c), (d), 7, 8 and 9 Charter rights;
> >
> > d) damages pursuant to s. 24(1) of the Charter;
> >
> > e) general and special damages for the tortious conduct of the RCMP;

> f) an order for the aggregate assessment of monetary relief and distribution thereof to the plaintiffs and Class for these same torts and Charter breaches;
>
> g) damages for personal injury and damage to property, to be determined at an individual claims stage;
>
> h) punitive and aggravated damages; and
>
> i) pre- and post-judgment interest pursuant to the *Court Order Interest Act*, RSBC 1996, c. 79; and
>
> j) such further and other relief as this Honourable Court may deem just.

[49] The legal basis section of the ANOCC pleads breaches of ss. 2(b), (c), (d), 7, 8 and 9 of the *Charter*, false imprisonment, assault and battery and conversion and trespass.

> 107. The plaintiffs assert that the RCMP's arrests, detentions, searches and seizures of their belongings, as well as of the Class, were unjustified and unconstitutional under the Charter.
>
> 108. The RCMP's Exclusion Zone Policy and Catch and Release Policy unjustifiably infringe on the plaintiffs' and Class' rights and freedoms protected by the Charter, including their:
>
> a) freedom of expression;
>
> b) freedom of peaceful assembly;
>
> c) freedom of association;
>
> d) right to life, liberty, and security of the person;
>
> e) right to be secure against unreasonable search and seizure; and
>
> f) right not to be arbitrarily detained or imprisoned.
>
> 109. The plaintiffs also assert that the RCMP committed the torts of false imprisonment, battery, assault, conversion, and trespass against them and the Class.

[50] I observe that there is no pleading of negligence.

Evidence

Plaintiffs' Evidence

[51] The plaintiff's evidence consists of:

a) Two affidavits of Arvin Singh Dang made November 30, 2023 and March 8, 2024;

b) Affidavit #1 of Kristy Morgan made November 30, 2023;

c) Affidavit #1 of Kim Woytowich made November 30, 2023;

d) Affidavit #1 of Noah Ross made March 8, 2024; and

e) Affidavit #1 of Benjamin Isitt made March 8, 2024.

[52] The defendants object to the admissibility of the affidavits of Kim Woytowich, Noah Ross and Benjamin Isitt. I will address the objections when I review those affidavits.

Plaintiff's Affidavits

[53] In his first affidavit, the representative plaintiff, Arvin Dang, deposes to his activities and observations at Fairy Creek. In summary, he deposes:

a) He is a photographer, visual storyteller and teacher at Pearson College UWC;

b) He has visited Fairy Creek on several occasions since September 2020 as a freelance photographer and videographer for news and media outlets to document the protests and the RCMP enforcement action;

c) In May 2021, he observed the RCMP at Caycuse camp surround and arrest protesters. One officer approached him, twisted his arm and informed him he was under arrest. He and six others were put in a van and driven to the RCMP detachment at Lake Cowichan, where he was placed in a cell. He was told that if he signed a document agreeing not to return to the injunction area, he would be free to go without charges. He refused telling the officer he was on assignment for PBS and had to return to Fairy Creek. He was released later that evening with no charges and no explanation;

d) On August 21, 2021, he attended a protest at Granite Main Road. He observed RCMP officers standing shoulder to shoulder and several people on the ground. He "learned" that pepper spray had been deployed;

e) On the afternoon of August 21, 2021, he sought access to the Injunction Area through an RCMP checkpoint on Granite Main Road and was refused. He observed one member of the media being pushed to the ground and arrested when they attempted to travel beyond the checkpoint. He then took out his drone camera to film the checkpoint. His drone camera was seized by the RCMP. When he objected, he was seized and told he was under arrest but was later released without charges. When he later retrieved his drone, it was damaged; and

f) Overall, he observed the RCMP restrict access into the Injunction Area and exclusion zones by detaining and arresting protestors, observers and media personnel.

[54] In his second affidavit, made March 8, 2024, Arvin Dang addresses information contained in the affidavit of John Brewer relating to his arrest in May 2021. In particular:

a) he acknowledges that the date of his arrest was May 25 and not May 21;

b) he disagrees with RCMP records that he was “engaged in Roadblock”; and

c) he disagrees that the injunction order was read to him before the arrest or that he was given the opportunity to leave before the arrest.

[55] The representative plaintiff, Kristy Morgan, deposes in her affidavit that:

a) She is a producer and owner of a media production company;

b) She has visited and reported on the protests at Fairy Creek from April 2 to October 18, 2021;

c) On every occasion she attended, she was confronted with an RCMP checkpoint or road blockade and almost every time she was stopped and asked to open her bags to be searched;

d) She was not permitted to travel freely in the injunction area. She was told there were exclusion zones where she could not go. On some occasions, she was permitted to travel through an exclusion zone but, on other occasions she was not. The explanations she was given differed;

e) On May 28, 2021, she and a group of reporters travelled to Fairy Creek to report on the protests and enforcement activities at Waterfall Camp. They were advised they could not enter the injunction area without a police escort. They agreed to the escort and their bags were searched. When they arrived at Waterfall Camp, they were told they had to remain in a confined area for media personnel that was “located far back from where arrests were occurring”. As a consequence, she was unable to obtain usable footage or hear what the protesters were saying;

f) On August 17, 2021, she travelled to Fairy Creek to report on the protests and enforcement activities at Red Dress. On this occasion, she was permitted to enter the injunction zone by following behind a police escort. When she arrived at Red Dress, she observed a beaver dam that had several individuals intertwined within the wood and RCMP attempting to remove these people from the dam using chainsaws and other tools. She was not permitted to move freely about the area but was instead confined to an area about 40 feet from the dam. She recorded her interactions with RCMP. Later, she and other journalists were moved to another confinement area. One of the journalists she was with was arrested after an interaction with an RCMP officer;

g) On August 21, 2021, she travelled to Fairy Creek to report on the protests and enforcement activities at Granite Mountain Road. She was told she could not travel past the checkpoint into the injunction area. She was later told to stand in a cordoned off area for media personnel and was advised if she left the area she would be arrested. She observed one journalist, who had stepped outside the cordoned off area, pushed back into the area by an RCMP officer. Despite observing this, she did step outside the cordoned off

area and walked up to protesters standing in the road with linked arms. The RCMP had pepper spray and the protesters were wearing masks. She assisted some of the protesters by pulling up their masks. She deposes that an RCMP officer “ripped” the mask off of one of the protesters. She further deposes the RCMP deployed the pepper spray into the faces of the protesters, pulled individuals out of the crowd and pushed some to the ground. While she was filming, she was grabbed and pushed by RCMP, told to get back to the media corral and advised she would be arrested if she left the corral. After a few minutes she stepped “closer to the pepper spray scene”. She was grabbed by her backpack and pushed into the media corral. She was told if she “stepped back in there again” she would be arrested; and

h) Later on August 21, 2021, she attempted to travel through the injunction area to River Camp. She was stopped at a checkpoint and told she was not permitted to enter the injunction area. She read Justice Thompson’s August 9, 2021 order to the officer. After some time, she was permitted to enter the injunction area and travel the seven kilometers to River Camp on foot. By the time she arrived, the RCMP’s enforcement activities had ceased.

[56] Both Mr. Dang and Ms. Morgan depose to their willingness to act as representative plaintiffs, their understanding of the steps required, their understanding of their responsibilities as representative plaintiffs and their lack of a conflict of interest.

Ross and Isitt Affidavits

[57] Noah Ross and Benjamin Isitt are lawyers who swore affidavits on March 8, 2024.

[58] Mr. Ross represents two plaintiffs in separate actions commenced against the Attorney General of Canada and the Minister of Public Safety and Solicitor General of British Columbia, alleging negligence causing personal injuries on the part of the RCMP during lawful arrests in the Fairy Creek area in June 2021. He deposes that one action is unlikely to proceed to trial because the plaintiff lacks funds and has no

medical evidence of injuries suffered. In respect of the other action, he deposes it is unlikely to proceed because the plaintiff has no medical evidence of injuries and has terminal stage 4 cancer. He further deposes that both cases were funded by third parties who have either withdrawn or exhausted their funding.

[59] At para. 13, Mr. Ross generally deposes:

> 13. Based on my experience working as legal counsel supporting individuals engaged in civil disobedience it is very financially onerous for such an individual to pursue a civil claim in respect of alleged RCMP misconduct as the cost of litigating such a claim properly typically costs between $40,000 and $100,000. This cost of litigation is in my experience disproportionate to the quantum of damages that can typically be obtained for actions arising from civil disobedience contexts.

[60] Mr. Isitt has represented 71 individuals who were charged with contempt in *Teal Cedar v. Rainforest Flying Squad.* He also represents one plaintiff on a *pro bono* basis and assists another plaintiff in separate actions commenced against the Attorney General of Canada and the Minister of Public Safety and Solicitor General of British Columbia in relation to alleged police misconduct at Fairy Creek. In relation to the pro bono plaintiff, he deposes at para. 11:

> 11. Notwithstanding the uneconomical nature of civil litigation for police misconduct, as described above, I accepted the *pro bona* retainer with Mr. Wagner based on access-to-justice considerations specific to his personal circumstances as an Indigenous person and cultural worker, whom I have known for a number of years.

[61] In relation to the other plaintiff whom he assists, he deposes at para. 13:

> 17. Based on my understanding of Mr. Bourne's personal circumstances, and my understanding that no financial resources are available to retain legal counsel, I think there is a high probability that his claim will not proceed to trial.

[62] The defendants submit that the Ross and Isitt affidavits are inadmissible as argumentative. I disagree. The affidavits merely set out facts relating to their respective retainers and clients. They are not argumentative and not inadmissible on this basis.

[63] The defendants additionally submit that the Ross and Isitt affidavits contain inadmissible opinions of the likelihood of the actions proceeding to trial. I again disagree. Mr. Ross gives general evidence based on his experience with such claims and Mr. Isitt gives evidence based on his understanding of the circumstances of his client. Neither affidavit is inadmissible as constituting expert opinion evidence.

Woytowich Affidavit

[64] Mr. Woytowich is a legal assistant employed by the plaintiffs' solicitors. The relevant parts of his affidavit are as follows:

> 3. Based on my review of the file materials, it appears that several affidavits describing the experiences of members of the media and public with RCMP have been filed in the Vancouver Registry, in relation to the action bearing Court File No. S211602.
>
> 4. Our office obtained these affidavits from Messrs. Sean Hern and Matthew Nefstead, counsel for the applicants in the application heard on July 14 to 15, 2021 to vary the injunction order granted by Justice Verhoeven on April 1, 2021.
>
> 5. Attached as Exhibit **"A"** is a true copy of the Affidavit #1 of P. Johnson made on June 14, 2021.
>
> …
>
> 15. Attached as Exhibit **"K"** is a true copy of the Affidavit #1 of Emily Twomey made on August 15, 2021.
>
> …
>
> 18. Based on my review of the file materials, it appears that several news articles and press releases discuss the RCMP's use of exclusion zones and expansion of their police powers. Attached as Exhibits "0" and "P" are two copies of these news reports on the RCMP's practice of using exclusion zones in enforcement operations.

[65] Exhibits "A" through "K" of Mr. Woytowich's affidavit are affidavits from journalists and other individuals who generally describe their observations, experiences and police interactions while attending at the Fairy Creek protests, mostly in May and June of 2021.

[66] Although Mr. Woytowich deposes the affidavits were filed in support of the application in action S211602 heard on July 14 to 15, 2021 to vary the injunction order made by Justice Verhoeven on April 1, 2021, that is clearly not the case for all

of the affidavits. Exhibits “I”, “J” and “K” were sworn in August of 2021 and describe events that occurred in late July and August 2021. Hence, they could not have been obtained for the July 14-15 hearing.

[67] Exhibit “O” of Mr. Woytowich’s affidavit is a press release, apparently downloaded from the website of the B.C. Civil Liberties Association. The press release is about a complaint made to Civilian Review and Complaints Commission for the RCMP by the B.C. Civil Liberties Association and the Union of BC Indian Chiefs. The press release contains a quotation from the complaint and quotes from two individuals interviewed.

[68] Exhibit “P” of Mr. Woytowich’s affidavit is a news report authored by Brett Foster for APTN News. It concerns a report issued by the Civilian Review and Complaints Commission for the RCMP into the alleged use of force by the RCMP during anti-fracking protests in New Brunswick. It quotes extensively from the report and from two individuals.

[69] The defendants submit that paras. 4-15 and 18, and exhibits “A”-“K”, “O” and “P” of the Woytowich affidavit are inadmissible hearsay and should be struck.

[70] The plaintiffs submit that the impugned paragraphs and exhibits are not being tendered for the truth of their contents and are therefore not hearsay. In any event, they submit that hearsay evidence is admissible on a certification application pursuant to Rule 22-2(13) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*].

[71] Hearsay evidence is an out of court statement tendered to prove the truth of its contents. Such evidence is presumptively inadmissible, unless: (1) it falls within an existing recognized exception; or, (2) the party tendering the evidence demonstrates, on a balance of probabilities, that the evidence is both necessary and has sufficient threshold reliability: *R. v. Bradshaw*, 2017 SCC 35, at paras. 20-24; *Fontaine v. Canada (Attorney General),* 2015 BCSC 1597 at para. 33.

[72] I must first determine if the evidence is proffered for a purpose other than to prove the truth of the contents and therefore not hearsay.

[73] The plaintiffs submit that exhibits “A” to “K” are not tendered for the proof of the contents of the affidavits but to establish the existence of other class members and to support the basis for the proposed common issues. I disagree. The affidavits are clearly provided to establish the truth of what the individual affiants depose to, i.e. what happened to them at Fairy Creek. They are wholly unnecessary to establish the existence of other class members. Moreover, to the extent that they are tendered to support the basis for the proposed common issues, they can only do so if the facts deposed to in the affidavits are accepted as true. The plaintiffs have not explained how they can otherwise provide a basis for the proposed common issues.

[74] Concerning the press release and news article, exhibits “O” and “P”, the plaintiffs say these are also not tendered for the truth of their contents but “are helpful to place the asserted facts in context, and demonstrate why a class action may be necessary to encourage behaviour modification”. I again disagree. The press release and news article have no relevance except for the truth of what is contained in them. They do nothing to place the facts in context. Indeed, exhibit “P” relates to New Brunswick. They also cannot demonstrate why a class action may be necessary to encourage behaviour modification unless the contents are accepted as true.

[75] Accordingly, in my view, the impugned paragraphs and exhibits of the Woytowich affidavit are hearsay. I must therefore address whether the plaintiffs have rebutted the presumption of inadmissibility.

[76] The plaintiffs rely on the exception to the hearsay rule contained in Rule 22-2(13) of the *SCCR* which provides:

> (13) An affidavit may contain statements as to the information and belief of the person swearing or affirming the affidavit, if
>
> (a) the source of the information and belief is given, and
>
> (b) the affidavit is made

> (i) in respect of an application that does not seek a final order, or
>
> (ii) by leave of the court under Rule 12-5 (71) (a) or 22-1 (4) (e).

[77] I do not understand the defendants to dispute that this rule applies to certification hearings generally, as was confirmed by Justice Murray in *Huebner v. PR Seniors Housing Management Ltd*., 2021 BCSC 837, at para. 25:

> [25] Because class certification under s. 4 of the *CPA* is an interlocutory application that does not seek a final order, Rule 22-2(13) of the *Supreme Court Civil Rules* permits the use of hearsay evidence in an affidavit if the source of the information and belief is given: *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 [*Araya BCSC*] at para. 141, aff'd 2020 SCC 5; *Albert* at paras. 19-22.

[78] Pursuant to Rule 22-2(13), for hearsay evidence to be admissible on an application, the affiant must depose to the source of the information and that they believe the information to be true. Mr. Woytowich has met the first of these requirements in that he has identified the sources of the hearsay information. However, he has not specifically attested that he believes the hearsay information to be true. In my view, this is fatal. An attestation that the affiant believes the hearsay evidence is true is a critical requirement of the exception in Rule 22-2(13). This requirement goes to the reliability of the hearsay evidence. If the affiant does not attest that they believe the evidence, then there is no basis for a finding that the evidence has any reliability.

[79] I am aware that at para. 1 of the Woytowich affidavit contains the following statement:

> 1. … I have personal knowledge of the facts and matters deposed to in this affidavit except where I state them to be made on information and belief, and as to those facts and matters, I believe them to be true.

[80] In my view, this preamble does not constitute a statement as to Mr. Woytowich's belief in the hearsay evidence. In relation to the specific impugned exhibits, he does not "state them to be made on information and belief" and, therefore, grammatically they are not subject to the attestation of belief in para. 1.

[81] In any event, there is ample authority that it is generally improper to attach one affidavit as an exhibit to another affidavit.

[82] In *Carter v. Canada (Attorney General),* 2011 BCSC 1371 [*Carter*], Justice Smith ruled that an affidavit from an American proceeding that was attached as an exhibit to a filed affidavit was inadmissible in the absence of evidence as to why it was necessary.

> [28] I have concluded that the affidavit of Mr. Stoelb is not admissible as attached to Ms. Tucker's affidavit. It is hearsay, and Ms. Tucker's assertion that Mr. Stoelb is too ill to produce a fresh affidavit is also hearsay. While the affidavit's reliability may be supported by the fact that it was made under oath, there is no admissible evidence to establish that it is necessary for Mr. Stoelb to submit an affidavit in this way. An affidavit from Mr. Stoelb himself, or better evidence as to why a fresh affidavit cannot be obtained from him, is necessary for his previous affidavit to be admissible.

[83] In *Tietz v Cryptobloc Technologies Corp*., 2021 BCSC 810, in similar circumstances, Justice Wilkinson held that three affidavits made in a Securities Commission proceeding and attached to a filed affidavit were inadmissible, in part, because the affiant did not depose to the basis for her knowledge and belief in the attached affidavit, and in part because no evidence was presented as to why the affiant of the attached affidavit could not have given evidence.

> [23] Ms. Hung does not depose in her affidavit as to the basis for her knowledge of the information in the Costin affidavits she attaches as exhibits to her affidavit.
>
> …
>
> [28] Examples of attempts to attach affidavits from one person to affidavits of another are few and far between in the authorities. This Court, in *Carter v. Canada (Attorney General)*, 2011 BCSC 1371 rejected an attempt to append another person's affidavit to an affidavit by a different person who also provided their evidence based on third party information. The evidence sought to be admitted was regarding why the original affiant could not file their own affidavit within the extant proceeding. This was held to be inadmissible hearsay.
>
> [29] … like in *Carter*, I have no direct evidence of that inability from Mr. Costin, someone who communicated with Mr. Costin, or someone who communicated with Securities Commission legal counsel.

[84] Finally, in *Leifso v. BevCanna Enterprises Inc*., 2023 BCSC 579 [*Leifso*], Justice Armstrong similarly held that affidavits from another proceeding that were attached to a filed affidavit were inadmissible because the affiant did not depose to the truth of the facts set out in the attached affidavits and there was no evidence as to why the author of attached affidavits could not provide an affidavit in the subject proceedings.

> [56] The petitioners contend that there is no admissible evidence on this application to support any of the underlying allegations made by the respondents. In one affidavit, made by Vanessa Coupar, a legal assistant at the respondent's law firm, she simply attached as exhibits several affidavits filed in the Alberta Action setting out the alleged pertinent facts. Ms. Coupar deposed that "except where stated to be on information and belief, and where so stated, I verily believe the same to be true", however she does not suggest that the facts set out in the three attached affidavits are true. Thus, the content of the attached affidavits is hearsay if offered for the truth of their contents.
>
> [58] In *Tietz*, Justice Wilkinson rejected an attempt by one party to rely on an affidavit attaching three other affidavits as exhibits from a securities commission proceeding. In that case, there was no direct evidence before the Court as to why the original affiant could not file their own affidavit in the proceeding. The Court in *Tietz* relied on *Carter v. Canada (Attorney General),* 2011 BCSC 1371 where the Court rejected an attempt to append another person's affidavit to an affidavit by a different person who also provided their evidence based on third party information. This was held to be inadmissible hearsay.
>
> [59] The above cases are apposite to this application and I find that the two affidavits of Mr. Dawson-Scully, attached as exhibits to Ms. Coupar's affidavit, are inadmissible hearsay on this application. No evidence was provided as to why Mr. Dawson-Scully was not able to provide an affidavit in support of the respondents' stay application.
>
> [Emphasis added.]

[85] The circumstances in *Leifso* are virtually identical to those before me, namely: the legal assistant did not attest to a belief that the facts set out in the attached affidavits were true; and, no explanation was provided as to why the affiants of the attached affidavits were not able to provide affidavits in the subject proceeding.

[86] Before concluding on the admissibility of the impugned parts of the Woytowich affidavit, I note that exhibits "O" and "P" suffer from one additional defect. They both contain information obtained from other persons or sources. They therefore constitute double hearsay, which is rarely admissible. The plaintiffs had the

onus of addressing this double hearsay problem by demonstrating that each level of hearsay falls within an exception or is admissible under the principled approach: *R. v. Starr*, 2000 SCC 40 at para. 172. They did not even attempt to discharge this onus.

[87] Accordingly, paras. 5-15 and 18 and exhibits “A” to “K”, “O” and “P” of the Woytowich affidavit are struck and I will not consider this evidence further on this certification application.

Respondents’ Evidence

[88] The respondents evidence consists of:

a) Affidavit #1 of John Brewer made 16 February 2024;

b) Affidavit #1 of Anna-Marie La Rocque made 16 February 2024;

c) Affidavit #1 of Jeffrey Ausmus made 15 February 2024; and

d) Affidavit #1 of Christopher McGee made 16 February 2024.

John Brewer

[89] Mr. Brewer is an Assistant Commissioner (“A/Commr.”) and member of the RCMP. From June 14, 2021 to November 2022 he was Gold Commander of the RCMP’s Community Industry Response Group (“C-IRGC”), which was the primary unit responsible for enforcing the Injunction Order. He led the RCMP’s enforcement of the Injunction Order and attended Fairy Creek regularly (para. 3). Based on his review of records, he deposed:

a) From May to October 2021, a total of approximately 390 RCMP officers participated in enforcement operations at Fairy Creek (para.4);

b) On a daily basis the number of officers varied from as many as 80 to as few as five (para. 5);

c) From May 2021 to the expiry of the Injunction Order, the RCMP made approximately 1,014 arrests and 443 charge recommendations and there have been 222 convictions (paras.7-10).

[90] Assistant Commissioner Brewer describes the protests at Fairy Creek as large. At the height of the activity, he deposes there were 150-200 people present on weekdays and 500 on weekends. It is his understanding that the protests in 2021 were the largest civil disobedience campaign in Canadian history.

[91] At para. 14, A/Commr. Brewer describes the nature of some of the more aggressive and dangerous protest activity at Fairy Creek.

> 14. Protesters engaged in various types of activities at Fairy Creek. These activities range from peaceful demonstrations to extreme and dangerous activities. I have personally observed and have been briefed about extreme protest behaviour such as:
>
> a. constructing and placing themselves in devices called '"tripods, bi-pods, monopods, or cantilevers" above roadways and bridges. These devices are constructed of poles, usually of wood, in which protestors hang in hammocks or seats suspended in the air, sometimes as high as 30 ft;
>
> b. constructing and placing themselves in devices called "sleeping dragons" buried in the ground. These devices are tubes in the ground where protesters insert their arm and lock themselves to the tube. These devices are sometimes enforced with concrete or metal;
>
> c. constructing and placing themselves in devices called flying dragons ' above roads or bridges. These devices are tripods bi-pods, monopods, or cantilevers but protesters would attach themselves to the device using chains or bicycle locks around their necks and/or placing their arms in tubes called sleeping dragons; constructing and placing themselves in deep trenches or holes dug into the roadway where one or more protestors would be anchored to a sleeping dragon;
>
> d. using disabled vehicles or other debris to block roadways;
>
> e. using violence to force their way past police checkpoints; and
>
> f. damaging equipment owned by Teal Cedar, the RCMP or other emergency response teams, such as, firefighting equipment, ambulances safety equipment, logging equipment.

[92] At paras. 17-24, A/Commr. Brewer deposes that a unique feature of the Fairy Creek protests was that protesters changed and adapted their tactics to thwart

RCMP enforcement efforts which, in turn, forced the RCMP to adapt its tactics. He provides two examples, namely:

a) At the beginning, protesters used basic sleeping dragon devices and the RCMP put cameras inside the dragon to see how and where the protester's hand was connected to the device. The protesters countered this tactic by filling the tubes of the sleeping dragons with oats, which rendered the cameras useless. The protesters also created more sophisticated and durable sleeping dragons over time, including encasing them in a metal stove or chicken wire; and

b) The protesters learned that processing of arrested individuals by RCMP was a lengthy process due in part to the limited ability of the Lake Cowichan detachment. He believes they took advantage of this by having large numbers of individuals submit themselves to arrest to overwhelm the RCMP's abilities to process the arrests. As a consequence, he deposes the RCMP abandoned the goal of processing all individuals for arrest and focused on processing only priority arrests.

[93] At paras. 25-32, A/Commr. Brewer deposes that the enforcement operations evolved or varied over time for various reasons including: the presence of a number of different groups and teams that participate in such operations such as aerial extraction, obstruction removal, quick response, media relations and information management, among others; changes in the availability of personnel which fluctuated for various reasons including burn-out, stress and refusals to attend at Fairy Creek; and the experience levels of personnel and the various watches, some of whom were more experienced with civil disobedience injunctions.

[94] At paras. 33-37, A/Commr. Brewer deposes that the geography of Fairy Creek complicated the enforcement operations. He explains the injunction area is remote, covered several hundred square kilometres of mostly forested and mountainous terrain, was mostly only accessible by forest roads that could be easily blocked, and much of the area had little to no cell reception.

[95] A large portion of A/Commr. Brewer's affidavit, paras. 33-77, addresses the use of temporary exclusion zones and access control points by the RCMP throughout its enforcement of the injunction. Concerning these zones and access control points, he deposes:

a) A temporary exclusion zone ("TEZ") is an area of space temporarily controlled by police;

b) At the initial planning stage for enforcement of the Injunction Order, it was determined that TEZs would be needed to enforce the injunction;

c) He prepared a record of decision, which was approved on May 6, 2021, that authorized the creation of a single TEZ in Fairy Creek at Hatton Caycuse. On the same day, he approved an access control point at Hatton Caycuse;

d) He disagrees that either decision was "policy" as pleaded in the ANOCC;

e) At the time, it was believed the enforcement operation would be concluded within two weeks;

f) Once the enforcement operations commenced, it was quickly realized that it would take longer than two weeks, would be more complex than anticipated and would require multiple TEZs;

g) Different approaches were taken on who approved TEZs and access control points. From May to October 2021, the RCMP held high-level weekly briefings and daily morning briefings at which the location of TEZs were discussed. Additionally, the location of TEZs might be moved depending on the situation on the ground. For most of the enforcement operations, the location of TEZs was left to Silver Commanders, given their closer proximity to enforcement operations;

h) In some cases, he approved the creation of particular TEZs. He personally approved the creation of a TEZ at Granite Mainline, given the particularly

contentious nature of the enforcement operations in that area and to respond to the criticisms of Thompson J. in the Media Access Decision;

i) The RCMP did not have a formal policy or guideline for authorizing the creation of a TEZ. Such decisions depended on a variety of factors namely the location of the enforcement operation, the nature of the enforcement operation, and the availability of resources;

j) The locations and sizes of TEZs depended on where the enforcement operations were occurring and the type of enforcement operation. In some cases, the location of a TEZ changed on a daily basis;

k) The use to which the RCMP put an exclusion zone, such as when a person would be permitted to pass an access control point or whether a search would be conducted, depended on the circumstances and the discretion of the officer. A Silver or Gold Commander was available 24 hours during the height of the enforcement to provide advice to officers in the exercise of this discretion;

l) In some cases, access was strictly controlled such as when the situation was particularly dangerous (for example when clearing occupied obstacles) or out of control. At other times, the RCMP would elect to not enforce a TEZ, such as when protesters had overwhelmed an area or where there were insufficient resources;

m) The use of searches at access control points varied over time and according to circumstances. Initially and generally, officers were instructed they could conduct consent searches of individuals or vehicles only if they had grounds. The purpose was to look for material that could be used to create obstructions. Although this was the general approach, officers had discretion as to when to conduct searches; and

n) Following the release of the Media Access Order and Decision, A/Commr. Brewer directed that the use of TEZs and access control points should be

more permissive and instructed that officers stop conducting searches of individuals.

[96] At paras. 78-91, A/Commr. Brewer addresses the RCMP's use of arrest powers. In summary, he deposes:

a) There was no catch and release policy and no orders for the indiscriminate arrest of individuals without cause;

b) The original intent was to process every single protester who was arrested but this proved impossible due to limited resources;

c) The decision as to whether an individual arrested should be processed was left to the discretion of the bronze or watch commanders depending on the circumstances;

d) The RCMP did arrest and release protesters without charges, conditions or undertakings;

e) Sometimes, it was necessary to make a large number of arrests quickly in chaotic circumstances; and

f) In September of 2021 he became aware a former member of C-IRG was alleging that some officers were intentionally arresting individuals and releasing them. In response to this allegation, he immediately interviewed the former member and determined that the allegations lacked any merit.

[97] Paragraphs 79 and 81 of his affidavit are particularly relevant, and are as follows:

> 79. As the former Silver and Gold Commander of the RCMP's enforcement operations, I have never issued any command orders as alleged by the Plaintiffs, any orders authorizing the general and indiscriminate detention or arrests of individuals without lawful grounds, or instituted any kind of Catch and Release Policy. Further, I am not aware of and have no reason to believe that any other RCMP member, including former Gold Commander Attfield, issue any such command orders.
>
> …

> 81. Once enforcement operations began, we quickly realized that it would be simply impossible to process the arrest of every single individual arrested. As described above, the process for arresting individuals is lengthy, and the RCMP did not have the resources to reasonably process all of these arrests. The Lake Cowichan RCMP detachment is small with limited personnel and space to house arrested individuals over-night.

[98] Paragraphs. 92-103 address various complaints made against the RCMP to the Civilian Review and Complaints Commission ("CRCC") or to an investigative team set up to address complaints. He deposes that:

a) There have 265 complaints made to the CRCC arising out of the enforcement of the injunction;

b) The CRCC declined to deal with 151 of the complaints;

c) The investigative team has concluded 15 complaints were supported and 118 complaints were not supported. An additional 39 complaints were not investigated because of s. 45.61(3) of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 [i.e. where the Commissioner directs that an investigation not be commenced or continued]; and

d) On March 3, 2023, the CRCC launched a systemic investigation of C-IRG, including with respect to the enforcement operations at Fairy Creek.

[99] Paragraphs 103-122 address documentation reviewed by A/Commr. Brewer concerning the representative plaintiffs, in particular, Mr. Dang. These records indicate Mr. Dang was arrested on May 25, 2021, for breaching the injunction and for obstruction. The prisoner report for Mr. Dang, attached as exhibit "I", states in the details section "Engaged in Roadblock".

[100] Paragraphs 113 -115 relate to estimated class size. He deposes that he is unable to give an estimate of the total number of different individuals who attended at Fairy Creek, although he estimates that from May to October 2021 there were 15 to 200 people present on weekdays and approximately 500 on weekends. He further

deposes that, from his review of records, the RCMP made at least 473 arrests without additional processing.

Jeffrey Ausmus

[101] Jeffrey Ausmus is a retired Staff Sergeant of the RCMP who was a Watch Commander with the C-IRG from 2019 until July 19, 2022. As Watch Commander he was responsible for managing the on-the-ground injunction enforcement operations at Fairy Creek. He was deployed to Fairy Creek on three occasions in 2021: from May 23 to 30; June 20 to 27: and August 15 to 22. He addresses his experiences while deployed to Fairy Creek, how the protests evolved over time and the events of August 21, 2022.

[102] Staff Sergeant Ausmus deposes generally that Fairy Creek was a unique and atypical policing situation involving long hours, challenging terrain and conditions and a large number of protesters who used sophisticated and often dangerous tactics.

> 7. Despite having extensive experience enforcing injunction orders with C-IRG, I found Fairy Creek to be a unique policing situation. My team averaged very long workdays, in the range of 16-18 hours. The terrain, remoteness, and densely forested location were a constant source of challenge for me and my team. We worked in conditions ranging from extreme summer heat to torrential rain. We dealt with thousands of protesters who used increasingly sophisticated, and often dangerous, protester tactics and obstructions. While we experienced a range of protester behaviour at Fairy Creek, I generally observed the protesters' level of resistance became greater over time.
>
> 8. Many different things made working at Fairy Creek a unique, atypical policing situation. Some of these things include: (i) encountering and dismantling obstructions; (ii) establishing and taking down TEZs; (iii) exercising discretion related to arrests; (iv) dealing with peaceful protesters; (v) dealing with active resistant protesters; and (vi) facilitating media access.

[103] At paras. 10-15, S/Sgt. Ausmus deposes to the dismantling of obstructions including:

a) On a typical day his team was assigned an objective of clearing a stretch of blocked road and, at the end of each day they would establish an ACP at the furthest point cleared;

b) The almost daily road blockades consisted of protesters blocking the road with their bodies and often consisted of one or more obstructions such as,

   i. sleeping dragons (a metal or plastic pipe to which a protester was chained and which sometimes had materials placed over or concrete poured over),

   ii. graves (holes in the ground with overhanging sides in which a protester lay, often in a sleeping dragon),

   iii. tripods (three long logs in a triangular structure with a protester either placed at or suspended from the top),

   iv. cantilevers (a structure placed perpendicularly on and extended out from a bridge or other surface upon which a protester would sit or suspend themselves), and

   v. beaver dams (a large amount of piled of wood or other materials placed on a roadway with a protester attached in, under or on top of).

c) The complexity of the obstructions increased over time through combining multiple devices and fortifying devices by adding concrete, chicken wire, metal bolts and large nails. The fortifications increased the risk of injury;

d) Dismantling the obstructions and extracting the protesters was time consuming and dangerous to anyone in the proximity, often required the expertise of the RCMP Obstruction Removal Team and the Emergency Response Team, and required that the protester to be extracted be provided with safety equipment; and

e) Often, the day after a section of road was cleared, they would return the next day to find new obstructions had been placed in the cleared section.

[104] Paragraphs 16-22 of S/Sgt. Ausmus' affidavit addresses the establishment of TEZs. In particular, he deposes:

a) When a road obstruction was encountered, a TEZ was typically set up around the obstruction for the safety of everyone including the RCMP, the protesters, the media and the general public. Dismantling the obstructions was often dangerous involving the use of power tools and heavy equipment;

b) TEZs were created by putting up yellow police tape on each side of the area being worked;

c) TEZs were temporary; once the work removing a particular obstruction was finished, the police tape was taken down and the team would then move to the next obstruction up the road and create a new TEZ;

d) The size of a particular TEZ depended on the terrain and the nature of the work required. A straightforward obstruction might require a 100-foot working area, whereas multiple obstructions or particularly dangerous or precarious obstructions might require an 800-foot TEZ;

e) Sometimes the size of a TEZ was increased to prevent protesters from distracting officers, drowning out commands or encouraging other protesters to resist extraction. On one occasion, a youth in a tripod fell after being encouraged not to participate in his rescue;

f) If protesters were caught within a TEZ when established, they were given the option to leave the area and, if they refused, they were subject to arrest; and

g) Protesters were sometimes allowed to remain inside a TEZ, such as persons designated to speak with police or to observe police activity and media members accompanied by a media liaison officer.

[105] At paras. 23-30, S/Sgt. Ausmus deposes on how arrests were handled including:

a) He exercised discretion in determining whether to make arrests;

b) On a given day, there were multiple protesters who were in breach of the injunction but not arrested because he viewed his objective as being to open the road, not to arrest people;

c) If protesters refused to comply with the injunction order to leave a TEZ, he would determine if there were grounds for arrest, whether it was necessary to effect an arrest for operational or safety reasons and whether the member resources were sufficient to carry out the arrest; and

d) If protesters were being peaceful and safe, he would often exercise his discretion not to arrest even if he had reasonable and probable grounds to believe they were in breach of the Injunction Order.

[106] At para. 33, S/Sgt. Ausmus deposes to how media persons were handled as follows:

> 33. To facilitate media access, a media liaison officer would often escort media members to where my team was working. I or someone on my team would then designate an area from which media could safely observe and report on our operations. If the media members were escorted by a media liaison officer, this area may have been within the TEZ, but a safe distance away from my team's operations. I heard and observed some media members express dissatisfaction with the access provided, particularly as the weeks progressed. I observed that these dissatisfied media members were often from less mainstream media outlets. At Fairy Creek, the media presence ranged from journalist from major media outlets to individuals with cameras who self-identified as media but presented no credentials. Sometimes, media members crossed the line between reporting on the protests to participating in the protests. For example, on August 21, 2021, several media members repeatedly disregarded officer commands to stay behind the police line (see para 89).

[107] At paras. 34-110, S/Sgt. Ausmus provides a day-by-day account of what occurred on each day he was deployed to Fairy Creek. I do not intend to review this evidence in any detail. In summary, he deposes:

a) Initially, in May 2021, the protest was mostly peaceful and resistance, when encountered, was passive;

b) In June 2021, the obstructions were becoming more complex and difficult to dismantle; and

c) In August 2021, the protesters were more aggressive and resistant and the obstacles more complex. His team was regularly confronted with protesters actively resisting arrest and repeatedly attempting to escape custody. Officers were also surrounded while attempting to arrest individual protesters, sometimes with other protesters pulling on arrestees or otherwise physically interfering with officers making arrests.

[108] At paras. 78-110, S/Sgt. Ausmus addresses the events of August 21, 2021, which he describes as a day unlike any other in his 25-year career as a police officer. Again, I do not intend to review his evidence in detail but, in summary, he deposes:

a) The objective that day was to clear a camp known as the “kitchen” that was blocking Granite Mainline road, a road in active use by industry;

b) The protesters had created a blockade at the ACP that spilled onto the public highway. The blockage included protesters chaining themselves to the gate and a “mob” of about 50 protesters further blocking access;

c) When the RCMP created a temporary access to bypass the blockage, the “mob” moved towards the temporary access disregarding police commands and at least two officers were injured. Pepper spray was deployed which ultimately stopped the “mob” from advancing. Arrests were made;

d) Further up the road, a tripod was encountered and cleared and then a line of at least 30 protesters was encountered across the road. Those who refused to move were arrested; and

e) At 12:40 pm, the RCMP arrived at the “kitchen” where the camp was fully blocking the road. They set up a TEZ and proceeded to dismantle the camp using heavy equipment and a helicopter. The dismantling took several hours.

Christopher McGee

[109] Christopher McGee is a Staff Sergeant with the RCMP and a member of the Quick Response Team with the C-IRG. His primary role at Fairy Creek was working on a rotational basis as the assigned QRT Watch commander. He was deployed to Fairy Creek on: May 30-June 6, June 27-July 4, August 22-29, September 19-26, and December 12-18, 2021. He addresses seven main topics in his affidavit:

a) Paragraphs 9-11 address the variety of the different areas within Fairy Creek where protests occurred ranging from publicly accessible to remote areas;

b) Paragraphs 13-23 address the number and variety of protesters encountered. The number of protesters he observed from May to September 2021 ranged from 50 per day to 150-200 per day but, by December 2021, the number had dwindled to approximately six. The individuals he encountered were from many walks of life and backgrounds. Some were peaceful and compliant with police requests; Others were committed protesters willing to impede logging efforts and RCMP enforcement efforts;

c) Paragraphs 24-28 address his encounters with media personnel. He deposes he took steps to ensure media persons could view RCMP enforcement activities but that there were times when it was necessary to prevent them from getting too close to the enforcement area to prevent them from interfering with enforcement operations, and to ensure their safety as well as the safety of RCMP members and the individuals being extracted. He also deposes that media access requests were facilitated by a Media Relations Officer;

d) Paragraphs 29-38 address the tactics used by protesters and the evolution and sophistication of those tactics. His evidence in relation to this topic mirrors generally what is contained in the affidavits of S/Sgt. Ausmus and A/Commr. Brewer. In summary, he deposes,

i. The protesters' activities prevented logging industry workers from entering areas to conduct their work and put both themselves and RCMP members at risk.

ii. At times protesters were peaceful, polite and respectful but at other times some were physically and verbally aggressive with RCMP.

iii. As time progressed, the tactics of the protesters evolved to include the use of more sophisticated means to impede RCMP enforcement activities including developing and attaching themselves to various sophisticated obstacles, digging deep and often precarious trenches in the roadway, suspending themselves from bridges, and placing themselves in cut blocks.

iv. Some activities involved significant risks to the safety of RCMP members and/or the protester including two individuals occupying a sleeping dragon had their arms physically glued and stitched together, some individuals placed themselves within "graves", and some individuals positioned themselves deep in a cut block under fallen old-growth trees.

v. The means by which protesters communicated amongst themselves became more sophisticated including by adopting the use of satellite phones.

e) Paragraphs 39-68 address the various tactics used by the RCMP in enforcement activities, in particular arrests, TEZs and ACPs. In summary,

i. Concerning arrests, he deposes that most times, a decision to arrest an individual was made by him or by his second in command. Every individual observed breaching the injunction was not arrested. Rather, he focused on arrests that would have a strategic impact on the goal of removing an obstacle and opening the road.

ii. Concerning TEZs, he deposes that he established TEZs where necessary to create a safe working space to conduct extractions or where there was a risk of individuals interfering with the safe removal and arrest of contemnors. The size of a TEZ depended on the circumstances but he tried to keep them as small as possible. TEZs were not always strictly enforced. Legal observers, support person and media were sometimes allowed within a TEZ. Unless an individual was being arrested, he was not aware of any instances where a search was conducted at a TEZ or property seized. He understood the decision to use a TEZ was within his discretion as Watch commander.

iii. Concerning ACPs, he deposed they were established by Gold and Silver commanders of C-IRG and he had limited involvement with them.

f) Paragraphs 69-79 address his role in leading the IDGIS investigative team, which was responsible for processing arrests, determining the release process to be used and determining if charges were to be recommended. He deposes that initially arrestees were transported to Lake Cowichan for further processing but this became unsustainable due to the number of arrests. In approximately June 2021, it was determined that processing/triaging would occur at the MCP and thereafter most arrestees were released at Port Renfrew. He further deposes that discretionary decisions about whether charges would be recommended or a detainee released were made on a case by case basis depending on the circumstances.

[110] The balance of S/Sgt. McGee's affidavit addresses his day-to-day and week-to-week experiences and observations at Fairy Creek. During the weeks of May 30-June 6, 2021, and August 22-29, 2021.

Anna-Marie La Rocque

[111] Anna-Marie La Roque is a paralegal in the British Columbia Regional Office of the Department of Justice. Her affidavit attaches various publicly available

documents relating to the Civilian Review and Complaints Commission including the jurisdiction and mandate of the CRCC, the CRCC complaints process, and the current and historic investigations of the CRCC, including complaints related to Ferry Creek. She also identifies that eight civil actions have been commenced involving the Ferry Creek operations of the RCMP, of which 2 were withdrawn and six remain outstanding, and that ten actions have been commenced against Teal Cedar for wrongful conversion and detinue of vehicles at Ferry Creek. She attaches various filed court document relating to these actions.

Analysis

Requirements and Tests for Certification

[112] Class proceedings are governed by the *CPA*. The three principle goals of the *CPA* procedure are behaviour modification, judicial economy and access to justice: *MM Fund v Excelsior Mining Corp*., 2024 BCCA 163. The *CPA* is to be interpreted in a broad and purposive manner consistent with these goals: *Halvorson v British Columbia (Medical Services Commission)*, 2010 BCCA 267 at para. 23.

[113] Section 4(1) of the *CPA* lists the requirements for certification and provides that the court must certify a proceeding as a class proceeding if the requirements set out therein are met.

> 4 (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,

> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

…

[114] The s. 4(1) requirements are subject to different tests. The requirement that the pleadings disclose a cause of action, in s. 4(1)(a), is subject to the same test as that for striking a pleading on the grounds that it fails to disclose a cause of action, namely, assuming the pleaded facts are true, whether it is plain and obvious the claim cannot succeed*: Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, at para. 63 [*Pro-Sys*].

[115] The balance of the requirements set out in s. 4(1) of the *CPA* are subject to a different but still low threshold or standard of proof. The applicable test is whether there is some basis in fact establishing each of the remaining requirements. This was succinctly set out by Justice Rothstein at paras. 99-100 of *Pro-Sys*:

> [99] The starting point in determining the standard of proof to be applied to the remaining certification requirements is the standard articulated in this Court's seminal decision in *Hollick*. In that case, McLachlin C.J. succinctly set out the standard: ". . . the class representative must show some basis in fact for each of the certification requirements set out in . . . the Act, other than the requirement that the pleadings disclose a cause of action" (para. 25 (emphasis added)). She noted, however, that "the certification stage is decidedly not meant to be a test of the merits of the action" (para. 16). Rather, this stage is concerned with form and with whether the action can properly proceed as a class action (see *Hollick*, at para. 16; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 ("*Infineon*"), at para. 65; *Cloud v. Canada (Attorney General)* (2004), 2004 CanLII 45444 (ON CA), 73 O.R. (3d) 401 (C.A.), at para. 50).
>
> [100] The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. McLachlin C.J. did, however, note in *Hollick* that evidence has a role to play in the certification process. She observed that "the Report of the Attorney General's Advisory Committee on Class Action Reform clearly contemplates that the class representative will have to establish an evidentiary basis for certification" (para. 25).

[116] In *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338, at para. 134 [*Nissan Canada*], Justice Griffin addressed the "some basis in fact" test. She explained it is a low threshold and does not involve "a robust analysis of the merits of the claim". She further explained it requires "more than superficial scrutiny of the sufficiency of the evidence" but less than "the civil standard of a balance of probabilities".

> [134] This is a low threshold. The purpose of the requirement is to ensure there is a minimum evidentiary foundation to support the certification order: *Hollick* at para. 24; *Atlantic Lottery* at para. 138. Because the standard is simply to ensure that the action is suited to a class proceeding, it does not entail a robust analysis of the merits of the claim: *Atlantic Lottery* at para. 138; *Pro-Sys* at paras. 103, 105. However, the court must undertake more than superficial scrutiny of the sufficiency of the evidence: *Pro-Sys* at para. 103; *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at para. 27, leave to appeal to SCC refused, 39882 (17 March 2022). This standard requires "an evidentiary basis" to show the plaintiff has met the certification requirements: *Hollick* at para. 25. Such evidence does not have to be conclusive or satisfy the civil standard of a balance of probabilities, and the particular level of evidence that is sufficient is highly fact-specific: *Sharp* at para. 27.

[117] Although the test for certification is not robust, the court nevertheless performs an important gatekeeping function, as expressed by Justice Dickson at para. 15 of *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 [*Finkel*]:

> [15] The court performs an important gatekeeping function on a certification application. Although the merits of the claim are not determined and competing evidence is not weighed, certification operates as a meaningful screening device to ensure that only claims in the common interest of class members are advanced. As Justice Rothstein stated in *Pro-Sys Consultants Ltd. v. Microsoft Corp.* 2013 SCC 57 at para. 104, for an action to be certified the s. 4(1) requirements must be met "to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of [the requirements] not having been met". While the threshold at the certification stage is low, merely symbolic scrutiny of the claim will not suffice: *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240 at para. 51.

[118] With these very general principles in mind, I now review each of the certification requirements.

Section 4(1)(a) – Cause of Action

Legal Principles

[119] The first requirement in s. 4(1) of the *CPA* is that the pleading discloses a cause of action. This requirement is assessed without regard to the evidence and the test is whether it is plain and obvious the claims, as pleaded, cannot succeed.

[120] In *Nissan Canada* at paras. 38-39, Griffin J. observed that "the pleadings are to be analyzed liberally, and without consideration of the evidence" and that it is important to read the notice of civil claim as a whole. (See also, *G.D. v. South Coast British Columbia Transportation Authority*, 2024 BCCA 252, at para. 38)

[121] Where the pleadings are deficient at the certification stage, but can be cured by amendments, the certification application should be adjourned to allow such amendments: *Finkel*, para. 17; *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at paras. 44 and 118.

Positions of the Parties

[122] Both parties made minimal submissions concerning the adequacy of the ANOCC.

[123] The defendants admit the ANOCC discloses individual and specific causes of action in relation to the representative plaintiffs. However, the defendants say the pleading is deficient in that it does not plead material facts that could establish a "systemic claim". In particular, the defendants say:

a) there are no material facts about an identifiable group of similar individuals in materially similar circumstances;

b) there are no material facts that establish any RCMP policies; and

c) the pleading fails to identify a triable cause of action in relation to the alleged policies.

[124] The plaintiffs rely on the defendant's admission that the *Charter* and tort claims were viable causes of action as plead by the two representative plaintiffs. Concerning the defendant's submissions that material facts supporting a systemic claim are not pleaded, the plaintiffs say the defendants conflate the requirement that the claim must disclose a reasonable cause of action with the requirement that the claim must raise common issues.

Discussion

[125] Given the positions of the parties, I do not intend to address the adequacy of the ANOCC in detail.

[126] I agree with the plaintiffs that the defendants conflate the issue of whether the pleading discloses a valid cause of action with the other requirements under s. 4(1) of the *CPA*. The defendant's submissions that there are no material facts pleaded establishing any RCMP policies and no cause of action pleaded in relation to the alleged policies is simply an inaccurate and a misreading of the ANOCC. The ANOCC is replete with allegations about RCMP policies and that the implementation of the alleged policies constituted breaches of *Charter* rights or other pleaded torts. (See for example paras. 30-43 and 44-47 of the ANOCC.) This is sufficient for the purposes of s. 4(1)(a) of the *CPA*. Whether there is some basis in fact for the existence of the alleged policies, is a matter better considered under s. 4(1)(c), the common issues. Similarly, the defendant's submission the ANOCC fails to plead a systemic claim or material facts about "an identifiable group of similar individuals in materially similar circumstances" is not a requirement of s. 4(1)(a) but is something better considered under s. 4(1)(b) or (c).

Charter Claims

[127] The plaintiffs have alleged that the RCMP implemented an "exclusion zone policy" and a "catch and release policy" that unjustifiably infringed the rights of putative class members, including: the rights to freedom of expression, peaceful assembly and association (*Charter,* s. 2(b), (c) and (d)); the right the right to life, liberty and security of the person and not to deprived thereof except in accordance

with the principles of fundamental justice (*Charter*, s. 7); the right to be secure against unreasonable search or seizure (*Charter,* s. 8); and the right to not be arbitrarily detained (*Charter*, s. 9).

[128] The plaintiffs have pleaded a valid cause of action in relation to breaches of *Charter* rights.

False Imprisonment

[129] The elements of the tort of false imprisonment are: (1) that the plaintiff has been totally deprived of their liberty; (2) against their will, and; (3) that the imprisonment was caused by the defendant. Once these elements are proved by the plaintiff the onus shifts to the defendant to justify the arrest or detention: *Huang v. Silvercorp Metals Inc.*, 2016 BCCA 100, at para. 23.

[130] In my view, paras. 141-143 of the ANOCC plead all of the required elements of false imprisonment as follows:

> 141. The RCMP deprived the liberty of the plaintiffs and Class in a manner that amounted to false imprisonment.
>
> 142. On numerous occasions, the RCMP confined the plaintiffs and class members within fixed boundaries in a manner that was:
>
> a. total and complete; and
>
> b. against the will of the plaintiffs and class members.
>
> 143. Further, these deprivations of liberty perpetrated by the RCMP were not justified at common law or by statute and were done without legal authority.

Assault and Battery

[131] The torts of assault and battery are distinct but related in that both involve trespass to a person. For battery, the plaintiff must prove the defendant intended to and did make actual physical contact and that this contact was harmful or offensive. For assault, the plaintiff must prove the defendant intentionally caused them to fear imminent harmful or offensive contact even if contact did not actually occur: *R.T. v. Lowe*, 2021 BCSC 590, at paras. 47-48.

[132] In my view, paras. 144-147 of the ANOCC plead all of the required elements of the torts of assault and battery as follows:

> 144. The RCMP committed assault and battery against the plaintiffs and Class.
>
> 145. The RCMP intentionally created the apprehension of imminent harmful and/or offensive contact with the plaintiffs and class members in a manner that would cause the reasonably courageous person to experience fear.
>
> 146. Further, the RCMP intentionally made direct physical contact, including harmful and/or offensive contact, with the plaintiffs and class members.
>
> 147. The RCMP had no legal authority, nor the consent of the plaintiffs and class members, to engage in many of the actions they did in relation to the plaintiffs and class members, including physical handling, handcuffing, searching, and/or other contact.

Conversion and Trespass

[133] The torts of conversion and trespass to goods are different but related. The elements of the tort of conversion are: (1) a wrongful act by the defendant involving the plaintiff's goods; (2) the act must involve handling, disposing, or destroying the goods; and (3) the defendant's actions must have either the effect or intention of interfering with (or denying) the plaintiff's right or title to the goods: *Pang v. Zhang*, 2021 BCSC 591, at para. 41. The tort of trespass to goods is similar in that it involves improper handling of, damage to, or seizure of goods; *Century 21 Canada Limited Partnership v. Rogers Communications Inc*., 2011 BCSC 1196, para. 258.

[134] In my view, paras. 148-153 of the ANOCC plead all of the required elements of conversion, as follows:

> 148. The RCMP committed conversion and trespass against the plaintiffs and Class.
>
> 149. The RCMP improperly handled, caused damage to, seized, and/or moved the goods and/or belongings of the plaintiffs and class members.
>
> 150. Further, the RCMP had no legal authority to handle the goods and/or belongings of the plaintiffs and class members.
>
> 151. The RCMP also intentionally exercised control over the goods and/or belongings of the plaintiffs and Class in a manner that interfered with the plaintiffs' and class members' rights to control the goods.

> 152. Further, the RCMP wrongfully took, used, destroyed, and/or exercised dominion over the goods and/or belongings of the plaintiffs and class members in a manner that was inconsistent with the RCMP's title to those goods and denied the plaintiffs' and class members' title to those goods.
>
> 153. Further, on occasion, the RCMP refused to return the goods and/or belongings of the plaintiff and class members without valid reason.

Section 4(1)(b) - Identifiable Class

Legal Principles

[135] The second requirement in s.4(1) of the *CPA* is that the plaintiff demonstrate some basis in fact there is an identifiable class of two or more persons. Bauman C.J. helpfully summarized the principles governing this requirement in *Jiang v. Peoples Trust Company*, 2017 BCCA 119, at para. 82:

> [82] In sum, the principles governing the identifiable class requirement may be summarized as follows:
>
> • the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
>
> • the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
>
> • the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
>
> • the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.

[136] In *Douez v. Facebook, Inc*., 2018 BCCA 186, at paras. 68-69, Justice Groberman addressed the need for a class definition to be as narrow as practical but without excluding persons with valid claims.

> [68] In order to fulfill its purpose, a class definition should be as narrow as practical, without excluding persons who have a valid claim. The problem of overbreadth was discussed by the Supreme Court of Canada in *Hollick v. Toronto (City)*, 2001 SCC 68:
>
> > [20] The respondent is of course correct to state that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues. …
> >
> > [21] The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in

> the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended: see W. K. Branch, Class Actions in Canada (1996), at para. 4.205; Webb v. K-Mart Canada Ltd. (1999), 1999 CanLII 15076 (ON SC), 45 O.R. (3d) 389 (S.C.J.) (claim for compensation for wrongful dismissal; class definition overbroad because included those who could be proven to have been terminated for just cause); Mouhteros v. DeVry Canada Inc. (1998), 1998 CanLII 14686 (ON SC), 41 O.R. (3d) 63 (Gen. Div.) (claim against school for misrepresentations about marketability of students after graduation; class definition overinclusive because included students who had found work after graduation).
>
> [69] A proper class definition will not include, within its ambit, large, identifiable groups of people who manifestly have no claim: see, for example, the recent decision of this Court in *Harrison* at paras. 43–44.
>
> [Emphasis added.]

[137] As noted by Groberman J. in the above quotation, every class member need not share the same interest. (See also: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, at para. 39.)

[138] Moreover, a class definition should include all members who may have a claim and is not overbroad merely because some class members may ultimately be determined to not be entitled to relief: *MacKinnon v Pfizer Canada Inc*., 2021 BCSC 1093, at paras. 74 and 82; *Jones v. Zimmer GMBH*, 2011 BCSC 1198, at para. 42, aff'd 2013 BCCA 21.

[139] Section 7 of the *CPA* specifically provides that certain matters are not a bar to certification, as follows:

> 7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;

> (d) the number of class members or the identity of each class member is not known;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[140] Thus, the fact that the class definition includes persons who are differently situated *vis a vis* the defendants is not a bar to certification. The fact that some class members have remedies that other class members do not is similarly not a bar to certification.

The Proposed Class

[141] The proposed class definition is as follows:

> (a) All individuals who had their movement impeded, were detained or arrested, or had their person or property searched or seized by RCMP officers in connection with enforcement of the Fairy Creek injunction during the Class Period, when attempting to access or travel within the injunction zone (the "Exclusion Zone Subclass"); and
>
> (b) All individuals who had their movement impeded, were detained or arrested, or had their person or property searched or seized by RCMP officers during the Class Period, in connection with the enforcement of the Fairy Creek injunction but for whom the RCMP did not recommend to bring charges (the **"**Catch and Release Subclass**"**).

Positions of the Parties

[142] The defendants challenge the proposed class definition on several grounds. First, they say the definition is overbroad in that it necessarily includes many individuals who suffered no infringement of their *Charter* rights and were not victims of the pleaded torts. For example, they say the Exclusion Zone Subclass includes individuals who were lawfully "arrested, detained or impeded" and the Catch and Release subclass includes individuals who were lawfully arrested and released without charge.

[143] Second, the defendants submit the proposed class is not rationally connected to the common issues because the legitimacy, or *bona fides*, of the RCMP's actions or conduct (in establishing and enforcing exclusion zones or in arresting and

releasing individuals) depends on the particular circumstances prevalent at the time and can only be addressed on an individual basis.

[144] Third, the defendants submit that the proposed class contains individuals with highly varied circumstances and interactions with the RCMP. The defendants specifically point out that the exclusion zone subclass will include individuals who have been convicted in criminal proceedings.

[145] Finally, the defendants submit that the word “impeded” in the proposed class definition is vague and ambiguous and includes an impermissible subjective element of self-identification.

[146] The plaintiffs submit that the defendants’ objections to the class definition again conflate issues of commonality under s. 4(1)(c) with issues of identifiable class. The plaintiffs deny the definition is overbroad or ambiguous. They specifically refer me to, and rely upon, *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 61 [*Nasogaluak*], where they say similar arguments raised by the defendants in opposition to certification of a class action were rejected by the Federal Court and the Federal Court of Appeal.

Discussion

[147] I agree with the defendants that the proposed class definition is overbroad and does not bear a rational relationship to the common issues.

[148] A glaring problem with the class definition is that both subclasses include “[a]ll individuals who had their movement impeded…”. Given the evidence before me of what transpired at Fairy Creek, it is obvious that virtually every individual who attended at Fairy Creek during the relevant time period would have had their movement impeded when attempting to access or travel within the injunction zone. Thus, the class as proposed would include every person who attended at Fairy Creek during the class period. However, not all such persons will have a claim against the defendant. For some, their movement will have been impeded because of the legitimate and lawful exercise of police powers in enforcing the injunction. In

the Media Access Decision, at para. 2, Thompson J. expressly recognized that the RCMP were entitled to interfere with access to the injunction area where there was a *bona fide* operational rationale for such interference. Additionally, in the Appeal of the Extension Decision, at para. 68, the court of appeal recognized that "the police as independent actors have discretion as to when and how to enforce court orders".

[149] Aside from the difficulties with the use of the word "impeded" in the class definition, the class definition is overbroad in other respects.

[150] The class definition includes individuals who were arrested, charged and convicted of breaching the Injunction Order. Such individuals can have no claim in relation to their detention and arrest.

[151] Additionally, the "Catch and Release" subclass as defined would include individuals who were legitimately and lawfully arrested by the RCMP for breaching the terms of the Injunction Order but ultimately not charged. The plaintiff, Arvin Dang, is possibly one such person. Although he deposes he was essentially arrested without just cause, the records of the RCMP indicate he was arrested for breaching the injunction and for obstruction, more particularly, for engaging in a roadblock. The circumstances of the arrest of Mr. Dang also illustrate how this class action will inevitably collapse into individual trials.

[152] The class definition also assumes a homogeneity or sameness with respect to the many exclusion zones established at various times and locations and with respect to the RCMP's enforcement tactics and operations. However, the evidence before me, including the plaintiffs' evidence, overwhelmingly establishes that the establishment of exclusion zones and the enforcement tactics implemented were dependent on a multiplicity of factors including time, geography, the particular circumstances being addressed, the number of officers available and the discretion of the officer in charge. In short, the exclusion zones and enforcement tactics were not the same for all of the putative class members.

[153] Relatedly, the putative class members were not homogeneous with the same interests, objectives and level of participation in the protests. Some attended Ferry Creek to peacefully and lawfully protest. Some were members of the media who attended to simply view and report on the protests. However, others clearly attended at Ferry Creek to deliberately breach the Injunction Order or to obstruct and interfere with the lawful enforcement operations of the RCMP.

[154] I have noted that the plaintiffs rely upon *Nasogaluak*, as supporting the proposed class definition. I do not agree that this decision assists the plaintiffs. *Nasogaluak* concerned certification of a class action on behalf of:

> All Aboriginal Persons [defined as the Indian, Inuit, and Métis peoples of Canada] who allege that they were assaulted at any time while being held in custody or detained by RCMP Officers in the Territories [defined as the Northwest Territories, Nunavut, and the Yukon Territory], and were alive as of December 18, 2016.

[155] The class definition in *Nasogaluak* is substantially different from the one before me. The class is restricted to aboriginal persons who were assaulted while in custody or detained by the RCMP. This is a much more restrictive and objective class definition than the one before me.

[156] The plaintiffs further rely on *Good v. Toronto (Police Services Board)*, 2014 ONSC 4583, aff'd 2016 ONCA 250 [*Good*], as supporting the proposed class definition. *Good* concerned certification of a class action by persons detained and arrested while demonstrating at the G20 summit held in Toronto in 2010. At first instance, certification of the class action was denied on various grounds. On appeal to the Divisional Court of Ontario, a differently framed class action was certified. The decision of the Divisional Court was upheld by the Ontario Court of Appeal. There are obvious similarities between the circumstances in *Good* and those before me in that both concern demonstrations or protests and the lawfulness of detentions and arrests by police. However, there are also marked differences. Specifically, the class definition that was certified in *Good* was much more circumscribed than the definition before me. In *Good*, the class comprised only individuals who were

arrested at specific locations on specific dates. This is in marked contrast to the class definition proposed before me.

[157] Accordingly, in my view, the plaintiffs have not demonstrated a basis in fact for an identifiable class of two or more persons.

Section 4(1)(c) – Common Issues

Legal Principles

[158] Section 4(1)(c) of the CPA requires that the claims of the class members raise common issues whether or not those common issues predominate over issues affecting only individual members. The term “common issues” is defined in s. 1 of the *CPA* as follows:

> "common issues" means
>
> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[159] In *Pro-Sys*, at para. 108, Rothstein J. set out some of the key considerations that apply in assessing commonality.

> [108] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that “[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis” (para. 39). I list the balance of McLachlin C.J.’s instructions, found at paras. 39-40 of that decision:
>
> > (1) The commonality question should be approached purposively.
> >
> > (2) An issue will be “common” only where its resolution is necessary to the resolution of each class member’s claim.
> >
> > (3) It is not essential that the class members be identically situated vis-à-vis the opposing party.
> >
> > (4) It not necessary that common issues predominate over non-common issues. However, the class members’ claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
> >
> > (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[160] The "common success" requirement was further addressed in *Pioneer Corp. v. Godfrey*, 2019 SCC 42, at para. 105, as follows:

> [105] In *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, this Court clarified that the "common success" requirement in *Dutton* should be applied flexibly. "Common success" denotes not that success for one class member must mean success for all, but rather that success for one class member must not mean *failure* for another (para. 45). A question is considered "common", then, "if it can serve to advance the resolution of every class member's claim", even if the answer to the question, while positive, will vary among those members (para. 46).

[161] In *Finkel*, at para. 22, the test was succinctly described as follows:

> [22] In contrast, the common issues requirement is often controversial. This may be so, at least in part, because resolution of common issues is the heart of a class proceeding. The commonality threshold is low; a triable factual or legal issue which advances the litigation when determined will be sufficient. The critical factors in determining whether an issue is common are: (i) its resolution will avoid duplicative fact-finding or legal analysis; (ii) it is a substantial ingredient of each class member's claim and must be resolved to resolve the claim; and (iii) success for one class member on the issue will mean success for all: *Thorburn v. British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480 at paras. 35-38.

[162] The evidentiary burden on the plaintiff in relation to the commonality requirement is set out in *Pro-Sys*, at para. 110:

> [110] … in order to establish commonality, evidence that the acts allegedly actually occurred is not required. Rather, the factual evidence required at this stage goes only to establish whether these common issues are common to all the class members.

[163] In *Trotman v. WestJet Airlines Ltd*., 2022 BCCA 22 [*Trotman*], at para. 57, Bauman C.J. described the evidentiary burden as follows:

> [57] The certification judge is not to conduct an adjudication on the merits. There need only be some basis in fact for the proposition that the issue can be determined on a class-wide basis: see *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 99 [*Pro-Sys*], citing *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25. The evidence at this stage "goes only to establishing whether these questions are common to all the class members": *Pro-Sys* at para. 110. Said another way: "is there some evidence of class-wide commonality, that is some evidence that the proposed common issue can be answered on a class-wide basis": *Grossman v. Nissan Canada*, 2019 ONSC 6180.

The Proposed Common Issues

[164] The proposed common issues are:

A. Charter Breaches

1. Do any searches and seizures, arrests, detentions, and/or restrictions of movement pursuant to the Exclusion Zone Policy constitute a violation of Class members' rights under sections 2, 7, 8 and/or 9 of the Charter?

2. Do any searches and seizures arrests, detentions, and/or restrictions of movement pursuant to the Catch and Release Policy constitute a violation of Class members' rights under sections 2, 7, 8 and/or 9 of the Charter?

B. Section 1 of the Charter

3. Were any infringements of the Charter justified pursuant to section 1 of the Charter?

C. Torts Committed by the RCMP

4. Did the police detain the members of the Class in a manner constituting false imprisonment?

5. Did the police subject the Class Members to physical handling or contact, the physical use of force, searches of their person, and/or physical violence and assaults in a manner constituting the torts of assault or battery?

6. Did the police improperly handle, cause damage to, seize, and/or destroy the goods of Class members in a manner constituting conversion or trespass?

D. Damages

7. Are the Class members entitled to damages pursuant to section 24(1) of the Charter for breaches of sections 2, 7, 8 and or 9 of the Charter?

    a. To the extent the Court concludes that Class members are entitled to damages pursuant to section 24(1) of the Charter, can an aggregate award of damages be made pursuant to section 29(1) of the Class Proceedings Act?

8. Are the Class members entitled to damages for false imprisonment, assault or battery?

    a. To the extent the Court determines that Class members are entitled to damages for false imprisonment and or assault and battery, can an aggregate damages award be made pursuant to section 29(1) of the Class Proceedings Act?

9. Are the Class members entitled to damages for conversion or trespass?

> a. To the extent the Court determines that Class members are entitled to damages for conversion or trespass, can an aggregate damages award be made pursuant to section 29(1) of the Class Proceedings Act?
>
> 10. Were the defendants guilty of conduct justifying awards of aggravated and punitive damages?

Positions of the Parties

[165] The plaintiffs submit all of the proposed common issues are certifiable as being common across the class and that their resolution will advance the proceeding. They say the lawfulness of the RCMP's use of the Exclusion Zone and Catch and Release policies is common across the class. They say that if the policies are determined to be unlawful, then any enforcement actions are in violation of the putative class members' *Charter* rights.

[166] The defendants submit that the plaintiffs have not demonstrated a basis in fact for the existence of the policies on which the action is based. They further say the lawfulness of a particular exercise of police conduct is not a common issue but one which involves consideration of the particular circumstances. For example, they say it is necessary to determine whether a specific temporary exclusion zone on a specific day was reasonably necessary, issues which cannot be addressed on a class-wide basis. Additionally, they say there is no basis in fact for an aggregate damages award in tort or under the *Charter* or for punitive damages.

Discussion

Common Issues 1, 2 and 3

[167] Common issues 1, 2 and 3 address the *Charter* claims of the plaintiffs, which are fundamental to the entire class action. Issues 1 and 2 ask whether <u>any</u> searches, seizures, arrests, detentions, and/or restrictions of movement pursuant to the Exclusion Zone Policy and the Catch and Release Policy constitute violations of putative class members' *Charter* rights under sections 2, 7, 8 and/or 9 of the *Charter*. There are, in my view, several problems with these common issues as posed.

[168] First, the use of the word “any” is problematic. The word “any” means one or more. The proposed common questions are therefore asking if one or more of the searches, seizures, arrests, detentions, and/or restrictions of movement were in breach of *Charter* rights. The answers to these questions do not advance each class member’s claim. A single arrest could be in breach of a particular class members *Charter* rights but a single wrongful arrest does not advance the other class members claims. The lack of commonality in the questions as posed can be seen by comparing the common questions certified in *Good*. In *Good,* there were separate subclasses for each specific location where the mass arrests and detentions were alleged to have occurred. The common question certified for each location was:

> 1. Did each mass detention and/or arrest (or the prolonged duration thereof) constitute (a) false imprisonment of the respective subclass members at common law and/or (b) arbitrary detention or imprisonment contrary to s. 9 of the Charter including a determination whether the mass detention and/or arrests are justified under s. 1?

[169] There was commonality in each subclass in *Good* because the putative members of the location subclasses were arrested/detained in the same event. In contrast, here the searches, seizures, arrests, detentions, and/or restrictions of movement occurred at different times and locations and under different circumstances. There is no unifying or common factor in the case before me as there was in *Good*.

[170] Second, Common issues 1 and 2 assume the existence of an “Exclusion Zone Policy” and a “Catch and Release Policy” but these terms are not defined. How is a putative class member to know whether their movement was impeded because of the exclusion zone policy or the catch and release policy or for some other reason that does not form part of the class action?

[171] Moreover, even if the definitions of “Exclusion Zone Policy” and “Catch and Release Policy” from paras. 35 and 45 of the ANOCC are used in the common questions, there remains a difficulty. The “Exclusion Zone Policy”, as defined in para. 35 of the ANOCC, is not in any real sense a policy. It does little more than describe such zones and allege the RCMP exercised discretion regarding the persons who

were permitted to pass through such zones. The “Exclusion Zone Policy”, as defined, does not raise a common issue given the many different exclusion zones implemented over time, in different locations and for different reasons. At a minimum, to raise a common issue, the putative class would need to be subdivided into class members who were subject to search, seizure, arrest, detention or impeded movement at a particular and identifiable exclusion zone. The questions as posed do not do this. Additionally, it is not possible to amend the proposed questions to identify particular exclusion zones because the number of subclasses would then be unmanageable.

[172] The “Catch and Release Policy”, as defined in para. 45 of the ANOCC, refers to “general and indiscriminate detention and arrests of persons … with the aim of deterring lawful protest” and to “a systematic practice and policy of detaining putative class members only to then release them without laying any charges”. In my view, this is not a definition of a discernible policy but a conclusory allegation of wrongdoing.

[173] It is again useful to contrast the catch and release policy before me with that in *Good*. In *Good*, there was a command order for mass detentions which was described by the Divisional Court, at paras. 47-48, as being an important aspect of the case.

> [47] A central feature of the above test is the requirement that the officer, who gives the order to detain a person, must have reasonable cause to suspect that the person "is criminally implicated in the activity under investigation". In this case, the allegation is that the command order was given without regard to whether any particular individual swept up in the mass detention was or was not implicated in the unlawful activity with which the police were concerned. In other words, the allegation is that the police engaged in an approach of detaining people first and then later deciding whether any of those persons were actually engaged in criminal activity.
>
> [48] This is a very important aspect of the first common issue….
>
> [Emphasis added.]

[174] Also, in *Good*, the Divisional Court found at paras. 35 and 58-61, that there was some evidence establishing a basis in fact for the allegations of arbitrary arrests

and detentions in relation to each subclass, including evidence from police that they had no discretion to not detain or arrest.

> [35] In this case, there is a single defendant and a single course of conduct alleged. Each of the proposed subclasses (save for the Detention Centre subclass) have the commonality of an alleged command order being made ordering the detention of the class members without regard for the individual characteristics or conduct of each class member. Indeed, it is alleged that one command officer, Superintendent Fenton, issued the command order in at least three of the five location-based subclasses.
>
> …
>
> [59] It was not therefore relevant whether the evidence at the certification stage could prove that all of the arrests were unlawful. Rather, what was relevant was whether there was some evidence that could suggest the possibility of that result. In that regard, the appellant filed affidavits from persons involved who attested to the arbitrary nature of the detentions and arrests supplemented by comments from various police officers that they had no discretion not to detain and arrest. The appellant also pointed to various police notes recording the issuance of mass arrest orders, instructions that persons detained were not [page432] to be allowed to leave before being arrested, and that the intent was to detain and arrest not to disperse the crowd.
>
> …
>
> [61] The evidence proffered by the appellant clearly establishes some basis in fact for the proposition that the members of the location-based subclasses were arbitrarily detained and/or arrested and that consequently that they were falsely imprisoned at common law and/or their rights under s. 9 of the Charter were violated. Proposed common issue #1 is therefore a suitable common issue for certification purposes.

[175] The evidence proffered in *Good* stands in marked contrast to the evidence before me. In particular, before me there is no evidence of a command order or policy to arbitrarily search, detain or arrest. The evidence before me presented by the plaintiffs does little more than establish that there were searches, seizures, arrests and detentions at different dates and locations and under different circumstances. The plaintiffs offer no evidence of a command order, systematic practice or policy applying throughout the relevant time period and at all locations within Ferry Creek to arbitrarily search, arrest or detain. In contrast, the evidence of the defendants is that were no umbrella command orders or policies to arbitrarily search, arrest or detain and that such decisions were left to the discretion of watch commanders or the officers present at the disparate locations.

[176] I add that the ANOCC itself suggests the absence of an umbrella command order or policy in that it is expressly pleaded RCMP decisions were, in some respects, discretionary. At para. 35(b) of the ANOCC it is expressly pleaded "the RCMP retained full discretion" concerning what individuals would be permitted to enter exclusion zones. Similarly, para. 37 of the ANOCC states the Exclusion Zone Policy "provided the RCMP wide discretion" and para. 50 states "media access to exclusion zones were at the complete discretion of the RCMP".

[177] The plaintiffs' reliance on policies in the common issues is also problematic in that *Charter* rights are individual in nature and require individual assessments. This was clearly set out by Justice D. Smith in *Thorburn v. British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480, at paras. 41-42 [*Thorburn*]:

> [41] As the litigation progressed it became apparent that the appellants could not rely merely on their claim that the policy for strip searching all new arrivals (with the exception of the SIPPS and Bylaw offenders) was unreasonable in order to establish a cause of action for the proposed class members. While a warrantless search is presumptively unreasonable, a Charter right is individual in nature. Individual assessments would be necessary to determine if reasonable grounds existed (based on the objectively-justifiable subjective belief of the arresting officer or staff member conducting the search) for the arrest and the search incidental to the arrest of each class member, and whether the manner of the search was reasonable in all of the circumstances unique to each proposed class member. On the basis of Golden, those circumstances would include a consideration of the likelihood that a detainee might be remanded into custody and thereby be mingling with the prison population. Each of these legal and factual determinations would require a consideration of the multifarious circumstances of each class member (e.g., the reason for the arrest, any prior criminal record or acts of violence and/or possession of weapons, and the extent of the possibility he or she might be remanded into custody). An unreasonable policy alone could not provide the foundation for determining each class member's cause of action of an unreasonable search; only an individual assessment of the relevant circumstances unique to each class member would allow a judge to determine if a cause of action had been established.
>
> [42] Both the initial Common Issues and the Supplementary Common Issues set out broadly-framed issues that include: (i) elements of the well-established legal tests for an unlawful search; (ii) settled law regarding the shift in onus for establishing a s. 8 Charter breach, (iii) the principles for awarding Charter damages (from Ward); and (iv) the availability of statutory defences (under the former and current legislation) and the common law defences (from Golden and the common law power of search incidental to arrest). The resolution of these "common issues" in practical terms resolves

> no "common" element of each member's cause of action (an unlawful search), as each of the elements of the cause of action (reasonable grounds for arrest, search incidental to arrest, reasonableness of the manner of the search including the likelihood of a member being placed into the prison population, and the appropriateness of Charter damages) requires individual findings specific to the proposed class member. Accordingly, even if the answers to the "common issues" could be said to clarify the questions they pose, they would not advance the litigation in any meaningful way as they would not avoid the duplication that would be necessary for the individual fact finding and legal analysis of each class member's claim. In other words, a finding of a s. 8 Charter violation as a result of an unreasonable search of one class member will not found a similar finding for another class member as a finding of an unreasonable search is dependent on a multitude of variable circumstances unique to each class member.
>
> [Emphasis added.]

[178] *Cirillo v. Ontario*, 2019 ONSC 3066, aff'd 2021 ONCA 353 [*Cirillo*] is to a similar effect. *Cirillo* concerned a proposed class action claiming redress for the Crown's failure to hold timely bail hearings for accused persons. Certification was denied at the Ontario Superior Court, *inter alia*, on the basis of a lack of commonality.

> [68] The proposed common issues relating to the Charter claims – the only claims for which there could be a viable cause of action – call for an assessment of whether, "By its operation, management or administration of bail hearings in Ontario, did the Defendant breach the class members' *Charter* rights under ss. 7, 9, 11(d), 11(e) and/or 12?" The specific questions proposed by the Plaintiff then ask whether, if there is a rights infringement, the actions of the Defendant can be saved by s. 1 of the *Charter*, and, if not, whether class members are entitled to damages and how these might be quantified.
>
> [69] The proposed common issues pertaining to the Charter claims require individualized and particularized assessments of each case. They are not amenable to the kind of universal and generalized analysis that the Plaintiff would ascribe to them. The Defendant rightly acknowledges that the Plaintiff "only has to show some evidence of commonality – that is, some evidence that the proposed common issue applies class-wide": *Kalra v Mercedes Benz,* 207 ONSC 3795, para 46. Nevertheless, even this modest evidentiary requirement is not met. There are therefore no common issues here that can be certified under s. 5(1)(c) of the *CPA*.
>
> [Emphasis added.]

[179] The Ontario Court of Appeal agreed with the motion judge, at para. 59:

> [59] The motion judge noted that "[a]t the very least, the claim must share not only a common court infrastructure but a common experience of having a

> specific Charter right violated." He noted that all of the Charter issues that were said to be engaged "share[d] a common thread of reasonableness" and that "[r]easonableness is a difficult issue to assess as a common issue." He concluded that "[t]he proposed common issues pertaining to the Charter claims require individualized and particularized assessments of each case." I agree with that conclusion.

[180] As in *Thorburn* and *Cirillo*, individualized and particularized assessments are required to resolve the *Charter* issues in this case. Indeed, given the nature of the protests at Fairy Creek, the multiple and disparate locations where enforcement actions took place, the differing circumstances for the different enforcement operations, the evolving nature of the protests and enforcement actions, and the time period involved, there is a very high degree of individualized and particularized assessments that are required in this case to resolve the *Charter* issues. There is no commonality that allows them to be resolved on a class wide basis.

[181] Accordingly, I decline to certify common issues 1, 2 and 3.

Common Issues 4, 5 and 6

[182] Common Issues 4, 5 and 6 address the various tort claims of the plaintiffs for false imprisonment, assault and conversion or trespass. The parties made minimal submissions pertaining to these common issues as they are largely subsumed in the *Charter* issues. I likewise do not intend to address these issues in detail. Suffice it to say that these common issues fail for the same reasons as the *Charter* issues fail, namely, there is no unifying or common factor and the claims require highly individualized and particularized assessments.

Common Issues 7-10

[183] Common Issues 7-10 address damages. In view of my findings on the proposed substantive common issues, I do not need to address the damages issues.

Sections 4(1)(d) and (e)

[184] I have determined that the plaintiffs have not met the ss. 4(1)(b) and (c) requirements of the *CPA* and, therefore, do not need to consider the ss.4(1)(d) and

(e) requirements. However, I am firmly of the view that a class action is not the preferable procedure, due to the lack of commonality. Any class action will be unmanageable and will inevitably collapse into multiple sub-classes or individual issues trials. Alternative preferable procedures include individual actions and complaints to the Independent Civilian Review and Complaints Commission and the Independent Investigations Office.

Conclusion and Orders

[185] The application for certification is dismissed.

[186] The parties have leave to speak to me regarding costs if necessary.

"Giaschi J."