Civilian Review and Complaints Commission for the RCMP

Commission civile d'examen et de traitement des plaintes relatives à la GRC

PUBLIC INTEREST INVESTIGATION INTO THE EVENTS AND THE ACTIONS OF THE RCMP MEMBERS INVOLVED IN THE NATIONAL ENERGY BOARD HEARINGS IN BRITISH COLUMBIA

Final Report
DECEMBER 2020

Canada

Interim Report

PUBLIC INTEREST INVESTIGATION INTO THE EVENTS AND THE ACTIONS OF THE RCMP MEMBERS INVOLVED IN THE NATIONAL ENERGY BOARD HEARINGS IN BRITISH COLUMBIA

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CIVILIAN REVIEW AND COMPLAINTS COMMISSION FOR THE ROYAL CANADIAN MOUNTED POLICE

Report Following a Public Interest Investigation Regarding Allegations that the RCMP Improperly Monitored and Disclosed Information of Persons and Groups Seeking to Participate in National Energy Board Hearings

Royal Canadian Mounted Police Act
Subsection 45.76(1)

Complainant

British Columbia Civil Liberties Association

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INTRODUCTION

[1] In 2012 and 2013, the National Energy Board ("NEB") conducted a series of public hearings as part of the assessment process for the planned Northern Gateway Project, an oil pipeline that would run from the Alberta oil sands to a port in British Columbia. The pipeline and related issues inspired significant controversy, particularly among Aboriginal and environmental conservation groups. Vocal opposition and protest, including the rise of the Idle No More movement, broke out across Canada in response.

[2] In British Columbia, where many of the NEB hearings took place, some of the hearings were met with protests. These protests were generally peaceful, but some disruptive incidents were a cause of concern for the NEB. As the police force of jurisdiction in much of British Columbia, as well as possessing national security and critical infrastructure protection mandates, the Royal Canadian Mounted Police ("RCMP") was called upon to assist with event security as well as to assess potential criminal threats. This meant that RCMP members were often physically present at hearings and protests, and also meant that the RCMP engaged in intelligence-gathering activities regarding upcoming protests and demonstrations in order to identify potential criminal activity.

[3] The British Columbia Civil Liberties Association ("BCCLA") has raised a number of concerns about the activities of the RCMP in relation to protests, demonstrations, and other lawful forms of dissent surrounding the pipeline hearings. These allegations call into question the RCMP's ability to fulfil its law enforcement and national security obligations while respecting lawful dissent. This report serves to provide a thorough review of the RCMP's conduct with respect to the allegations.

COMPLAINT AND PUBLIC INTEREST INVESTIGATION

[4] The Commission received the complaint from the BCCLA on February 6, 2014 (**Appendix A**). The BCCLA stated in its complaint that, based upon documents provided pursuant to an *Access to Information Act* request, members of the RCMP:

(1) Improperly monitored activities of various persons and groups seeking participation in NEB hearings;
(2) Improperly engaged in covert intelligence gathering and/or infiltration of peaceful organizations; and
(3) Improperly disclosed information concerning persons and groups.

[5] On February 20, 2014, the Commission notified the Minister of Public Safety and the RCMP Commissioner that it would conduct a public interest investigation into the BCCLA's complaint (**Appendix B**), pursuant to the authority granted to it under subsection 45.43(1) of the *Royal Canadian Mounted Police Act* ("RCMP Act") (now subsection 45.66(1)).

[6] On February 20, 2014, the Commission also notified the BCCLA that it would conduct a public interest investigation in response to its complaint.

[7] Pursuant to subsection 45.76(1) of the RCMP Act, the Commission is required to prepare a written report setting out its findings and recommendations with respect to the complaint. This report will examine the events and the actions of the RCMP members involved in the NEB hearings in British Columbia. The Commission's role is to examine the conduct of RCMP members in the execution of their duties against applicable training, policies, procedures, guidelines and statutory requirements and, where applicable, make remedial recommendations. This report constitutes the Commission's investigation into the issues raised in the complaint, and the associated findings and recommendations. A summary of the Commission's findings and recommendations can be found in **Appendix C**.

COMMISSION'S REVIEW OF THE FACTS SURROUNDING THE EVENTS

[8] It is important to note that the Commission is an agency of the federal government, distinct and independent from the RCMP. When conducting a public interest investigation, the Commission does not act as an advocate either for the complainant or for RCMP members. The Commission's role is to reach conclusions after an objective examination of the evidence and, where judged appropriate, to make recommendations that focus on steps that the RCMP can take to improve or correct conduct by RCMP members.

[9] The Commission's findings, as detailed below, are based on a thorough examination of the extensive investigation materials, and the applicable law and RCMP policy. It is important to note that the findings and recommendations made by the Commission are not criminal in nature, nor are they intended to convey any aspect of criminal culpability. A public complaint is part of the quasi-judicial process, which weighs evidence on a balance of probabilities. Although some terms used in this report may concurrently be used in the criminal context, such language is not intended to include any of the requirements of the criminal law with respect to guilt, innocence or the standard of proof.

[10] The Commission has also relied in large part on the independent investigation conducted by the Commission's investigator, which included a review of several thousand pages of documents provided by the RCMP at the national and divisional (provincial) level as well as discussions with RCMP officials. The Commission wishes to acknowledge that the RCMP's "E" Division (British Columbia) provided complete cooperation to the Commission throughout the public interest investigation process.

Northern Gateway Project

[11] Canada has the third-largest reserve of oil in the world.[1] According to Natural Resources Canada, the "[t]otal Canadian proven oil reserves are estimated at 171.0 billion barrels, of which 166.3 billion barrels are found in Alberta's oil sands and an additional 4.7 billion barrels in conventional, offshore and tight oil formations."[2] While being host to most of Canada's oil reserves, Alberta is landlocked. This presents significant challenges with respect to transporting oil both within Canada as well as to markets in the United States of America and overseas. Historically, oil pipelines have played a critical role in such transport.

[12] The Northern Gateway Project consists of a twin pipeline expected to ". . . run 1,177 km from Bruderheim, Alberta, across northern British Columbia, to the deep-water port of Kitimat."[3] One of the primary purposes of the Project would be to provide access to Canadian oil to international markets, including Asia and the United States West Coast.[4]

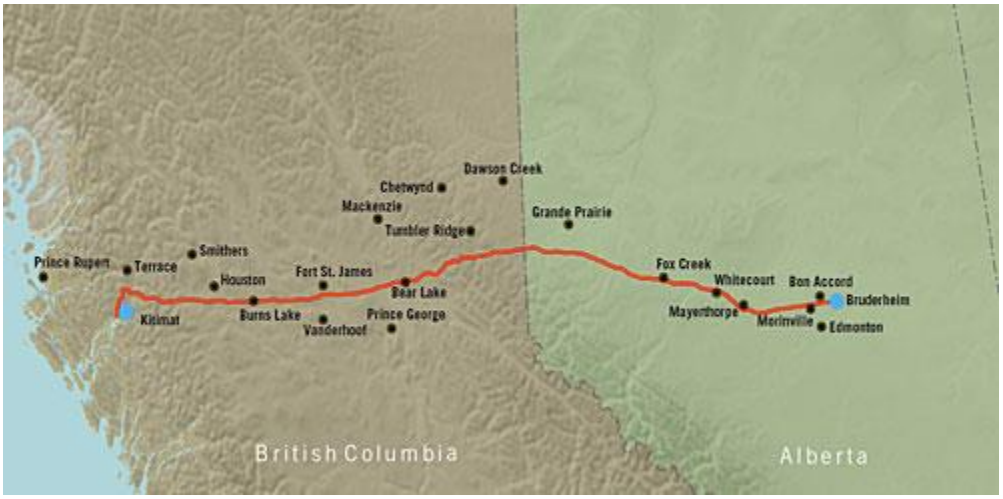

Image source: NorthernGateway.ca

[13] The route would cross private land in about half of the Alberta portion and over 90 percent of the route in British Columbia would be on provincial Crown lands, while "[m]uch of the route in both provinces would cross lands currently and traditionally used by Aboriginal groups."[5] In addition to the pipeline, the Project would ". . . require a terminal

[1] Behind Saudi Arabia and Venezuela according to the U.S. Energy Information Administration, 2012 World Proved Reserves, www.eia.gov/countries/index.cfm?view=reserves.
[2] http://www.nrcan.gc.ca/energy/oil-sands/18085 (Date Modified: 2016-02-19).
[3] Northern Gateway, online: http://www.gatewayfacts.ca/About-The-Project/Project-Overview.aspx.
[4] Enbridge Northern Gateway Project Joint Review Panel, (2013), *Considerations: Report of the Joint Review Panel for the Enbridge Northern Gateway Project* (Vol. 2), p. 3, online: http://gatewaypanel.review-examen.gc.ca/clf-nsi/dcmnt/rcmndtnsrprt/rcmndtnsrprtvlm2-eng.pdf (accessed November 14, 2016) [Joint Review Panel Report (Vol. 2)].
[5] Ibid., p. 2

to be built and operated at Kitimat including two tanker berths, three condensate storage tanks, and 16 oil storage tanks."[6]

[14] The Project would cost approximately $7.9 billion to build with a projected completion date of late 2018.[7] It would result in Kitimat becoming a much busier place, with 190–250 oil tanker calls per year.[8] The Project could operate for 50 years or more.

[15] As part of the approval process, the Project was subject to an assessment by a Joint Review Panel that had been established in 2009 by the NEB and the Minister of the Environment pursuant to the *Canadian Environmental Assessment Act* and the *National Energy Board Act*.[9] The direction given to the Panel was to "conduct an environmental assessment of the project and submit a report recommending whether or not the project was in the public interest."[10] The Panel consisted of two members of the NEB, and a third temporarily appointed one.[11]

[16] Defined as an expert tribunal, the Joint Review Panel was ". . . required to determine the sufficiency of the application, hold public hearings, and conduct a technical analysis of the project based on all of the evidence, ultimately making a recommendation on whether the project should be approved or not."[12] The Joint Review Panel would report its findings and recommendations to the Governor in Council for its consideration on whether to approve the Project.

[17] On December 19, 2013, the Project received the Joint Review Panel's approval subject to 209 conditions (including conditions requiring affected Aboriginal groups to have input into the planning, construction and operation of the Project, environmental and monitoring commitments, emergency preparedness and response matters, and the delivery of economic benefits). The federal government approved the Project on June 17, 2014, when the Governor in Council directed the NEB to issue Certificates of Public Convenience and Necessity for the Northern Gateway Project. Throughout the approval process, the Project has been the subject of considerable media and public attention.[13]

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[6] National Energy Board. *Annual Report to Parliament 2013*, p. 49, online: https://www.neb-one.gc.ca/bts/pblctn/nnlrprt/archive/2013/nnlrprt2013-eng.html (accessed November 14, 2016) [NEB Annual Report 2013].
[7] Joint Review Panel Report (Vol. 2), *supra* note 4 at p. 3.
[8] *Gitxaala Nation v Canada*, 2016 FCA 187 at paras 13–14 [*Gitxaala Nation*].
[9] Agreement between the National Energy Board and the Minister of the Environment Concerning the Joint Review of the Northern Gateway Pipeline Project, December 4, 2009, online: https://apps.neb-one.gc.ca/REGDOCS/File/Download/591960.
[10] Joint Review Panel Report (Vol. 2), *supra* note 4 at p. 3.
[11] Ibid.
[12] Enbridge Northern Gateway Project Joint Review Panel. (2013). *Connections: Report of the Joint Review Panel for the Enbridge Northern Gateway Project* (Vol. 1), p. 8, online: http://gatewaypanel.review-examen.gc.ca/clf-nsi/dcmnt/rcmndtnsrprt/rcmndtnsrprtvlm1-eng.pdf (accessed November 14, 2016) [Joint Review Panel Report (Vol. 1)].
[13] "Northern Gateway Pipeline", *CBC News* Special Report, online: CBC News www.cbc.ca/calgary/features/northerngateway.

[18] In June 2016, the Federal Court of Appeal quashed the approval of the Northern Gateway Project on the basis that the federal government had failed to properly consult First Nations affected by the pipeline.[14] This followed a request for judicial review of the Project's approval that was brought by a number of British Columbia Aboriginal groups. The federal government later decided not to appeal this decision,[15] and on November 29, 2016, announced that it would not approve the Northern Gateway Project.[16]

National Energy Board

a. National Energy Board Mandate

[19] The NEB is the independent energy and safety regulator of Canada. It was established in 1959, following the recommendations of the Royal Commission on Energy,[17] with the mandate to "promote safety and security, environmental protection and economic efficiency in the Canadian public interest, in the regulation of pipelines, energy development and trade."[18]

[20] The main responsibilities of the NEB are established in the *National Energy Board Act* ("NEB Act"), and include regulating the complete life cycle of any pipeline projects that cross international borders or provincial boundaries. Before a pipeline can be built, the proponent must file an application with the NEB and the NEB must assess the pipeline's proposed design, construction and operation for safety and for adequate environmental protection, and must ensure that the project is in the public interest.[19]

b. National Energy Board Hearings

[21] In its Annual Report, the NEB states that it ". . . listens to what Canadians have to say about how energy infrastructure is developed and regulated, engaging them in meaningful dialogue about issues and solutions, and publically sharing information about regulatory initiatives."[20]

[22] The NEB conducts public hearings as part of the assessment process for major energy projects, including international or interprovincial pipelines like the Northern Gateway Project. Public hearings give ". . . participants . . . an opportunity to express their

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[14] *Gitxaala Nation*, *supra* note 8.
[15] "Ottawa won't appeal court decision blocking Northern Gateway pipeline", *CBC News* (September 20, 2016), online: CBC News http://www.cbc.ca/news/politics/enbridge-northern-gateway-federal-court-1.3770543 (accessed November 14, 2016).
[16] "Trudeau cabinet approves Trans Mountain, Line 3 pipelines, rejects Northern Gateway", *CBC News* (November 29, 2016), online: CBC News http://www.cbc.ca/news/politics/federal-cabinet-trudeau-pipeline-decisions-1.3872828 (accessed November 30, 2016).
[17] Royal Commission on Energy, online: http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/borden1958-59-eng/borden1958-59-eng.htm.
[18] NEB Annual Report 2013, *supra* note 6 at p. 9 (accessed November 15, 2016).
[19] National Energy Board. *Issue: NEB's full lifecycle oversight*, online: https://www.neb-one.gc.ca/bts/nws/rgltrsnpshts/2016/09rgltrsnpsht-eng.html (accessed November 15, 2016).
[20] NEB Annual Report 2013, s*upra* note 6 at p. 58.

point of view, and possibly ask or answer questions about a proposed project or application. This provides the NEB with the information it needs to make a transparent, fair and objective recommendation or decision on whether or not a project should be allowed to proceed or an application should be approved."[21] During hearings, the topics discussed typically include the design and safety of the project, environmental matters, the impact of a project on directly affected Aboriginal groups, socio-economic and land matters, the economic feasibility of the project, and the Canadian public interest.[22]

[23] The NEB website contains information about upcoming hearings, how to participate in a hearing's process,[23] as well as its Participant Funding Program. The NEB has an active presence on social media, including Twitter (@NEBCanada), where under the hash tag #NEBhearing it provides content, links to material and live updates of presentations and topics being discussed in public hearings. For those who cannot attend the hearings in person, the NEB hearings can even be listened to live online on the NEB website.

c. National Energy Board Role with Respect to Security and Intelligence

[24] The NEB is part of the portfolio of Natural Resources Canada, the mandate of which includes the protection of critical infrastructure under federal jurisdiction. The RCMP and Natural Resources Canada are jointly responsible for the security of Canada's critical infrastructure, with Natural Resources Canada specifically responsible for energy infrastructure, such as energy transmission lines and oil and gas pipelines. Canada defines "critical infrastructure" as "processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of Canadians and the effective functioning of government."[24] Disruptions to critical infrastructure "could result in catastrophic loss of life, adverse economic effects and significant harm to public confidence."[25] The vulnerability of critical infrastructure to attacks such as sabotage and terrorism is well understood, as these systems are typically large and decentralized and difficult to protect.[26]

[25] The *Public Safety Act, 2002*, which was enacted by Parliament in 2004, amended the NEB Act "by extending the powers and duties of the National Energy Board to include matters relating to the security of pipelines and international power lines."[27]

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[21] National Energy Board, "National Energy Board Hearing Process Handbook", online: https://www.neb-one.gc.ca/prtcptn/hrng/hndbk/index-eng.html (accessed November 15, 2016).
[22] Ibid.
[23] Section 55.2 of the NEB Act sets out when the NEB will allow a person to participate in a hearing to consider a pipeline project.
[24] Public Safety Canada, "Critical Infrastructure", online: https://www.publicsafety.gc.ca/cnt/ntnl-scrt/crtcl-nfrstrctr/index-en.aspx (accessed November 16, 2016).
[25] Ibid.
[26] Canada, Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Air India Flight 182: A Canadian Tragedy, Volume Two, Part 2: Post-Bombing*, p. 531.
[27] Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities*, p. 78 [Maher Arar Inquiry, *A New Review Mechanism for the RCMP's National Security Activities*].

[26] The NEB is reported to ". . . operate with a high degree of autonomy, including in [its] interaction with elements of the Canadian security and intelligence community."[28] In relation to this infrastructure protection role, the RCMP and Natural Resources Canada share information and intelligence.[29] In addition to its interaction with law enforcement, the NEB also shares information with the Canadian Security Intelligence Service ("CSIS"), and the Integrated Threat Assessment Centre[30] ("ITAC") may consult with Natural Resources Canada with respect to "subject matter within its expertise, or during the preparation of an ITAC threat assessment."[31]

[27] In the context of the public hearing process, one of the set NEB goals is to hear from those directly affected by a project in a safe and respectful environment. The NEB considers the safety of hearing participants and the general public who attend hearings to be a first priority. The *Canada Labour Code* guides the NEB in ensuring that all requirements are met for a safe public hearing.[32]

[28] According to its Annual Report, the NEB ". . . conduct[s] a security assessment on a hearing location prior to any hearing, and would look at things such as publicly available information to assess any prior planned events that may have an impact on a venue. [The NEB] work[s] with local officials and federal colleagues such as the RCMP to conduct the assessment."[33] The security assessment is then used to ensure that plans are in place to provide for security officers, emergency evacuation plans, and other plans aimed to protect everyone in participation.

d. Interaction between the RCMP and the National Energy Board

[29] As noted above, the RCMP and Natural Resources Canada share information and intelligence in following their critical infrastructure security mandates, and the NEB works with local and federal officials (including the RCMP) in the conduct of security assessments related to the public hearing venues.[34]

[30] Organized under the RCMP's National Security Criminal Investigations Program, the RCMP Critical Infrastructure Intelligence Team ("CIIT") focuses on the Government of Canada's critical infrastructure protection mandates. In doing so, it produces ". . . threat and risk assessments, indications and warnings, and intelligence assessments relevant to critical infrastructure, as well as provid[es] support for investigations related to threats

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[28] *Idem*, p. 207.
[29] Ibid.
[30] ITAC is a federal agency that brings together the various participants in Canada's security intelligence community, including CSIS, the RCMP, the Canada Border Services Agency and Transport Canada, to prevent and reduce the effects of terrorist incidents on Canadians and Canadian interests at home and abroad. ITAC analyses security intelligence from its partner institutions and produces threat assessments that are distributed throughout the security intelligence community.
[31] Maher Arar Inquiry, *A New Review Mechanism for the RCMP's National Security Activities*, *supra* note 27 at p. 208.
[32] NEB Annual Report 2013, *supra* note 6 at p. 61 (accessed January 11, 2017).
[33] Ibid.
[34] Ibid.

to critical infrastructure."[35] Its threat assessments are specific to criminal threats and "do not infringe on legal, non-violent, protest and dissent."

[31] According to the RCMP's website, the CIIT "collaborates closely with domestic partners at the federal and provincial government levels, as well as other law enforcement groups and private sector stakeholders. As part of its mandate, it has developed the Suspicious Incident Reporting ("SIR") system to gather information from industry and law enforcement about suspicious incidents that may have a nexus to national security."[36]

[32] The NEB and the RCMP have entered into an agreement for the NEB to have access to SIR. The preamble to the agreement emphasizes that information sharing and information protection among critical infrastructure stakeholders and the Government of Canada and its security partners (including the RCMP) is an important element of critical infrastructure protection. Under the terms of the agreement, the NEB is expected to report suspicious incidents that could indicate a possible criminal threat to Canada's critical infrastructure. For its part, the RCMP provides the NEB with assessments about potential criminal threats to critical infrastructure based on reports to SIR and other information sources.

[33] In terms of protecting against the disclosure of personal information, it should be noted that there is no intention under the arrangement to collect personal information, and the NEB must take all reasonable measures to preserve the confidentiality of information obtained through the system against accidental or unauthorized access, use or disclosure. The NEB must treat information obtained through the system in accordance with its security markings, and must respect all caveats, conditions and terms attached to the information obtained from the system. The NEB is also prohibited from sharing SIR information with any third party without prior written consent from the RCMP.

[34] Information sharing between the RCMP and the NEB in the context of the NEB hearings is the subject of the present report.

e. Comment on the National Energy Board's Intelligence-Gathering Activities

[35] In its public complaint, the BCCLA first points to ". . . recent media reports indicat[ing] that the National Energy Board . . . has engaged in systematic information and intelligence gathering about organizations seeking to participate in the Board's Northern Gateway Project hearings."[37]

[36] Relying on records obtained under the *Access to Information Act*, the BCCLA adds that "this information and intelligence gathering was undertaken with the cooperation and involvement of the RCMP and other law enforcement agencies, and that the RCMP

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[35] Maher Arar Inquiry, *A New Review Mechanism for the RCMP's National Security Activities*, *supra* note 27 at p. 98.
[36] The RCMP and Canada's National Security, online: http://www.rcmp-grc.gc.ca/nsci-ecsn/index-eng.htm (formerly http://www.rcmp-grc.gc.ca/nsci-ecsn/nsci-ecsn-eng.htm). Note: As of May 2017, this page no longer includes the quoted text, which was cited at an earlier date.
[37] BCCLA complaint, p. 1.

participates in sharing intelligence information with the Board's security personnel, the Canadian Security Intelligence Service . . . and private petroleum industry security firms."[38]

[37] On the basis of these records, the BCCLA advances that ". . . the targeted organizations are viewed as potential security risks simply because they advocate for the protection of the environment."[39]

[38] The Commission does not have jurisdiction to review the actions of the NEB; however, as previously noted, the NEB Act, the *Public Safety Act*, as well as the NEB mandate and its Annual Report, all make it clear that the NEB has an information- and intelligence-sharing mandate with the RCMP as well as intelligence agencies. This has been recognized by a previous judicial inquiry.[40] In this context, the Commission will review the activities of the RCMP members as they relate to those who would have participated in or commanded the activities complained about in the BCCLA letter pertaining to the monitoring and disclosure of information in relation to the NEB hearings.

RCMP

a. RCMP Mandate and Intelligence-Led Policing

[39] At common law, police duties (including those of the RCMP) include the preservation of the peace, the prevention of crime, and the protection of life and property.[41] Section 18 of the RCMP Act establishes statutory duties for RCMP members, which include among other things the enforcement of laws, the execution of warrants, crime prevention, and keeping the peace.[42] The RCMP website describes its broad mandate as including:

> . . . preventing and investigating crime; maintaining peace and order; enforcing laws; contributing to national security; ensuring the safety of state officials, visiting dignitaries and foreign missions; and providing vital operational support services to other police and law enforcement agencies within Canada and abroad.[43]

[40] By virtue of subsection 6(1) of the *Security Offences Act*, the RCMP is the primary agency responsible for national security law enforcement.[44] This includes preventing and investigating offences arising from conduct constituting a threat to the security of Canada. Such threats are defined in the *Canadian Security Intelligence Service Act* ["the CSIS

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[38] Ibid.
[39] Ibid.
[40] Maher Arar Inquiry, *A New Review Mechanism for the RCMP's National Security Activities*, *supra* note 27 at pp. 207–208.
[41] See e.g. *R v Godoy*, [1999] 1 SCR 311 (SCC), 131 CCC (3d) 129; *R v Dedman*, [1985] 2 SCR 2, [1985] SCJ No. 45, 20 CCC (3d) 97 [*Dedman*].
[42] *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, s 18.
[43] RCMP, "About the RCMP", online: http://www.rcmp-grc.gc.ca/about-ausujet/index-eng.htm (accessed November 15, 2016).
[44] "Members of the Royal Canadian Mounted Police who are peace officers have the primary responsibility to perform the duties that are assigned to peace officers in relation to any offence referred to in section 2 or the apprehension of the commission of such an offence." *Security Offences Act*, RSC, 1985, c S-7, s 6(1).

Act"], which refers to:

> (a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,
>
> (b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,
>
> (c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and
>
> (d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada . . . .[45]

[41] Of note, the definition of "threats to the security of Canada" expressly does **not** include lawful advocacy, protest or dissent, unless carried on in conjunction with one of the above acts.

[42] The RCMP has a wide range of national security-related mandates and responsibilities, including the protection of critical infrastructure.[46] These national security activities, including national security criminal investigations conducted by National Security Investigation Sections and Integrated National Security Enforcement Teams and RCMP provincial divisions, are organized under the RCMP's National Security Program overseen by the Assistant Commissioner, National Security Criminal Investigations. The RCMP's activities in support of its national security mandate include:

> collecting, maintaining and analyzing information and intelligence related to national security; sharing such information and intelligence with other agencies, both domestic and foreign; preparing analyses and threat assessments and developing other methods of support for internal and external purposes; investigating crimes related to national security; investigating and countering activities to prevent the commission of crimes related to national security; and protecting specific national security targets.[47]

[43] In pursuing its national security activities, the RCMP engages in what is known as intelligence-led policing. This model of policing recognizes that there is an overlap between the use of intelligence and the traditional policing law enforcement function when it comes to detecting and preventing crime.[48] It involves the collection and analysis of

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[45] *Canadian Security Intelligence Act*, RSC, 1985, c C-23, s 2.
[46] RCMP *Operational Manual*, chap 12. "National Security: General", s 2.2., 2.2.1.6.7. and 2.3. [RCMP *Operational Manual*].
[47] Maher Arar Inquiry, *A New Review Mechanism for the RCMP's National Security Activities*, *supra* note 27 at p. 83.
[48] *Idem*, pp. 42–43.

information[49] to produce intelligence that informs police decision-making and operations, and is employed by most major police forces in the Western world. The intelligence produced by the RCMP is referred to as "criminal intelligence," as distinct from the security intelligence collected by CSIS.[50] It is characterized as intelligence with a link to criminal activity, gathered in support of investigations with the goal of "preventing or deterring a criminal act or of arresting a criminal."[51] According to the RCMP website for the Criminal Intelligence Program, criminal intelligence:

> . . . enables the organization to "connect the dots", in order to increase public safety, i.e. follow manifestations of unlawful activity from 'local to global' to prevent crime and to investigate criminal activity. Intelligence-led policing requires reliance on intelligence before decisions are taken, be they tactical or strategic.
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> . . .
>
> Information collected in the context of lawful investigations by the RCMP is collated with information from many other sources. It becomes intelligence when it is analyzed in the Criminal Intelligence Program (CIP) by professional criminal intelligence analysts to ascertain validity and ensure accuracy before it is included in a threat assessment.[52]

b. RCMP Integration and Information Sharing

[44] The RCMP shares national security information and intelligence with its partner agencies inside and outside of Canada.[53] The RCMP is bound by agreements (such as its Memorandum of Understanding with CSIS) and, in some instances, legislation, requiring the RCMP to share information with others. The RCMP *Operational Manual* provides some guidance as to information sharing. Of relevance to this report, RCMP policy cautions that disclosure of personal information must be made in accordance with the *Privacy Act*[54] (which defines "personal information" as "information about an identifiable individual that is recorded in any form"),[55] and must be based on a "need to know" and a "right to know" the information.

[45] The *Privacy Act* generally prohibits the disclosure of personal information without the consent of the individual to whom the information relates, subject to certain

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[49] The RCMP distinguishes between "information" and "intelligence," referring to the former as unprocessed data that may be used in the production of intelligence, whereas the latter is the end product of information that has been subject to the intelligence process of "collection, evaluation, analysis, reporting and dissemination." See Maher Arar Inquiry, *A New Review Mechanism for the RCMP's National Security Activities*, *supra* note 27 at p. 49, note 7.

[50] *Idem*, p. 44.

[51] Ibid.

[52] RCMP, "Criminal Intelligence Program", online: http://www.rcmp-grc.gc.ca/ci-rc/index-eng.htm (accessed November 14, 2016).

[53] Maher Arar Inquiry, *A New Review Mechanism for the RCMP's National Security Activities*, *supra* note 27 at p. 112.

[54] RCMP *Operational Manual*, chap 12.3., "Sharing, Handling, and Release/Dissemination of Information", s 1.4.

[55] *Privacy Act*, RSC, 1985, c P-21, s 3 [*Privacy Act*].

exceptions. One such exception is “consistent use disclosure,” which means that where personal information has been collected for one purpose (such as law enforcement), it may be disclosed for a purpose consistent with that purpose.[56] Another exception is “public interest disclosure,” which means that personal information may be disclosed if the public interest in its disclosure “clearly outweighs any invasion of privacy that could result from the disclosure . . . .”[57] A further exception involves disclosure of personal information to certain designated investigative bodies in Canada, following a written request from that body, for the purpose of enforcing any law of Canada or a province or for carrying out a lawful investigation.[58]

[46] When sharing classified or national security information with other Canadian departments and agencies, the RCMP requires that a caveat be added stating:

> This document is the property of the Royal Canadian Mounted Police (RCMP), National Security Program. It is loaned specifically to your department/agency in confidence and for internal use only, and it is not to be reclassified, copied, reproduced, used or further disseminated, in whole or in part, without the consent of the originator. It is not to be used in affidavits, court proceedings, subpoenas or any other legal or judicial purpose without the consent of the originator. The handling and storing of this document must comply with handling and storage guidelines established by the Government of Canada for classified information. If your department/agency cannot apply these guidelines, please read and destroy this document. This caveat is an integral part of this document and must accompany any extracted information. For any enquiries concerning the information or the caveat, please contact the OIC [Officer in Charge] National Security Criminal Operations, RCMP.[59]

In this way, the RCMP aims to maintain control over the information it shares with its partners.

[47] Integration and interaction with other police forces and government agencies has become an integral part of the RCMP’s national security activities.[60] During his testimony before the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, former Commission Chairperson Paul Kennedy identified globalization, the Internet and encrypted communications, new criminal partnerships, and emerging threats such as new forms of terrorism, as driving this need:

> [M]odern policing reality is that some of these challenges can’t be addressed by individual police forces acting alone. That is just the reality. There is an obvious need for police to combine resources, both human and financial, and to maximize unique skillsets.

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[56] *Idem*, para 8(2)(*a*).
[57] *Idem*, para 8(2)(*m*)(i).
[58] *Idem*, s 8(*e*).
[59] RCMP *Operational Manual*, chap 12.3., *supra* note 54, s 7.2.1.
[60] Maher Arar Inquiry, *A New Review Mechanism for the RCMP’s National Security Activities*, *supra* note 27 at p. 117.

. . .

> **To address these challenges police forces have integrated their operations and they have adopted intelligence-led policing models which engage multiple partners at the municipal, provincial, federal and international level. This is the new norm.**
>
> . . .
>
> This inter-agency co-operation finds expressions at all levels of the public safety framework. In other words, it isn't just police doing this.[61] [Emphasis added]

[48] The importance of integration is reflected in the RCMP reorganizing some of its National Security Investigation Sections ("NSISs") into Integrated National Security Enforcement Teams ("INSETs"). NSISs and INSETs operate at the divisional level (where most of the investigative work regarding national security matters is carried out),[62] and have primary responsibility for criminal investigations relating to national security.[63] NSISs are made up entirely of RCMP personnel. To facilitate greater integration of resources and intelligence among its partners, the RCMP established INSETs, four of which were created from NSISs following the terrorist attacks of September 11, 2001.[64]

[49] INSETs work in ". . . early detection and prevention of any potential threats to Canada and the public."[65] They are integrated teams comprised of RCMP members and seconded federal partners and agencies, as well as provincial and municipal police services who share their services. Their activities are overseen by the RCMP Headquarters; RCMP policies, rules, and accountability all apply to INSET members. The mandate of the INSETs is threefold: (1) increase the capacity to collect, share and analyse intelligence among partners, with respect to targets (individuals) that are threats to national security; (2) create an enhanced enforcement capacity to bring such targets to justice; and (3) enhance partner agencies' collective ability to combat national security threats and meet specific mandate responsibilities.[66] While the primary function is investigative with respect to national security, integrated units also perform intelligence analysis, and are not restricted to national security matters.[67]

[50] In British Columbia, where the matters complained of took place, the RCMP provides provincial policing services as well as contract policing services to many

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[61] Paul Kennedy, Chair of the Commission for Public Complaints Against the RCMP, Transcript of Arar Commission Policy Review Public Hearing (November 17, 2005), pp. 330–333.
[62] Canada, Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, Report, p. 74.
[63] Maher Arar Inquiry, *A New Review Mechanism for the RCMP's National Security Activities*, *supra* note 27 at p. 102.
[64] Ibid.
[65] RCMP, "Integrated National Security Enforcement Teams", online: http://www.rcmp-grc.gc.ca/secur/insets-eisn-eng.htm.
[66] Ibid.
[67] Maher Arar Inquiry, *A New Review Mechanism for the RCMP's National Security Activities*, *supra* note 27 at pp. 102, 118.

municipalities.[68] To facilitate the flow of information, the province created an integrated information management system that allows the RCMP and municipal police forces like the Vancouver Police Department and the Victoria Police Department to share information. Under the provincial *Police Act*,[69] all police agencies, including the RCMP, are required to employ the Police Records Information Management Environment ("PRIME-BC"). This allows real-time sharing of information across municipal boundaries, such that information about an incident in one part of the province can be accessed by police officers in another municipality. These entries may yield intelligence that can assist in matters such as anti-terrorism investigations by revealing information such as the movement of suspects.[70] PRIME-BC is utilized by 13 independent and provincial police agencies and 135 RCMP detachments in British Columbia.[71] PRIME-BC is also accessible to the RCMP's "E" Division headquarters and federal units.[72]

c. Joint Working Group – Resource Development

[51] From the materials provided to the Commission, it appears that, in 2012, the RCMP established a criminal operations joint working group with respect to resource development in British Columbia. Its mission statement acknowledged the "Rights and Freedoms of every Canadian citizen including the right to free speech and the right to lawful protest," and provided that "[t]he public safety of all Canadians and the safety and integrity of Canada's critical infrastructure must be protected."

[52] The membership of the Joint Working Group included multiple RCMP units, such as the CIIT, the "E" Division Criminal Intelligence Section, the "E" Division National Security Program, the "E" Division INSET, "E" Division Aboriginal Policing Services, and the "E" Division North District (which includes Terrace and Prince Rupert). CSIS BC Region was also represented in the group. The "E" Division Southeast District (which includes Kelowna) was added to the working group in October 2012.

[53] Guided by the *Canadian Charter of Rights and Freedoms*[73] ("Charter"), the *Criminal Code*, and other federal and provincial legislation, the mandate of the Joint Working Group was to assess public safety concerns with respect to resource development projects proposed in British Columbia. In particular, the Joint Working Group was to "maintain situational awareness" on resource development proposals, NEB review processes, and decisions by the Government of Canada regarding development proposals in British Columbia, including the Northern Gateway Project. The group would monitor the efforts of operational units responsible for the collection and assessment of

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[68] *Idem*, p. 215.
[69] *Police Act*, RSBC 1996, c 367.
[70] Maher Arar Inquiry, *A New Review Mechanism for the RCMP's National Security Activities*, *supra* note 27 at p. 215.
[71] PrimeCorp, *Annual Report: 2014-2015*, p. 2. Online: https://www.primecorpbc.ca/publications/annual-report-2014,2015.pdf (accessed November 17, 2016).
[72] RCMP, "PRIME BC – Frequently asked questions", online: http://bc.rcmp-grc.gc.ca/ViewPage.action?siteNodeId=50&languageId=1&contentId=22987 (accessed November 17, 2016). Note: As of May 2017, this article is no longer available.
[73] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11 [Charter].

open source and confidential source information, "and provide strategic advice to ["E" Division Criminal Operations] on potential threats to public safety."

d. Intelligence and Public Order Policing

[54] Intelligence-led policing is also of particular importance with respect to policing "public order events" such as protests and demonstrations. Although the practice of gathering intelligence in this context is controversial, police must be prepared for any eventuality, and they have been heavily criticized for having failed to obtain sufficient prior information to prepare for acts of public disorder when they take place.[74]

[55] A research paper commissioned by the Ipperwash Inquiry (established to inquire and report on events surrounding the death of Dudley George during a protest by First Nations representatives) noted that obtaining intelligence about planned protests and demonstrations informs police decision-makers, which leads to the development of a strategic plan and tactics. The basic police objective regarding protests and demonstrations is to determine the intention of the organizers. They may then prepare a course of action "for a measured response to maintain public order while respecting individual and collective rights."[75]

[56] The preferred intelligence-led police approach to a public order event is called the "measured response." Its steps are:

- Use intelligence to tell the story of the event as it approaches.
- Prepare a plan that includes all the police abilities, in case they are needed.
- Make every effort to stay low on the continuum of force by interacting with protesters in an open-handed fashion.
- Use police officers in normal uniform, and be with the protesters.
- Only escalate up to the continuum of force when no other choice is available.
- Return to open-handed methods as soon as conditions permit.[76]

Public Hearing Process and Factual Background

[57] In 2012, the NEB Act was amended with the passage of omnibus Bill C-38 (enacted as the *Jobs, Growth and Long-term Prosperity Act*)[77] to create a faster, more streamlined assessment process. This had an impact on participatory rights to the hearings and the scope of the NEB's assessment for pipeline projects. Prior to the enactment of Bill C-38, the NEB Act allowed the NEB to accept any "interested person"

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[74] Wawryk, Wayne P., "The Collection and Use of Intelligence in Policing Public Order Events", (2005) (Research Paper Commissioned by the Ipperwash Inquiry, 2005), p. 1, online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Wawryk.pdf (accessed December 7, 2016) [Wawryk].
[75] *Idem*, p. 2.
[76] *Idem*, p. 1.
[77] *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19.

to participate in the review process.[78] This term was not defined, affording the NEB considerable discretion in determining who qualified, and this discretion was typically applied liberally. However, Bill C-38 amended the NEB Act such that only persons who were "directly affected" by the proposed project or who had "relevant information or expertise" could participate in the hearings.[79] This restricted the qualifications for participation to matters concerning the project itself and not wider concerns such as climate change and oil sands. Similarly, the scope of NEB hearings was narrowed to consideration of matters directly related to the pipeline.[80] It must be noted that these changes did not apply to the Joint Review Panel hearings for the Northern Gateway Project, as the Joint Review Panel process was already underway at the time of the enactment. Nevertheless, the amendments to the NEB Act were seen by some politicians and members of the public as a means of "gutting"[81] the assessment process and excluding public participation.

[58] As part of the Joint Review Panel's assessment process for the Northern Gateway Project, extensive public hearings were held. A Hearing Order was issued in May 2011 that outlined the joint review process and invited participation, including by the public and by Aboriginal groups, through letters of comment, oral statements, intervenor status, or government participant status.[82] The review process would include community hearings (where oral statements and oral evidence from intervenors would be heard) and final hearings (where intervenors and government participants ". . . could provide written and oral evidence, request information, question witnesses, and present written and oral final argument.")[83] Aboriginal groups were encouraged to participate and provide information to help the Joint Review Panel in its deliberations, and the Crown was to provide expert scientific and regulatory advice.[84] Participants in the hearings included the Gitxaala Nation, the Haisla Nation, the Kitasoo Xai'xais Band Council, the Haida Nation, the ForestEthics Advocacy Association, B.C. Nature, and Unifor, to name a few, as well as a number of departments and agencies.[85]

[59] The Joint Review Panel hearings for the Northern Gateway Project took place between January 2012 and June 2013 in a variety of locations along the planned pipeline route, including Edmonton, Alberta, and the British Columbia towns of Kitamaat Village, Prince Rupert, Terrace, and Prince George. The hearing venues included community centres, hotels, and schools. The Joint Review Panel received letters of comment and

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[78] Savage, Sonya, "Bill C-38 and the evolution of the National Energy Board: The changing role of the National Energy Board from 1959 to 2015," (2016) *Canadian Institute of Resources Law*, Occasional Paper #52, pp. 23–24, online: http://dspace.ucalgary.ca/bitstream/1880/51110/1/EvolvingRoleOP52w.pdf (accessed December 7, 2016) [Savage].
[79] *Idem*, p. 24.
[80] Ibid.
[81] *Idem*, pp. 19 and 60–61 (accessed March 1, 2017).
[82] NEB Joint Review Panel Hearing Order OH-4-2011 for the Northern Gateway Pipelines Inc. Enbridge Northern Gateway Project (May 5, 2011), online: http://gatewaypanel.review-examen.gc.ca/clf-nsi/dcmnt/hrngrdr-eng.html (accessed November 15, 2016).
[83] Joint Review Panel Report (Vol. 1), *supra* note 12 at p. 15.
[84] *Gitxaala Nation*, *supra* note 8 at para 26.
[85] *Idem*, at para 48.

oral statements, including statements from representatives of Aboriginal groups.[86] The hearings were generally open to the public, but hearings in Victoria and Vancouver, British Columbia, were conducted with separate venues for the hearing and the public respectively.[87] The NEB's website served as a public record-keeper to the location details of the hearings, the transcripts, and the details of the participation process. In all, there were 180 days of oral hearings in 21 communities, featuring 175,000 pages of evidence, 9,500 letters of comment, and 1,179 oral presentations. In addition, 268 participants were allowed to cross-examine and 389 witnesses were put forward by intervenors.[88]

[60] The Joint Review Panel's community hearings included one of relevance to this public interest investigation on January 28, 2013, in Kelowna, British Columbia. The final hearings were held in 2012 and 2013 in Edmonton, Prince George, and Prince Rupert for oral questioning, and oral final arguments were presented in Terrace, British Columbia. The final hearings that took place in Terrace on June 16 and 17, 2013, are also of particular relevance to the present report.

[61] The Northern Gateway Project attracted a great deal of public attention and scrutiny, particularly because of concerns about the environmental impact of a potential pipeline or oil tanker spill, and because the pipeline would cross lands currently and traditionally used by Aboriginal groups. Indeed, the British Columbia government opposed the Project in view of these concerns, and issued a number of corresponding conditions that would need to be met before it could support the Project.[89] Broad opposition by Aboriginal groups and environmental protection and conservation groups, among others, coalesced into organized movements to stop the Project. The Idle No More movement arose in part because of First Nations opposition to the Northern Gateway pipeline and the federal omnibus bills (Bill C-38 and Bill C-45) relating to it and other pipeline projects.[90] The NEB's Joint Review Panel hearings took place as that movement and other concerned groups opposed and conducted demonstrations against the Project.[91]

[62] Shortly before the Joint Review Panel hearing in Kelowna on January 28, 2013, a series of protests took place in Vancouver during Joint Review Panel hearings being held

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[86] *Idem*, at para 42.
[87] "Police patrol Northern Gateway hearings", *Times Colonist* (January 4, 2013), online: Times Colonist http://www.timescolonist.com/news/weather/police-patrol-northern-gateway-hearings-1.39681 (accessed November 15, 2016).
[88] Savage, *supra* note 78 at p. 54 (accessed December 7, 2016).
[89] "B.C. says 'No' to Northern Gateway on concerns over oil spills," *The Globe and Mail* (May 31, 2013), online: The Globe and Mail http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/bc-says-no-to-northern-gateway-on-concerns-over-oil-spills/article12288098/ (accessed November 16, 2016).
[90] Cassels Brock, "Update on Indigenous conflicts across Canada," (October 3, 2015), online: http://www.casselsbrock.com/CBNewsletter/Update_on_Indigenous_Conflicts_Across_Canada (accessed November 16, 2016); "9 questions about Idle No More", *CBC News* (January 5, 2013), online: CBC News http://www.cbc.ca/news/canada/9-questions-about-idle-no-more-1.1301843 (accessed December 7, 2016).
[91] Idle No More, "First Nations group calls for B.C. to reject Northern Gateway pipeline work permits", (June 27, 2013), online: http://www.idlenomore.ca/first_nations_group_calls_for_b_c_to_reject_northern_gateway_pipeline_work_permits (accessed November 16, 2016).

there. In one instance, a group of roughly 100 Idle No More demonstrators massed outside the hearings amidst a day of national action by Aboriginal groups.[92] One protester was arrested after evading security and entering the lobby of the hotel on the first day of hearings. Furthermore, a group of five protesters were arrested after they snuck into and disrupted a closed-door hearing due to their concern about the environmental implications of the Project.[93] The Vancouver hearings also took place against the backdrop of an evening rally of 1,000 people in the city's Victory Square, with about half that number marching to the hearing site.[94] This resulted in "an increased anxiety level" within the NEB as it prepared for the Kelowna hearing and raised concerns that similar threats to disrupt the hearing process could arise, particularly since the panel, presenters, and the public would again be in one venue.

Threat Level

[63] The CIIT informed the Commission that, at the federal level, a comprehensive assessment relating to the Joint Review Panel hearings was not completed because there was no identified need (i.e. there was a very low level of criminal activity, or assessed potential for criminal activity, which did not indicate a requirement for such an assessment). However, some threat indications were noted at the "E" Division level:

- In January 2013, one "person of interest" sent e-mail messages to the NEB implying that he was willing to engage in violence to make himself heard at the hearings. Nothing came of these threats, however.

- Joint Review Panel hearings in Vancouver in January 2013 saw increased protests, with up to 1,000 persons attending, and (as noted above) included disruption of the hearings themselves. The Vancouver Police Department passed on an account to the RCMP that stated, "Approximately 20 masked up black clad anarchist rebels created a defiant contingent within the 600 to 1000 person anti-pipelines demo organized by 'Rising Tide', on the evening of January 14th."

- On January 24, 2013, Corporal Dave Albrecht[95] of the Kelowna RCMP Detachment General Investigations Section wrote in his notes that he was informed by a member of the "E" Division INSET that the "black bloc" (militant, potentially aggressive or violent black-clad protesters) had become more aggressive due to the fact that access to the hearings had been limited, which

[92] "First Nations protesters block rail lines as demonstrations roll out across Canada", *National Post* (January 16, 2013), online: National Post http://news.nationalpost.com/news/canada/first-nations-protests-slow-traffic-at-busiest-canadau-s-border-crossing (accessed November 16, 2016).
[93] "Five protesters arrested at Northern Gateway hearing", *CTV News* (January 15, 2013), online: CTV News http://bc.ctvnews.ca/five-protesters-arrested-at-northern-gateway-hearing-1.1115459 (accessed November 17, 2016).
[94] "Northern Gateway hearings: Vancouver protesters greet Enbridge panel", *The Canadian Press* (January 14, 2013), online: The Canadian Press http://www.huffingtonpost.ca/2013/01/14/northern-gateway-hearings-vancouver-enbridge_n_2475994.html (accessed November 17, 2016).
[95] Unless otherwise noted, the members named in this report are referred to by their rank at the time the events in question occurred.

upset more people.

- The next day, Sergeant Steve Barton of the RCMP Criminal Intelligence Section sent an update to Corporal Albrecht, concerning threatening letters that had been sent to Enbridge and to TransCanada Pipelines Ltd. in "K" Division in Alberta. At that time, no link to British Columbia had been identified.

- When the Joint Review Panel released its report approving the Northern Gateway Project in December 2013, a Wet'suwet'en Hereditary Chief of the Unist'ot'en protest camp expressed opposition to pipeline development in the area and reportedly stated that he was willing to stop it "by any means."

[64] Additionally, in January 2014, the RCMP's CIIT released an intelligence assessment of criminal threats to the Canadian petroleum industry. This was provided to the NEB. Its key findings (which the Commission references to indicate the RCMP's assessment) were that:

- The Canadian petroleum industry is requesting government approval to construct many large petroleum projects which, if approved, will be situated across the country;
- There is a growing, highly organized and well-financed, anti-Canadian petroleum movement, that consists of peaceful activists, militants and violent extremists, who are opposed to society's reliance on fossil fuels;
- The anti-petroleum movement is focused on challenging the energy and environmental policies that promote the development of Canada's vast petroleum resources;
- Governments and petroleum companies are being encouraged, and increasingly threatened, by violent extremists to cease all actions which the extremists believe, contributes [*sic*] to greenhouse gas emissions;
- Recent protests in New Brunswick are the most violent of the national anti-petroleum protests to date;
- Violent anti-petroleum extremists will continue to engage in criminal activity to promote their anti-petroleum ideology;
- These extremists pose a realistic criminal threat to Canada's petroleum industry, its workers and assets, and to first responders.

[65] It should be noted that the protest actions concerning the Northern Gateway Project were generally peaceful, but it is in the context of the demonstrations, and the RCMP's understanding of the threat environment, that the events that form the subject of the BCCLA's complaint took place.

FIRST ALLEGATION: The RCMP improperly monitored activities of various persons and groups participating or seeking to participate in the National Energy Board hearings.

a. RCMP Presence at the National Energy Board Hearings

[66] Among its specific concerns, the BCCLA contends that "RCMP members have maintained a visible presence at NEB hearings when there are no grounds for security concerns."[96]

[67] E-mail messages and other documents provided to the Commission disclosed discussions regarding the RCMP being asked to provide a security presence for an NEB Joint Review Panel hearing held in Kelowna on January 28, 2013. The RCMP's assistance was requested in light of recent disruptions to prior hearings in Vancouver, and to ensure public and highway safety during planned Idle No More gatherings. An RCMP planning document concerning the hearing noted that a number of Idle No More protests had been joined by groups such as "Freemen of the land" and "black clad anarchist rebels," and that the recent protests in Vancouver that took place during the hearings there had quickly become "confrontational" towards the police.

[68] Several demonstrations were planned for the day of the hearing. The RCMP had been told by a representative of the Idle No More movement that the intention was to hold a peaceful rally, and the RCMP noted that a number of the hearing dates had taken place with minimal police involvement, but the RCMP nevertheless expressed concern that more militant protesters from across the province would attend. The NEB decided to hold a "closed door" hearing, with one venue for the hearing at a hotel, and another venue with a viewing room for the public at a separate, nearby hotel.

[69] Approximately 18 RCMP members in total were assigned to the event, stationed at the hearing venue hotel and along the route to the hotel, including uniformed and plainclothes members. However, while protests did take place on January 28, 2013, at the hearing site in Kelowna, they were peaceful and uneventful.

[70] The Commission noted in its review of the information provided that the RCMP objected to the apparent expectation that its members were to act like "security guards" for the NEB, which wished them to check identification and determine who would or would not have access to the hearing. The RCMP reiterated that its role was to keep the peace and to act only under lawful authority where, for example, an individual refused to leave when asked by the property owners. The RCMP's position at that time was that the threat level regarding the Kelowna hearing was low and that they had received no indication of violence being planned.

[71] The RCMP was also asked to provide a security presence for NEB Joint Review Panel hearings in Terrace on June 16 and 17, 2013, where the RCMP would keep the peace and enforce the law as required for the first two days of hearings. The Commission reviewed the NEB's security plan for the hearings (details of which the Commission will not disclose due to its security designation) and found that although no direct threats to safety and security had been identified, the NEB nevertheless assessed the risk of building occupations and demonstrations as high. The NEB requested that the RCMP

[96] BCCLA complaint, p. 2.

provide uniformed and plainclothes members as a consequence. The Officer in Charge ("OIC") of the Terrace Detachment understood the RCMP as being obliged to assist the NEB.

[72] Of note, the Terrace Detachment's operational plan for the June 2013 Joint Review Panel hearings stated that the OIC would meet with the organizers to emphasize the importance of a peaceful rally, respecting the rights of all persons. The plan noted that the demonstrations that had occurred at prior NEB hearings had been peaceful and without major incident. The Terrace Detachment had been in contact with the Idle No More organizers and found them to be "most co-operative." The plan's objective stated, "**Recognizing the democratic right to rally protest and demonstrate in a lawful and peaceful manner**, as well as the legal authority for the National Energy Board to conduct orderly hearings into the proposed Northern Gateway pipeline, **the RCMP will maintain law and order with a measured approach**." [Emphasis added]

[73] The first Idle No More rally took place at George Little Park in Terrace on June 16, 2013, which more than 300 people attended. RCMP members maintained a "low key, but visible presence with positive interaction, handing out RCMP tattoos, stickers, etc…to children in attendance." The event was peaceful and uneventful. Owing to the hot weather, the demonstrators did not march to the hearing site as originally planned. A further peaceful demonstration was promised for the next day.

[74] On June 17, 2013, about 70 people gathered to demonstrate outside the NEB Joint Review Panel hearing site with placards and drumming, and the RCMP again observed that the event was peaceful with no disruptions to the hearing. The Terrace Detachment determined that the measured approach taken to that point would continue, but a "significantly reduced" presence was anticipated for the remainder of the hearings. Indeed, the hearings concluded on June 24, 2013, without further incident, and the NEB was reportedly most appreciative of the RCMP's "outstanding" support.

[75] The BCCLA argues that "[c]ourts and tribunals conduct hearings every day across Canada without the presence of police or other security personnel."[97] Contrary to the complainant's assertion, however, legislation has been enacted across Canada that specifically provides for the presence of security personnel and for the overall security of the courts and members of the public.[98] Many courts and tribunals across Canada feature police, commissionaires, and even security screening. At the federal level, the RCMP Protective Policing Services are responsible for the safety of Supreme and Federal Court judges.[99] The Canadian Judges' Forum, a conference of the Canadian Bar Association, has also produced a restricted access report entitled *Court Security in Canada*, which is

[97] BCCLA complaint, p. 2.
[98] British Columbia's *Sheriff Act*; Alberta's *Peace Officers Act*; Saskatchewan's *Court Security Act*; Manitoba's *Court Security Act*; Ontario's *Security for Courts, Electricity Generating Facilities and Nuclear Facilities Act*; Quebec's *Loi sur la Police*; New Brunswick's *Court Security Act*; Nova Scotia's *Court Security Act*; Prince Edward Island's *Court Security Act*; and Newfoundland and Labrador's *Court Security Act*.
[99] RCMP, online: www.rcmp-grc.gc.ca/pp/index-eng.htm.

aimed at considering ". . . unique Canadian challenges for ensuring the safety of judges and other court personnel."[100]

[76] Unlike most courts and many other tribunals across Canada, moreover, the NEB hearings present the considerable challenge of taking place in different buildings and settings, mainly hotels, which lack the physical security perimeter of a court or a tribunal that has a fixed location. Furthermore, as noted above, the *Canada Labour Code* obliges the NEB to ensure that all requirements are met for a safe public hearing.[101] In that context, the RCMP presence at the NEB hearings was initiated by the NEB based on an NEB security assessment that identified a high risk for building occupation and demonstrations, which had previously taken place in the context of NEB hearings. With safeguards in place that included an RCMP presence, the NEB reassessed the threat as medium.

[77] The Commission notes that the RCMP did not uniformly attend all hearings and information sessions, with member attendance being influenced by such factors as specific NEB requests, the threat environment, and unit resources. In one instance in the fall of 2013, the RCMP informed the NEB that they had no concerns about an upcoming information session and "would stop by [the venue] if time permitted." Ultimately, the RCMP did not attend and no active files were generated.

[78] After a careful review, the Commission does not find that the visible presence of RCMP members at the NEB hearings equated to improper monitoring in and of itself. Although the RCMP assessed the risk of criminal activity as low, it was reasonable for the RCMP to provide a service that would facilitate a safe public hearing; such services are offered by police and other security personnel across the country.

FINDING NO. 1: It was reasonable for the RCMP to provide a visible presence at the National Energy Board hearings.

b. Monitoring of a Protest at the Prince Rupert Courthouse

[79] In its complaint, the BCCLA states:

> RCMP S/Sgt VK Steinhammer notified an NEB security officer of an Idle No More protest that was scheduled to take place on the Prince Rupert courthouse lawn on a Sunday afternoon. Despite confirming that the RCMP anticipated the protest would be peaceful, S/Sgt Steinhammer nevertheless advised that the RCMP would be "monitoring" this event. BCCLA is troubled that the RCMP would deem it necessary to monitor peaceful gatherings at which it has no expectation of criminal behaviour, threat to public safety or need to ensure the safety of demonstrators.[102]

[100] Canadian Bar Association, Canadian Judges' Forum, online: www.cba.org/cba/judges_forum/main.
[101] NEB Annual Report 2013, *supra* note 6 at p. 61.
[102] BCCLA complaint, pp. 2–3.

[80] As support for its allegation, the BCCLA makes reference to an e-mail dated April 19, 2013, from Staff Sergeant Victor Steinhammer (Operations Non-Commissioned Officer ["NCO"] of the Prince Rupert Detachment) to NEB Security Group Leader, R.G. The Commission reviewed the documentary materials, which confirmed the communication. The conduct of Staff Sergeant Steinhammer was identified as the subject matter of the complaint and, therefore, Staff Sergeant Steinhammer was given notice of the complaint. The chronology of the information is as follows:

- On April 18, 2013, Mr. G informed the RCMP by e-mail that the NEB senior management was expressing concerns about the possibility of violent protest activity surrounding the following two weeks of hearings in Prince Rupert. He asked if it would be possible for the RCMP to "step up" its visibility and have a uniformed presence for the first day or two of the hearings.
- On April 19, 2013, Inspector Peter Haring (Operations Officer, North District, RCMP "E" Division) sent an e-mail to Staff Sergeant Steinhammer asking him if he was aware of a planned Idle No More gathering at the Prince Rupert courthouse on April 21, 2013, and stated that the RCMP should inform the court and sheriffs of the event.
- On April 19, 2013, Staff Sergeant Steinhammer replied to Mr. G's April 18 e-mail, and stated that he had "received information of a planned peaceful Idle No More Protest on the courthouse lawn on Sunday April 21 @ 1400 hours." He told Mr. G that the Prince Rupert Detachment would be monitoring the event, and noted that the Facebook page for the event had "only 24 hits."
- On April 19, 2013, Staff Sergeant Steinhammer contacted an RCMP member named Nancy Roe, and asked her to let him know how the event went. She replied on May 2, 2013, and informed him that turnout was very low and that the RCMP members who attended remained for only about 30 minutes. They drove by later in the day and still saw only sparse attendance.

[81] The Prince Rupert Detachment monitored other protests in 2013, and it is worthwhile to note that Staff Sergeant Steinhammer seems to have recognized the peaceful nature of the demonstrations. In an e-mail dated January 11, 2013, to members of the RCMP, Staff Sergeant Steinhammer provided direction on a possible Idle No More protest at the Prince Rupert mall: "If this occurs, **please attend, allow them to protest as they have been peaceful. You only intervene if something criminal takes place**, and only if it is safe, you intervene." [Emphasis added] The protesters ultimately did not keep their pledge to not enter the mall, and were asked to leave by mall security. They did so without incident and there is no indication that the RCMP became involved. Of note, Joint Review Panel hearings that took place in Prince Rupert for several days in February 2013 occurred without continuous police presence and without incident. Further Joint Review Panel hearings later in February 2013 and in March 2013 also occurred without continuous police presence and without incident.

[82] The NEB sought information from Staff Sergeant Steinhammer on two other occasions identified in the materials provided. Following hearings in Vancouver in January 2013 in which the NEB "had a very busy time with protesters," and having

"received intel that [they] may expect same in Kelowna next week," Mr. G asked Staff Sergeant Steinhammer on January 21, 2013, if there were any changes in the intelligence picture. This would assist the NEB in determining its security requirements for upcoming hearings. Staff Sergeant Steinhammer replied that the RCMP had received no intelligence with respect to the hearings. He suggested that the RCMP and NEB "take the same approach as the last set of hearings." An earlier exchange suggested that RCMP members were not present at the previous hearings.

[83] Additionally, on February 15, 2013, Mr. G asked Staff Sergeant Steinhammer if he had any threat information with respect to a group called "The People's Summit on the Northern Gateway Project" in the context of the Prince Rupert Joint Review Panel hearings. Staff Sergeant Steinhammer replied, "None at all."

[84] The information provided by Staff Sergeant Steinhammer to Mr. G was open source information (i.e. obtained from a publicly available source, and in this specific case the social media site Facebook). It was provided in response to a concern expressed by the NEB about potentially violent protests.

[85] The Commission appreciates that the BCCLA is troubled by the RCMP presence at the April 2013 protest, but even though the RCMP anticipated that the event would be peaceful (as it in fact was), protests and demonstrations are of a dynamic nature and even a lawful assembly has the potential to become an unlawful one. The standard against which the conduct of the RCMP is assessed is one of reasonableness in the circumstances. Given the RCMP's mandate to maintain peace and order and to prevent crime, it was not unreasonable to send members to monitor the event and confirm that it remained a peaceful one.

FINDING NO. 2: It was reasonable for the RCMP to monitor the Prince Rupert protest.

c. Monitoring of Protests by the Critical Infrastructure Intelligence Team

[86] The BCCLA alleges that Tim O'Neil, a temporary civilian employee Senior Criminal Intelligence Research Specialist (now retired) with the RCMP's CIIT, improperly monitored the activities of groups that it did not suspect of any criminality. Specifically, the BCCLA is concerned that:

> Despite confirming that CIIT has no intelligence indicating a criminal threat to the NEB or its members, O'Neil advises that "CIIT will continue to monitor all aspects of the anti-petroleum industry movement," requests that an SPROS/SIR National Security database file be opened for this matter, and notes that this information is also being shared with CSIS. Again, BCCLA is troubled that the RCMP and CSIS would deem it necessary to monitor the activities of groups which it does not suspect of any criminality.[103] [Emphasis in original]

[103] BCCLA complaint, p. 3.

[87] Mr. O'Neil's conduct was identified as the subject matter of the complaint and therefore Mr. O'Neil was given notice of the complaint. It should be noted that Mr. O'Neil was appointed under Part I of the RCMP Act as it read prior to being amended on November 28, 2014.[104] This meant that the RCMP Act, as it read at the time of the complaint and the commencement of the public interest investigation, made temporary civilian employees like Mr. O'Neil subject to the complaint process under Part VII of the RCMP Act.[105] Although the November 2014 amendments to the RCMP Act repealed the provision that allowed for the appointment of temporary civilian employees, the complaint was filed in February 2014 and this public interest investigation commenced in February 2014. Accordingly, Mr. O'Neil's actions were subject to the Commission's review under the previous RCMP Act. Moreover, the amended RCMP Act gives the Commission jurisdiction to receive complaints about persons who were appointed or employed under the RCMP Act at the time that the conduct complained of is alleged to have occurred.[106] As this would clearly include persons who were appointed or employed under the RCMP Act as it read prior to November 2014, the Commission concludes that it has the jurisdiction to consider Mr. O'Neil's conduct.

[88] The relevant material of concern with respect to this specific sub-allegation is an e-mail dated April 19, 2013, in which Mr. O'Neil responded to a request for assistance from Mr. G of the NEB to determine whether a credible threat existed against NEB panel members. The NEB was concerned about a YouTube video and other websites that discussed the NEB. Mr. O'Neil noted that he had detected no direct or specific criminal threat, and that the CIIT had no intelligence indicating a criminal threat to the NEB or its members.

[89] After a careful review, the Commission notes that only an incomplete extract from Mr. O'Neil's e-mail was inserted into the specific allegation. This had the effect of taking Mr. O'Neil's response out of context. The full text states: "CIIT will continue to monitor all aspects of the anti-petroleum industry movement **to identify criminal activity, and will ensure you are apprized accordingly**." [Emphasis added] To provide background to this statement, Mr. O'Neil observed that the ongoing opposition to petroleum and petroleum pipelines included both lawful and unlawful actions. The unlawful actions

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[104] See the RCMP Act, RSC, 1985, c R-10, s 10(2), as amended by SC 2013, c 18, which provided that the Commissioner may employ such number of temporary civilian employees at such remuneration and on such other terms and conditions as are prescribed by the Treasury Board, and may at any time dismiss or discharge any such employee [RCMP Act].

[105] Subsections 45.35(1) and 45.43(1) of the RCMP Act, as they read at the time of the complaint and the commencement of the public interest investigation, only empowered the Commission to take complaints or commence a public interest investigation about persons who were appointed or employed under the Act at the time of the complaint or the commencement of the public interest investigation. The complaint process did not apply to persons who had departed the RCMP prior to the complaint or the commencement of the public interest investigation. Mr. O'Neil departed from the RCMP on March 31, 2014. The complaint was filed in February 2014 and this public interest investigation commenced in February 2014. Accordingly, Mr. O'Neil's actions were subject to the Commission's review under the previous RCMP Act.

[106] RCMP Act, *supra* note 104, s 45.53(1) states that any individual may make a complaint concerning the conduct, in the performance of any duty or function under this Act or the *Witness Protection Program Act*, of any person who, at the time that the conduct is alleged to have occurred, was a member or other person appointed or employed under Part I.

included vandalism, sabotage, and threats to property and persons. He noted that activists had previously engaged in coordinated mass participation in regulatory hearings to overwhelm the assessment process, resulting in the hearings being "bogged down" on occasion. The corresponding efforts of the federal government to limit who may make formal presentations at the NEB's public hearings had the result of making the conduct of the hearings themselves the focus of protest activities, and made the NEB and its members the subjects of protest rhetoric. Additionally, due to the NEB's role as the federal regulator for many aspects of petroleum and petroleum pipeline projects, it had also become a focus of opposition attention, and Mr. O'Neil concluded that it "is highly likely that the NEB may expect to receive threats to its hearings and its board members."

[90] The purpose of the monitoring is significant; the CIIT is required to identify and investigate criminal threats to critical infrastructure, and the RCMP more broadly is required to identify and investigate criminal threats to public events such as the Joint Review Panel hearings. Had the RCMP indeed undertaken to monitor the entire "anti-petroleum movement" without regard to the right to peaceful dissent, such activity might have been unreasonable. However, it is clear that with the added context of criminal threats to critical infrastructure and the NEB and its members, and the stated purpose of identifying criminal activity, the RCMP monitoring was to be confined to purposes within its law enforcement mandate.

FINDING NO. 3: It was reasonable for the RCMP to monitor events for the purpose of identifying criminal activity.

d. Monitoring by Unidentified Members of Various Persons and Groups seeking to Participate in the National Energy Board Hearings

[91] The BCCLA is troubled about allegations concerning the RCMP's "improper and unlawful actions . . . in gathering information about Canadian citizens and groups engaging in peaceful and lawful expressive activities . . . ."[107] It further states:

> Police monitoring may also deter those who simply wish to meet with or join a group to learn more about a matter of public debate or otherwise exchange information or share views with others in their community. Indeed, BCCLA has already heard from several of the affected groups that members and prospective members of their organizations have expressed serious concerns and reluctance to participate in light of recent media reports of RCMP monitoring.[108]

[107] BCCLA complaint, p. 1.
[108] *Idem*, p. 5.

[92] The RCMP's CIIT reported that it is not aware of specific efforts by the RCMP to gather information about, or monitor the activities of, any persons and groups who wanted to participate in the NEB hearings. The CIIT stated that if any information about a criminal threat were to surface as part of an investigation or from another source (i.e. an e-mail request from the NEB), the CIIT, as part of the RCMP's law enforcement mandate, would make an initial examination to determine if there was any criminal component to the identified activity or material. If there was no identified criminal component, the information would not be further examined or pursued.

[93] The CIIT informed the Commission that it has no records of information being gathered by the RCMP on various persons and groups seeking to participate in the NEB hearings.

[94] However, the materials before the Commission reveal that the RCMP monitored protests and demonstrations at the "E" Division level. Additionally, the materials reveal that the RCMP video-recorded some of the public protests and demonstrations.

i. RCMP Monitoring and Video-Recording of Protests and Demonstrations

[95] On January 28, 2013, an Idle No More flash mob round dance intended to draw attention to Bill C-45 and the Joint Review Panel hearings was organized in Vernon, British Columbia. It was advertised via Facebook, among other means. The organizer of the event contacted the Vernon Detachment to request a police presence at what he anticipated would be a peaceful event that would include elders, children, and the patrons of the shopping mall where the event would be taking place. The RCMP did attend to monitor the situation; approximately 70 people participated in the flash mob, and the RCMP noted that the event was peaceful and that it concluded without incident.

[96] As discussed above, a protest took place at the Joint Review Panel hearing site in Kelowna on January 28, 2013. Approximately 135 people attended in total, and RCMP members were present, but it was peaceful and uneventful. Of note, a member of the Kelowna Detachment Forensic Identification Section attended the demonstration at the hotel where the hearing was held, recording approximately 10 minutes of video footage of the event from a hotel room on the top floor.

[97] Again, as discussed above, on June 16, 2013, a rally took place in George Little Park in Terrace, where some 300 demonstrators assembled and listened to speakers. The RCMP attended, maintaining a "low-key, but visible presence with positive interaction. . . ." There are no indications that this event was video-recorded.

[98] On June 17, 2013, the RCMP monitored a second day of demonstrations in Terrace and noted that it was a peaceful event. This is also described above. However, the general occurrence report concerning the event reveals that a member of the Terrace Detachment Forensic Identification Section attended the scene (the Best Western Plus Terrace Inn, where the Joint Review Panel hearings were taking place) for the

approximately one-hour duration of the demonstration, and recorded the event. The recording was saved as a DVD.

[99] On July 1, 2013, an Idle No More gathering was organized at the City Park in Kelowna. An RCMP member contacted one of the organizers of the event and was informed that the gathering was expected to be peaceful and that the organizers would be providing their own security. An RCMP First Nations Policing member worked closely with the organizers on the day of the event, which was peaceful and uneventful.

[100] The RCMP's "E" Division Aboriginal Policing Services compiled a spreadsheet of British Columbia Idle No More events held in December 2012 and throughout 2013. The spreadsheet recorded the date, location, and size of the event, along with the detachment or police service of jurisdiction, details about the event, and nearby infrastructure or vulnerabilities. Over 220 events (some of which never took place and were listed only as plans or unconfirmed) were listed, including rallies, road blockades, flash mobs, marches, information sessions, demonstrations at Joint Review Panel hearings, round dances, and concerts. There was no indication of the extent of what police presence, if any, may have been required for the events, and no identifying details regarding organizers or participants were included in the spreadsheet.

[101] In assessing the reasonableness of the RCMP's actions, the Commission notes that the RCMP's monitoring and internal reporting (e.g. preparing briefing notes) is consistent with RCMP policy, including its policy regarding Aboriginal demonstrations or protests.[109] For example, the RCMP *Operational Manual* states:

> 1.1 The RCMP's primary role in any demonstration or protest is to preserve the peace, protect life and property, and enforce the law.
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> . . .
>
> 2.2. "A [p]eaceful protest, peaceful assembly and freedom of expression are all fundamental rights as defined under Part I, sec. 1, *Canadian Charter of Rights and Freedoms*.
>
> 2.3. A **measured response based on accurate and timely intelligence** must form the basis for the management of aboriginal demonstration or protest.[110] [Emphasis added]

[102] As indicated above, the dynamic nature of protests and demonstrations means that it is generally appropriate for police to monitor these events to ensure public safety and to be prepared in the event that unlawful activity occurs. Again, given the RCMP's mandate and duty to maintain peace and order and to prevent crime, the Commission is satisfied that the RCMP acted reasonably in monitoring the above-noted demonstrations.

FINDING NO. 4: The RCMP acted reasonably in monitoring the demonstrations.

[109] RCMP *Operational Manual*, chap 38.9. "Aboriginal Demonstrations or Protests".
[110] *Idem*, s 1.1., 2.2., and 2.3.

[103] With respect to the RCMP practice of video-recording protests, video surveillance can in some circumstances constitute a police search[111] within the meaning of section 8 of the Charter,[112] which protects against unreasonable search or seizure. However, police conduct will only rise to the level of a search where the affected person has a **reasonable expectation of privacy**.[113] In that vein, the RCMP *Operational Manual* and the "E" Division *Operational Manual* state that where there is no reasonable expectation of privacy, a judicial authorization (warrant) for video surveillance may not be required.[114]

[104] Additionally, even where there is a reasonable expectation of privacy, it is only **unreasonable searches** that are impermissible; a search authorized by law and carried out in a reasonable manner will not offend section 8.[115] Accordingly, there are two distinct questions that must be addressed regarding police searches and the expectation of privacy: first, whether the individual concerned had a reasonable expectation of privacy; and second, whether the search was an unreasonable intrusion on that right to privacy.[116]

[105] It is not the role of the Commission to make a finding as to whether a Charter right has been infringed. That role belongs to a court of competent jurisdiction. The Commission may, however, determine whether RCMP conduct is reasonable and consistent with Charter principles. The Commission begins its analysis with an assessment of whether there was a reasonable expectation of privacy; only if a reasonable expectation of privacy is found will the Commission consider whether the RCMP's conduct was consistent with the principles underlying section 8.

[106] Whether an expectation of privacy is reasonable or not must be assessed in the totality of the circumstances of a particular case.[117] It includes an assessment of whether there was a subjective expectation of privacy and whether that expectation was reasonable in the circumstances.[118] This requires "value judgments" from the "perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy."[119] Significantly, however, the more that the information concerned touches on an individual's biographical core, the more the balance will weigh in favour of a reasonable expectation of privacy. The "biographical core" refers to personal information "which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information that tends to reveal intimate details of the lifestyle and personal choices of the individual."[120]

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[111] *R v Wong*, 1990 CarswellOnt 58, [1990] 3 SCR 36, 60 CCC (3d) 460 (SCC) at paras 8 and 10 [*Wong*].
[112] Charter, *supra* note 73 at s 8.
[113] *Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc.*, 1984 CarswellAlta 121, [1984] 2 SCR 145, 14 CCC (3d) 97 (SCC) at para 25.
[114] RCMP *Operational Manual*, chap 29.4. "Video Surveillance", s 2.; RCMP "E" Division *Operational Manual*, chap 29.4. "Video Surveillance", s 2.
[115] *R v Caslake*, [1998] 1 SCR 51 (SCC); *R v Collins*, [1987] 1 SCR 265 (SCC).
[116] *R v Edwards*, [1996] 1 SCR 128, 26 OR (3d) 736 (SCC) at para 33.
[117] *Idem*, at para 31.
[118] Ibid.
[119] *R v Patrick*, 2009 SCC 17, [2009] 1 SCR 579 at para 14.
[120] *R v Plant*, [1993] 3 SCR 281 at p 293.

[107] Although the RCMP engaged in video surveillance of public protesters, one's public activities can be subject to a reasonable expectation of privacy. The Supreme Court of Canada has found that public activities can attract a privacy expectation where, for instance, the government engages in continuous surveillance of that activity, such as in a case where an individual was continuously tracked while driving a vehicle on public highways.[121] Individuals generally expect a degree of anonymity when in public places, free from identification and surveillance. This is because of the value of what has been called "public privacy."[122] In the context of section 8 of the Charter, the Supreme Court of Canada has also concluded that anonymity is one conception of informational privacy because it permits individuals to act in public places while preserving freedom from identification and surveillance.[123] The Court stated, "The mere fact that someone leaves the privacy of their home and enters a public space does not mean that the person abandons all of his or her privacy rights, despite the fact that as a practical matter, such a person may not be able to control who observes him or her in public."[124] Accordingly, depending on the totality of the circumstances, anonymity "may be the foundation of a privacy interest that engages constitutional protection against unreasonable search and seizure."[125]

[108] Additionally, while it is relevant to the analysis to ascertain whether police searches take place in the context of information, things, or activities that have been hidden from view, the Charter protects against searches where society agrees that the object of the search should be kept out of the state's hands unless there is a constitutional justification. The Court of Appeal for Ontario observed in *R v Ward* that the reasonable expectation of privacy requires asking more than whether the claimant had a subjective expectation of privacy and whether in all the circumstances that expectation was reasonable:

> . . . While both questions help to focus the inquiry on the specific facts of the case and the values underlying s. 8, neither question captures the entirety of the reasonable expectation of privacy inquiry. **Section 8 is concerned with the degree of privacy needed to maintain a free and open society, not necessarily the degree of privacy expected by the individual or respected by the state in a given situation**. As Binnie J. put it in *R. v. M. (A.)* (2008) . . . s. 8 protects the privacy interests that
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> > . . . the citizen subjectively believes ought to be respected by the government and "that society is prepared to recognize as 'reasonable'"[.]
>
> [87] The fact that the paranoid target of a search has no expectation of privacy cannot negative his s. 8 rights . . . . Nor can ubiquitous state intrusions upon privacy render expectations of privacy unreasonable for the purposes of s. 8. . . . The ultimate question is whether the personal privacy claim advanced in a particular

[121] *R v Wise*, [1992] 1 SCR 527, 11 CR (4th) 253; 70 CCC (3d) 193 at p 583.
[122] Westin, Alan F., *Privacy and Freedom* (New York: Athenum, 1967), at p. 32, cited in *R v Ward*, 2012 ONCA 660, 112 OR (3d) 321; 296 OAC 298 at para 73 [*Ward*].
[123] *R v Spencer*, 2014 SCC 43, [2014] 2 SCR 212 at paras 43–45.
[124] *Idem*, at para 44.
[125] *Idem*, at para 48.

> case must, upon a review of the totality of the circumstances, be recognized as beyond state intrusion absent constitutional justification if Canadian society is to remain a free, democratic and open society . . . .[126] [Emphasis added]

[109] As the Court also stated, if the state were able to gather information to identify individuals "engaged in activities of interest to the state" unilaterally and without restraint, "individual freedom and with it meaningful participation in the democratic process would be curtailed."[127] These considerations also form part of the privacy analysis.

[110] Nevertheless, personal privacy must be balanced against other legitimate and competing interests, such as the interest in the prevention and investigation of crime and the public's expectation of safety. This is why section 8 of the Charter protects only privacy claims that are founded on a reasonable expectation of privacy and only prohibits "[unreasonable] state intrusions upon reasonable expectations of privacy . . . ."[128]

[111] Here, the Commission is not satisfied on a balance of probabilities that the demonstrators had a reasonable expectation of privacy such that being video-recorded by police without judicial authorization would constitute an unreasonable search. Although there may be a subjective expectation of privacy in terms of information such as a person's whereabouts and their support or opposition with respect to a given cause, the purpose of a public protest is to be seen and to gain publicity for a cause. They are in a sense creating a public spectacle. As with the police, the press and the public might also be expected to witness and record a public event like a demonstration, greatly expanding one's potential exposure. The modern ubiquity of cameras (particularly those built into mobile phones) along with the ease of social media posting also make it less likely that one's actions in such an event will go unrecorded or otherwise remain private. A reasonable and informed person concerned about the protection of privacy would be unlikely to expect in these circumstances that their activities would be private.

[112] Beyond the freedom from unreasonable search and seizure by the state, however, there are nevertheless privacy implications for police video surveillance of protests and demonstrations that must be considered. By capturing recognizable images of demonstrators (along with information about the individual such as whereabouts and behaviour) on a recording medium, RCMP camera operators are recording personal information within the meaning of the *Privacy Act*.[129] In addition to imposing obligations with respect to the retention and disposal of such information, the *Privacy Act* prohibits the very collection of personal information by a government institution unless it relates directly to an operating program or activity of the institution.[130] While arguably the RCMP's mandate brings the recording of protests and demonstrations within the grasp of its

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[126] *Ward*, *supra* note 122 at paras 86-87.
[127] *Idem*, at para 74.
[128] *Idem*, at paras 79–80.
[129] Office of the Privacy Commissioner of Canada, "Privacy Commissioner's finding on video surveillance by RCMP in Kelowna," (October 4, 2001), online: https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-federal-institutions/2001-02/02_05_b_011004/ (accessed November 24, 2016) [OPC finding – video surveillance by RCMP in Kelowna].
[130] *Privacy Act*, *supra* note 55, s 4.

operational programs and activities, it may not always be reasonable. The Privacy Commissioner of Canada made the following observations in the context of continuous RCMP video surveillance of a public area:

> In my view, there are gradations to the right to privacy. Clearly, we have a greater right to privacy in our homes than in public places, where we are inevitably likely to be noticed and observed by those with whom we share the space. **But in those public places, we retain the privacy right of being "lost in the crowd", of going about our business without being systematically observed or monitored, particularly by the state.**
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> I share this view with the Supreme Court of Canada, which stated in its [1990 *R. v Wong*] decision: "**[T]here is an important difference between the risk that our activities may be observed by other persons, and the risk that agents of the state, in the absence of prior authorization, will permanently record those activities on videotape**, a distinction that may in certain circumstances have constitutional implications. To fail to recognize this distinction is to blind oneself to the fact that the threat to privacy inherent in subjecting ourselves to the ordinary observations of others pales by comparison with the threat to privacy posed by allowing the state to make permanent electronic records of our words or activities."[131] [Emphasis added]

[113] As with the RCMP's attendance at dynamic events like protests and demonstrations, recording video of such events where the purpose is consistent with mandates such as law enforcement and keeping the peace may be reasonable. Recording selective incidents directly related to the RCMP mandate in particular may be reasonable, and may be a reasonable infringement of the privacy rights of those gathered to demonstrate.

[114] However, depending on the circumstances, surveillance of peaceful protesters may raise concerns and may amount to an unreasonable exercise of police authority. Were the RCMP to engage in systematic or unrestrained video surveillance of protests and demonstrations (which is not alleged here), this would have the potential to engage the Charter or the *Privacy Act*. Accordingly, the Commission urges the RCMP to exercise restraint in its surveillance activities, particularly where intelligence suggests that an event will likely be peaceful. The RCMP should give consideration to only recording video at demonstrations where disturbances or unlawful acts are likely, or actually occur. As La Forest J. wrote in the Supreme Court of Canada decision of *R v Wong*:

> I am firmly of the view that if a free and open society cannot brook the prospect that the agents of the state should, in the absence of judicial authorization, enjoy the right to record the words of whomever they choose, it is equally inconceivable that the state should have unrestricted discretion to target whomever it wishes for surreptitious video surveillance.
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> . . .

[131] OPC finding – video surveillance by RCMP in Kelowna, *supra* note 129.

> [T]o permit unrestricted video surveillance by agents of the state would seriously diminish the degree of privacy we can reasonably expect to enjoy in a free society . . . . [W]e must always be alert to the fact that modern methods of electronic surveillance have the potential, if uncontrolled, to annihilate privacy."[132]

[115] With that being said, it can be difficult to predict in advance whether a protest or demonstration will include acts of violence. A certain amount of operational discretion in regard to video-recording protests and demonstrations is reasonable. There is, furthermore, no indication in the information before the Commission that the video recordings were made for an unreasonable purpose. As the Commission has found that the demonstrators did not have a reasonable expectation of privacy, it cannot be said that the RCMP's decision to record the demonstrations on video constitutes an unreasonable police search. In the circumstances, the Commission is satisfied that capturing video recordings of the demonstrations discussed here was reasonable.

[116] What is to be done with such video is another matter. The Commission was concerned about the fact that the video recorded on June 17, 2013, still existed on June 5, 2014 (in the form of relevant material provided to the Commission), after it was determined that the protest was peaceful. Inspector Dana Hart (OIC, Terrace Detachment) informed the Commission on October 10, 2014, that the video was considered transitory in nature and would be destroyed after a prescribed period of five years. The RCMP relies on the Library and Archives Canada definition of "transitory record," which applies to "those records that are required only for a limited time to ensure the completion of a routine action or the preparation of a subsequent record."[133]

[117] In response to the Commission's request for a policy concerning the retention of videos of events that have no criminal nexus, the "E" Division of the RCMP referenced Chapter 16.4 of the national *Operational Manual*. This policy, while aimed at the use of closed-circuit video cameras rather than cameras operated by RCMP members at protests and demonstrations, states that recordings that reveal no significant events to the operator are to be considered transitory records, and that all transitory recordings must be retained for a prescribed period set by the detachment/district commander.[134]

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[132] *Wong*, *supra* note 111 at para 15.

[133] Library and Archives Canada, "Authority for the Destruction of Transitory Records (90/000)", online: http://www.bac-lac.gc.ca/eng/services/government-information-resources/disposition/multi-institutional-disposition-authorities/Pages/1990-transitory-records.aspx (accessed November 24, 2016). The Commission notes that, as of early 2017, this disposition authorization has been revoked and a replacement structure is currently in development. Transitory records are now described as not being of business value, including ". . . records that serve solely as convenience copies of records held in a government institution repository, but do not include any records that are required to control, support, or document the delivery of programs, to carry out operations, to make decisions, or to provide evidence to account for the activities of government at any time." See Library and Archives Canada, "Disposition Authorization #2016/001 for Transitory Records", online: http://www.bac-lac.gc.ca/eng/services/government-information-resources/disposition/multi-institutional-disposition-authorities/Documents/DA-2016-001-transitory-records.pdf (accessed April 13, 2017).

[134] RCMP *Operational Manual*, chap 16.4. "Closed Circuit Video Equipment", s 2.7., 7.1.3., 7.1.3.2. and 7.1.3.2.1.

[118] The lack of a clear policy, the privacy implications, and the apparent inconsistency in video retention periods across detachments or districts leads the Commission to recommend that the RCMP consider implementing a specific policy regarding video-recording protests and demonstrations. The policy should set out reasonable criteria and limitations for video-recording protests and demonstrations. Where a protest is peaceful, any video taken of that protest should not be retained. All recordings and images of peaceful protests and demonstrations should be destroyed as soon as is practicable and in accordance with applicable law.

FINDING NO. 5: It was reasonable to video-record the demonstrations.

FINDING NO. 6: As demonstrated by the RCMP's reliance on a closed-circuit surveillance camera policy, the RCMP lacks a clear policy with respect to video-recording public order events such as demonstrations and protests.

RECOMMENDATION NO. 1: That the RCMP consider implementing a specific policy regarding video-recording protests and demonstrations, setting out criteria and limits for video-recording protests and demonstrations and for video retention periods.

RECOMMENDATION NO. 2: In particular, that all recordings and images of peaceful protests and demonstrations be destroyed as soon as is practicable.

ii. RCMP Monitoring of Open Sources

[119] "Open sources" refer to all publicly accessible sources of information, such as the media, websites, blogs, video-sharing sites and other user-generated content, speeches, and academic literature. Open source material is primarily acquired from the Internet. Social media in particular facilitates the organizing and fundraising of protests and demonstrations within local communities and urban centres, drawing regional, national, and even international support.[135] As noted in a research paper commissioned for the Ipperwash Inquiry, police "are now highly dependent on open source material to reveal the intent of protesters. . . . Activists are operating, using the Internet as a primary communication and organizing tool."[136] The materials provided to the Commission indicate that the RCMP monitored open sources such as social media platforms, news articles, and other websites to obtain information about protests related to the Joint Review Panel hearings or otherwise related to the opposition to the Northern Gateway Project.

[120] In one instance, an Idle No More rally was scheduled for January 11, 2013, in Kelowna. This event was evidently organized online, and the organizers created an associated Facebook page. This page was noted, screen-captured, and discussed by

[135] RCMP, National Intelligence Coordination Centre, *Project SITKA: Serious Criminality Associated to Large Public Order Events with National Implications*, 2015/03/16, p. 11 [RCMP, *Project SITKA*].
[136] Wawryk, *supra* note 74 at p. 9.

RCMP division-level Criminal Intelligence Analysts, who observed that there was no indication of any intention of blocking traffic and that the intention seemed to be to hold a peaceful rally. Based on a reported concern that the protest would "become more serious," one "E" Division Criminal Analysis Section Criminal Intelligence Analyst sought updates about the Facebook page, as well as "all of the persons that have joined the [Facebook] group if possible." The Intelligence Analyst also noted that there was apparently Twitter activity regarding the demonstration. She also inquired as to whether anyone had "done any work-ups on any of the persons involved," particularly two individuals, Person A and Person B, who were apparently planning the event and regarding whom "[the RCMP is] especially interested."

[121] Although a member spoke to one of the organizers directly to obtain details about the event, there was concern based on Twitter and Facebook activity that a road blockade might be in the planning. The RCMP also learned that a separate Idle No More event would be occurring in Kelowna on the same day, and contacted the organizer for details. The RCMP noted that the organizers communicated information about this event through Twitter and Facebook, as well as the Idle No More website.

[122] When protesters were arrested in Vancouver in January 2013, the Kelowna Detachment made note of a CBC news article about the arrests, including a photograph of five arrested persons and the name of one of the protest organizers, Person C. This information was included in a planning document for upcoming hearings later that month, but the information provided does not reveal what other intelligence use, if any, was made of that information. The article, photograph and the name of the protest organizer were also included in an intelligence document titled "Enbridge and Idle No More Protests" that tracked protests relating to the Joint Review Panel hearings and to the Idle No More movement more generally.

[123] On another occasion, the RCMP received a tip about a planned Idle No More protest in Kamloops to be held on January 25, 2013, and a Kamloops Detachment Criminal Intelligence Analyst unsuccessfully attempted to find more information on Facebook and other Internet sources. Looking at the Idle No More website, he instead only found information about a Kelowna protest scheduled for January 28, 2013. An RCMP Staff Sergeant later noted that a Facebook group page called "Idle No More Kamloops" had created a post about a flash mob to be held on January 25, 2013. He also indicated that he had been told about a named individual (Person D) who "has posted that they will be planning something for today," but as the member did not personally have Facebook access, he could not obtain further information. He raised the question of whether the Criminal Intelligence Section wished to monitor "Idle No More Kamloops."

[124] In another instance, an Aboriginal Policing Services Criminal Intelligence Analyst monitoring Facebook identified an activist workshop scheduled for January 27, 2013, aimed at building skills and providing strategies for organizing rallies and for preparing for an upcoming provincial election. The event, entitled "Enbridge No More – Workshop: Pipelines and Provincial Organizing," was focused in part on the Joint Review Panel hearing in Kelowna set for January 28, 2013. Organizers planned to build and decorate a 25-foot whale that would be taken to the hearing. The Analyst noted the number of

people who had indicated that they would attend, and attached screen captures of the Facebook posts of those who would be attending. The event was anticipated to be “very peaceful,” but the Facebook group title had gotten the attention of an Analyst; it was flagged for other Analysts for their awareness only. When the Southeast District RCMP learned that a flash mob might be organized through the event, they made use of Facebook to attempt to confirm the information. The names of several Facebook posters who were posting about the event or discussing group coordination were noted by the RCMP.

[125] The organizer of an Idle No More flash mob round dance (discussed above), that was intended to draw attention to Bill C-45 and the Joint Review Panel hearing in Kelowna, contacted the RCMP in Vernon to inform them of the event and to request a police presence. Members of the RCMP Southeast District observed that it was being advertised by Facebook and other means, and made note of the number of people who had indicated via Facebook that they would attend.

[126] The RCMP also learned of a Kelowna Idle No More event via Facebook that was scheduled for the day of the Joint Review Panel hearing held there; they noted the planned attendance of at least 150 people.

[127] With respect to the Idle No More demonstration organized to take place at the Prince Rupert courthouse in April 2013 (discussed above), the RCMP monitored Facebook to track the planned attendance. An RCMP Aboriginal Policing Services Criminal Intelligence Analyst noted that 28 people had confirmed their participation, and remarked in a subsequent e-mail that “the expected Facebook numbers are usually inflated.”

[128] When an April 2013 Earth Day event in Kelowna, coordinated by members of Idle No More and “Defenders of the Land,” was organized to bring non-Indigenous peoples to join Aboriginal communities in “non-violent direct actions,” one of the organizers contacted the RCMP to request a police presence. An RCMP Aboriginal Policing Services Criminal Intelligence Analyst monitored the event and the planned attendance via Facebook, and passed along screen captures from Facebook. The RCMP concluded that no extra police resources would be brought in, as there was no intelligence to suggest that it would be anything but a peaceful event. First Nations Policing members attended to provide a police presence.

[129] The Terrace Detachment and NEB Communications and Security personnel monitored open source information concerning the Joint Review Panel hearings to be held in Terrace in June 2013. The NEB noted that there was a considerable amount of discussion about the Northern Gateway Project and the hearings on social media and different websites, although they noted no indications of planned security threats or disruptions. An RCMP Aboriginal Policing Services Criminal Intelligence Analyst also monitored Facebook regarding the rallies to be held in Terrace on June 16 and 17, 2013, during the Joint Review Panel hearings there. This monitoring included capturing screens of Facebook pages (which included comments from identifiable individuals confirming their attendance) and noting the anticipated attendance.

[130] Finally, when the Joint Review Panel decision regarding the Northern Gateway Project was to be released in December 2013, the RCMP's "E" Division INSET monitored social media in the days leading up to the release, and immediately afterwards.

[131] Other police services also monitored open sources for intelligence purposes, and the information provided reveals instances where they would inform the RCMP. A member of the Vancouver Police Department's Criminal Intelligence Unit sent the RCMP's Southeast District Probe Team Criminal Intelligence Section a website post written by a self-described anarchist who recounted his experience in the Vancouver Idle No More demonstrations in opposition to the Northern Gateway Project. The writer recalled that approximately 20 masked and black-clad "anarchist rebels" created an "openly confrontational" "defiant contingent" amidst the crowd of 600–1,000 anti-pipeline demonstrators at Victory Square in January 2013. Anarchists shot fireworks into the sky and used banners and a black flag to attempt to thwart police surveillance efforts. The anarchists were apparently intending to "break the peace of the Enbridge bosses" but were deterred from a potential confrontation with police by demonstration organizers and other individuals who physically placed themselves between police and the "rebels."

[132] In summary, the RCMP obtained significant information regarding protests and other actions from open sources, particularly through social media platforms like Facebook and Twitter. The information obtained included details such as the date, time and location of protests, as well as other particulars (e.g. the potential number of attendees, or whether participants planned to block traffic or infrastructure). In some cases, the RCMP also obtained names of event organizers or other participants. RCMP screen captures of social media groups often contained posts made by interested individuals, and the Commission notes that the *Privacy Act* includes "personal opinions or views of the individual" as constituting personal information.[137]

[133] Although social media posts are often regarded as being "public" information, their status in law is somewhat complex. Each social media platform has its own privacy settings and user agreements, and the content available to a given individual may depend on whether they access the platform through a signed-in account or not. Users of social media sites may also restrict the access that members of the public who are not otherwise connected to the user may have to their profiles and postings. The legal context may also impact the expectation of privacy. A plaintiff in a civil suit may be required to deliver their relevant social media postings to the defendant along with other relevant documents during discovery (e.g. in an injury lawsuit where the plaintiff claims pain, disability, or loss of enjoyment of life, but has posted material to social media that undermines that claim),[138] but police collection of information from social media postings may be regarded differently by the courts.

[134] As noted above, a police investigative technique will only qualify as a search for Charter purposes where the person concerned has a reasonable expectation of privacy

[137] *Privacy Act*, *supra* note 55 at s 3, "personal information".
[138] See e.g. *McDonnell v Levie*, 2011 ONSC 7151 at paras 15–16.

as assessed in the totality of the circumstances. The reasonable expectation of privacy can fall into one of three broad types: personal, territorial, and informational; police social media searches likely invoke informational privacy,[139] and such searches will likely encounter information worthy of Charter protection.[140] The Supreme Court of Canada has observed that activities involving personal computers and the Internet are entitled to a high degree of privacy.[141] Although the Supreme Court of Canada has not specifically considered the privacy expectations associated with social media use, social media may be entitled to protection under section 8 of the Charter because of its connection to a person's biographical core. As Fish J. wrote for the majority of the Supreme Court of Canada in *R v Cole*:

> The closer the subject matter of the alleged search lies to the biographical core of personal information, the more this factor will favour a reasonable expectation of privacy. **Put another way, the more personal and confidential the information, the more willing reasonable and informed Canadians will be to recognize the existence of a constitutionally protected privacy interest**.
>
> Computers that are used for personal purposes, regardless of where they are found or to whom they belong, "contain the details of our financial, medical, and personal situations" . . . . This is particularly the case where, as here, the computer is used to browse the Web. Internet-connected devices "reveal our specific interests, likes, and propensities, recording in the browsing history and cache files the information we seek out and read, watch, or listen to on the Internet" . . . .
>
> This sort of private information falls at the very heart of the "biographical core" protected by s. 8 of the Charter.[142] [Emphasis added]

[135] The British Columbia Court of Appeal recently found that users could have a reasonable expectation of privacy in personal messages exchanged through social media, suggesting that in at least some cases it will be an infringement of the Charter right against unreasonable search and seizure for police to search social media accounts.[143] In that case, the messages seized by police were exchanged privately, but the intended recipients provided the police with the messages and the social media site had relaxed privacy settings and policies. Nevertheless, the sender retained a reasonable expectation of privacy in the messages even though, once sent, they could easily be printed, circulated to others, or (as in this case) given to the authorities.[144] Some lower

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[139] *R v Tessling*, 2004 SCC 67, [2004] 3 SCR 432 at para 23, citing A. F. Westin, *Privacy and Freedom* (1970), at p. 7: "[T]he claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."

[140] See Coughlan, Steve, and Currie, Robert J., "Social media: the law simply stated", *Canadian Journal of Law and Technology* (2013), vol. 11, no. 2, pp. 229–251 [Coughlan and Currie].

[141] *R v Morelli*, 2010 SCC 8, 2010 CarswellSask 150, 2010 CarswellSask 151 (SCC) at para 105.

[142] *R v Cole*, 2012 SCC 53, [2012] 3 SCR 34 at paras 46–48 [citations omitted].

[143] *R v Craig*, 2016 BCCA 154 [*Craig*].

[144] Some lower courts have not found a reasonable expectation of privacy with respect to messages exchanged through social media. The Alberta Provincial Court acknowledged but departed from the *Craig* (*supra*) decision of the British Columbia Court of Appeal in a case with very similar facts because the accused person had distanced himself from the messages in question and argued that someone else could have written them. He did not take steps to ensure that no one could view the contents of his Facebook

courts have also concluded that a search warrant is required for police to gather information from and about the accused through sites like Facebook during a criminal investigation, including personal information about the accused and the messages exchanged there.[145]

[136] On the other hand, some courts have found that the publicly accessible information posted to social media sites such as Facebook can be utilized by police, at least where it is not protected by privacy settings. The Alberta Court of Queen's Bench observed that a police Facebook search for information about the accused to corroborate an informant's tip concerned information that was "open to the entire world" and was "available for the world to read."[146] Publicly available Facebook photos of individuals brandishing firearms have also been used as the basis for obtaining search warrants.[147] In another decision, police were able to access Facebook postings advertising a "rave" promoting alcohol and drug consumption, after being informed about the event by concerned parents, without comment from the court.[148] There are indications that protest organizers are beginning to utilize Facebook's privacy settings among other tools to limit viewing of posts by police.[149]

[137] The RCMP's new national policy on the use of the Internet for criminal investigations and intelligence requires any "designated practitioner" accessing social media to articulate any actions that may conflict with a social media platform's terms of service agreements.[150] It should be noted, accordingly, that the tools police may use to monitor sites like Facebook could violate their terms of service. In 2016, Facebook banned Media Sonar, a Canadian company selling social media monitoring tools to police, from accessing its data.[151] This was because the application did not comply with its Facebook Platform Policy for application developers. The information before the Commission does not reveal whether the RCMP uses such software to monitor Facebook.

[138] The social media platform Twitter also may not be regarded as private; a person's public "tweets" (short messages/posts from one's user account) are available to anyone

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account. It was also not clear to the Court that the messages contained information connected to his biographical core. The Court concluded on this basis that the accused did not have a reasonable expectation of privacy in the messages to the complainant. See *R v Lowrey*, 2016 ABPC 131, 2016 CarswellAlta 1086 at paras 64–70. Note also that, in an analogous case, the majority of the Court of Appeal for Ontario recently decided that the sender of text messages has no reasonable expectation of privacy in the messages received by the recipient's device because, once sent, the sender has lost control over what happens to those messages. This reasoning could be extended to apply to social media messages in Ontario. The decision, along with a related case, has been appealed to the Supreme Court of Canada and was heard in March 2017, with the decision reserved by the Court. See *R v Marakah*, 2016 ONCA 542.

[145] *R v Mills*, [2013] N.J. No. 395 (NL Prov Ct).

[146] *R v Franko*, 2012 ABQB 282, 2012 CarswellAlta 824 (AB Ct QB) at para 43.

[147] See e.g. *R v Ball*, 2014 ONCJ 265, 2014 CarswellOnt 7081 (Ont CJ).

[148] *R v F (J)*, 2015 ONSC 2068, 2015 CarswellOnt 9587 (Ont SCJ) at para 3.

[149] RCMP, *Project SITKA*, *supra* note 135 at p. 12.

[150] RCMP *Operational Manual*, chap 26.5. "Using the Internet for Criminal Investigations and Intelligence", s 5.2.1. (amended 2015-03-13).

[151] Pearson, Jordan, "Facebook banned this Canadian surveillance company from accessing its data", *Vice Motherboard*, (January 19, 2017), online: https://motherboard.vice.com/en_us/article/instagram-banned-this-canadian-surveillance-company-from-accessing-its-data-media-sonar (accessed February 13, 2017).

on the public platform, and the Ontario Court of Justice has ruled that a search warrant is not required for police to obtain them.[152] The Commission notes, however, that Twitter itself prohibits third parties (who develop applications that allow scanning of social media, for example) from allowing law enforcement to use Twitter data for surveillance purposes, stating that "[u]sing Twitter's Public APIs or data products to track or profile protesters and activists is absolutely unacceptable and prohibited."[153]

[139] As with Facebook, while the RCMP and other law enforcement agencies may not require a judicial authorization to access Twitter, the tools they may use may violate Twitter's terms of service. Twitter recently shut out two different companies that were providing surveillance services to U.S. law enforcement agencies after complaints that these companies were using Twitter's massive output of data to help police monitor activists.[154] Again, in keeping with the new RCMP policy, practitioners engaged in criminal investigations or intelligence-gathering must be prepared to articulate any actions that may conflict with those terms of service.

[140] Based on the Commission's review of the jurisprudence, it appears likely that, from a Charter perspective, the police are generally permitted to gather at least some information from sources that are accessible by the public. The collection of general details about planned events through social media would likely be regarded as permissible, and such information would be unlikely to attract a reasonable expectation of privacy. Personal information about specific individuals may be regarded differently, but at present it seems that publicly accessible information obtained from social media, such as names and profile photos, is not protected.

[141] As with the issue of video-recording demonstrators, however, there are nevertheless privacy law implications for obtaining personal information from social media and other Internet sources. The Office of the Privacy Commissioner of Canada ("OPC") has stated that information online is often posted with an expectation of privacy, whether this is reasonable to expect or not.[155] The OPC has itself concluded that the public availability of personal information on the Internet "does not render personal information non-personal" for the purposes of the *Privacy Act*.[156] In one notable case, government departments, including the Department of Justice, were regularly accessing and compiling information from a prominent activist's personal Facebook page and other

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[152] *R v Elliott*, 2016 ONCJ 35.

[153] Twitter, "Developer policies to protect people's voices on Twitter", (November 22, 2016), online: https://blog.twitter.com/2016/developer-policies-to-protect-people-s-voices-on-twitter (accessed November 29, 2016).

[154] Recode, "Twitter reminds everyone it won't cooperate with government or police surveillance", (November 22, 2016), online: http://www.recode.net/2016/11/22/13719876/twitter-surveillance-policy-dataminr-fbi (accessed November 29, 2016).

[155] Office of the Privacy Commissioner of Canada, *Checks and Controls: Reinforcing Privacy Protection and Oversight for the Canadian Intelligence Community in an Era of Cyber Surveillance*, p. 3, online: https://www.priv.gc.ca/en/opc-actions-and-decisions/reports-to-parliament-on-canada-s-federal-privacy-laws/201314/sr_cic/ [OPC, *Checks and Controls*].

[156] Office of the Privacy Commissioner of Canada, *Securing the right to privacy*, Annual Report to Parliament 2012-2013, *Report on the Privacy Act*, pp. 26–27, online: https://www.priv.gc.ca/en/opc-actions-and-decisions/reports-to-parliament-on-canada-s-federal-privacy-laws/201213/201213_pa/.

social media sites over a period of years. They had argued that people surrender their right to privacy by posting on social media. The OPC forcefully disagreed. It recommended that this practice stop immediately unless the departments could demonstrate a direct connection to legitimate government business, and recommended the destruction of any personal information previously collected without such a connection. The OPC further recommended that the departments develop policies and guidelines governing the collection of personal information from social media sites, and limiting such collection only to situations in which there is a direct connection to their operating programs or activities.[157] These recommendations were accepted by the involved departments.

[142] Relying on social media postings can also be potentially misleading for police intelligence and investigations. Such information can be unreliable.[158] Posts may be inaccurate or exaggerated, may rely on hearsay or false information, or may even be posted by other persons using the login credentials of the purported poster (e.g. where a person leaves their computer unattended while signed in to social media).[159] Even simple information can be unreliable. In one case, an RCMP member noted that attendance figures for events obtained from social media are usually greatly inflated compared to actual turnout, with attendance estimated to be only one-sixth of that indicated. A Criminal Intelligence Analyst made a similar observation about inflated turnout numbers. The report on RCMP Project SITKA also stated that social media posts about planned attendance at events can greatly exaggerate the actual attendance, or even understate it.[160]

[143] Moreover, seemingly reliable documents such as photographs may be digitally altered in significant and hard to detect ways and (like any photograph or document) images obtained from open Web sources must be authenticated to be admissible.[161] This can be difficult to establish. Websites and social media platforms may subtly alter the images themselves (e.g. by cropping or resizing images) and/or strip relevant metadata from images when they are uploaded, making it challenging to demonstrate that an image has not been materially edited. The materials provided to the Commission do not reveal what reliability issues the RCMP may have identified when generating intelligence from information obtained from open sources, or what methods are in place to mitigate these issues.

[144] Notwithstanding the above concerns, it was reasonable in the Commission's view for the RCMP to obtain information about public events through publicly available social media postings. Specifically, it was reasonable to obtain details such as the date and time and location of an event and the number of people who indicated an intention to attend. This was neither personal nor confidential information and it cannot be said that any individual would have a reasonable expectation of privacy with respect to such information—at least so long as individual attendance and participation in the events was

[157] Ibid.
[158] OPC, *Checks and* Controls, *supra* note 154.
[159] Coughlan and Currie, *supra* note 140 pp. 241–242.
[160] RCMP, *Project SITKA*, *supra* note 134 at p. 11.
[161] See e.g. *R v Andalib-Goortani*, 2014 ONSC 4690 (Ont SCJ) at paras 27–28 and 30–34.

not tracked. The collection was also directly related to the RCMP's operating programs and activities, in accordance with the *Privacy Act*. The information provided helpful glimpses into the likely nature of a given event and assisted the RCMP in determining the threat level and the most appropriate police response. Although there was rarely if ever a threat of criminal activity, some disruptions to the hearings had occurred in the past, and from an intelligence-gathering perspective it was reasonable for the RCMP to keep abreast of developing events.

[145] However, the Commission notes that the RCMP's efforts to monitor events and public groups through social media frequently resulted in the collection of personal information. Screen captures of social media sites like Facebook contained multiple names of group members and/or prospective event attendees along with information such as their plans to attend, their opinions regarding an issue in discussion, or their very membership in the Facebook group. This information appears to have been retained.

[146] Since the events that are the subject of this report, the RCMP has developed a national policy for using the Internet for criminal investigations and intelligence.[162] The policy states that open source information can be used to develop actionable criminal intelligence, and that open source intelligence functions can be performed by all categories of RCMP employees (subject to training, designation and authorization requirements depending on the level of the open source intelligence activity undertaken). Open source information is defined in the policy as "unclassified, raw material that is derived from a primary source, i.e., the Internet, and can include any type of media in any format. The information is obtained, derived, or recovered lawfully, purchased or observed from open or publicly available sources, e.g. websites, blogs, social networks, and various online databases."[163]

[147] The policy discusses the generation of intelligence ("OSINT") from open source information. Echoing the language of the *Privacy Act*, it requires all OSINT collections to be directly related to the operating program's mandate and official law enforcement activities. Where it is unclear if OSINT activities may be contrary to policy or could violate the law, the designated practitioners must consult the unit commander and RCMP Legal Services, among others. OSINT activities are conducted at one of three tiers. Each tier level is increasingly covert and may entail the use of discreet or concealed online identities.

[148] The policy makes reference to individual privacy expectations, stating that specialized tools, techniques or software designed to circumvent online privacy settings must not be used. Designated practitioners must use a passive collection approach that "can be articulated as publicly available on the internet."[164] They must also ensure that they have legal access to the information being sought online, as "the public's reasonable expectation of privacy is paramount."[165] The policy states that the collection, retention

[162] RCMP *Operational Manual*, chap 26.5., *supra* note 150.
[163] *Idem*, s 2.11.
[164] *Idem*, s 4.2.6.
[165] *Idem*, s 4.2.5.

and disposal of personal information must be conducted in accordance with the *Privacy Act*, and practitioners must have mechanisms in place "to meet or exceed all legal and access to information requirements as outlined in [the RCMP *Operational Manual*] and in accordance with subsec. 5.(2), *Privacy Act.*"[166]

[149] With respect to social media in particular, the policy states:

> 5. 1. Open source intelligence collections from social media websites, e.g. Facebook, Twitter, YouTube, Instagram, Google+, and the use of third party social network aggregates, software, or tools are acceptable, provided that:
>
> 5. 1. 1. the research and the collection are passive and based on a specific task or investigative purpose; or
>
> 5. 1. 2. the client needs to confirm, corroborate, or discredit information stemming from criminal intelligence, threat-related information, or traditional investigative leads relating to a person, place, or event.
>
> 5. 2. Designated practitioners are responsible for reading and understanding the Terms of Service of the websites they use.
>
> 5. 2. 1. Designated practitioners must be able to articulate any actions taken that may conflict with Terms of Service agreements.
>
> . . .[167]

[150] In summary, the new policy provides some guidance with respect to privacy expectations and the collection of personal information from sources such as social media. It generally outlines when personal information may be collected (in that the collection must directly connect to legitimate law enforcement business). If the new policy had been in place at the time the intelligence-gathering activities reviewed in this report took place, however, the Commission finds that little would have changed in terms of the retention of personal information of individuals where there is no criminal nexus or other threat of harm.

[151] The Commission believes it would be useful for the RCMP's policy on the use of open sources to be clearer with respect to social media and personal information. The policy should delineate what information is appropriate to collect from sources such as social media, and what the acceptable and unacceptable uses of any information obtained are. It should also determine what steps should be taken to ensure the reliability of any information obtained. The Commission particularly recommends that the policy (and related policies on the retention of personal information) direct that social media records, including screen captures, be destroyed as soon as is practicable and in accordance with applicable law once it is determined that there is no criminal nexus or that the information is otherwise no longer necessary for the purposes for which it was collected.

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[166] *Idem*, s 8.2.
[167] *Idem*, s 5.

FINDING NO. 7: It was reasonable for the RCMP to monitor open sources for information about upcoming protests and demonstrations.

FINDING NO. 8: The RCMP's current policy on the use of open sources does not provide clear guidance as to the collection, use, and retention of personal information obtained from social media where there is no criminal nexus.

RECOMMENDATION NO. 3: That the RCMP provide clear policy guidance describing what personal information from social media sites can be collected, the uses that can be made of it, and what steps should be taken to ensure its reliability.

RECOMMENDATION NO. 4: That the RCMP policy require the destruction of records obtained from social media sources containing personal information (such as screen captures of social media sites) once it is determined that there is no criminal nexus regarding the information.

iii. RCMP Checks of Individuals

[152] The Commission's review of the materials provided indicated that the RCMP conducted open source and internal database checks on a number of individuals organizing and/or attending protests and demonstrations.

[153] As an example, Person A and Person B were identified as individuals of interest to RCMP Criminal Intelligence Analysts in January 2013, apparently because they were involved in organizing an Idle No More event in Kelowna. A Criminal Intelligence Analyst in the Kelowna Detachment asked two other Analysts if they had "done any work-ups on any of the persons involved." Person B was later noted in an intelligence document titled "Enbridge and Idle No More Protests" as "leading the pack" of 100 Idle No More demonstrators in West Kelowna.

[154] Separately, on January 18, 2013, the general manager of a hotel in Kelowna (where the Joint Review Panel hearing would be taking place) wrote to members of the RCMP and NEB security to inform them of two individuals who had approached her seeking the hotel's cooperation and permission for their respective groups to demonstrate on the day of the Joint Review Panel hearing.

[155] The first person to speak to the general manager that day, Person E, wished to have space allocated at the hotel for her "Enbridge No More" protest group on the day of the Joint Review Panel hearing. She stated that her contingent would come from across the interior of British Columbia and expected a great deal of interest in the event. She believed that Idle No More would also be represented. When the general manager explained that the hotel and its grounds were private property and not a public venue, Person E warned her that the protesters would not take kindly to being restricted from the event and that the hotel essentially had to choose between facilitating the protesters or

having bad press and bad publicity on national television. The general manager stated that she would pass Person E's comments along to the hotel chain's legal department, which Person E encouraged, and accordingly provided her contact information in case they wished to speak to her directly. Her contact information was provided to the RCMP at their request. Person E's remarks about the "Enbridge No More" protest were added to an RCMP briefing note about protests planned for the Joint Review Panel hearing on January 28, 2013.

[156] Person E appears to have been viewed by the hotel management as a potential threat, as the management expressed concern to the NEB and the RCMP for the safety and security of the hotel's employees and guests as a result of "recent feedback [they] have received from some of the protesters . . . ." RCMP members conducted reconnaissance of the hotel on the morning of January 21, 2013, and the hotel chain's regional manager informed the RCMP that their lawyers had recommended that the Joint Review Panel hearing not be held at the hotel. The RCMP also learned from the hotel chain's regional manager that Person E had called the hotel daily with "threats" about protest activity and seeking the cooperation of the hotel in providing power for large speakers and a place to make speeches. That same day, an RCMP Sergeant of the Southeast District Probe Team of the Kelowna Criminal Intelligence Section sent an e-mail to a Superintendent of the Southeast District asking if anyone was "doing any work up on [Person E]." He stated that he could coordinate this effort, but did not want to duplicate any work being done. Later that day, the RCMP Sergeant replied that he would likely have open source and "Level 4" checks run on "the subject."

[157] Also later that day, the RCMP Sergeant of the Southeast District Probe Team provided some information about Person E, who was described in his e-mail as a "person of interest." He wrote that Person E was:

> . . . actively involved in signing petitions and community issues to which she supports. Was one of the organizers involved in the pro-choice protest in front of city hall in Sept 2012 . . . which went off peacefully I understand. She is not in support of Enbridge and shows at least a passive support to first nations issues amongst a multitude of other social issues.
>
> All indications are she uses her democratic right to petition and protest against issues, private and governmental, that she disagrees with. No evidence of mental health issues or her being in support of violence or aggressive civil disobedience." [*sic* throughout]

[158] An NEB security advisor, who had been included in the e-mail from the hotel regarding Person E, sought further information about her group from the RCMP on January 22, 2013. The Operations NCO of the "E" Division Criminal Intelligence Section also requested that police database and open source checks be run on Person E on January 23, 2013, in an incident discussed below. Person E contacted the RCMP several days later to express her concerns about the upcoming demonstrations, and she and the RCMP appeared to have a dialogue in advance of the event.

[159] The second individual to speak to the hotel general manager, Person F, stated that he had previously worked with Person E, but his organization had withdrawn its support from hers due to issues that he said concerned him, and they were no longer affiliated. He stated that he was expecting a very large contingent to attend, and requested that they be allowed to occupy a section of the hotel's parking lot. He informed the hotel manager that the group would be peaceful and respectful and would not try to enter the hotel. He added that they would be accompanied by First Nations Police and RCMP members, and that they would leave at the first sign of violence. This information was included in an internal briefing note. The materials before the Commission do not reveal whether open source or police database checks were run on Person F. However, his group's disassociation from Person E's group concerned NEB security, as it was unclear why they had done so. When the NEB learned of the two protest groups approaching the hotel, moreover, an NEB security advisor recommended separating the hearing into two distinct venues that would result in the public being excluded from the hearing room, as had been done in Vancouver and Victoria.

[160] Person G was also identified by the RCMP in January 2013 due to her role as an organizer and contact person for an Idle No More rally scheduled for the January 28, 2013, Joint Review Panel hearing in Kelowna. Person G had contacted Corporal Martin Trudeau, the RCMP's Rural/First Nations Policing NCO in Penticton, British Columbia, in mid-January 2013, to inform the RCMP of the protest. Corporal Trudeau noted in an e-mail that the organizers of the protest knew that the hotel where the hearing was taking place was private property and did not want to cause any problems. He also pointed out that Person G had previously organized an Idle No More protest earlier that month and that "she has been very accommodating and great to work with thus far." The Operations NCO of the "E" Division Criminal Intelligence Section stated that the Section's Southeast District had been tasked with collecting intelligence regarding the upcoming hearing, but because the Southeast District lacked an analyst, he requested police database checks and open source checks for Person G and another "possible organizer/supporter," Person E (discussed above). The e-mail chain discussing the matter also included a briefing note containing background information on the events and some basic information about the organizers.

[161] In response to the RCMP's "E" Division Criminal Intelligence Section's request, a civilian member of the Combined Forces Special Enforcement Unit British Columbia, Open Source Section, provided a "mini profile" on Person G as well as information obtained from open sources such as YouTube. The profile (which the civilian member of the Combined Forces Special Enforcement Unit British Columbia stated was derived from open sources) contained information such as her address, date of birth, telephone number, driver's licence number, height, hair colour, eye colour, and information about individuals believed to be relatives based upon their surnames (and included those individuals' dates of birth, addresses, and some British Columbia driver's licence information). It did not make reference to any criminal records. According to the information provided to the Commission, this profile was sent to the "E" Division Criminal Analysis Section, Southeast District, as well as to a Criminal Intelligence Analyst and an Operations Officer at the Kelowna Detachment. Limited information about Person E,

Person F, Person G, and the events they represented appeared in RCMP briefing notes as the January hearing date approached.

[162] On some occasions, the NEB conducted its own checks and provided them to the RCMP. On January 23, 2013, an NEB security advisor provided the RCMP with a list of scheduled presenters for the Kelowna hearing, including names, e-mail addresses, phone numbers, and cities of residence. He flagged the names of two individuals that open source checks had indicated may be activists, although he noted that it was not uncommon for activists and protesters to make oral statements. The Commission saw no indication in the information provided that the RCMP took any action regarding this information or otherwise conducted checks on scheduled presenters.

[163] The goal of the criminal intelligence process is the disruption of criminal activity. It is clear that the RCMP has a need for up-to-date information and intelligence about potential criminal threats, as well as information and intelligence pertaining to objectives like preserving the peace and facilitating the exercise of the rights of all sides involved. Obtaining relevant information about protest organizers and other participants can be a reasonable component of the intelligence-gathering process. For example, if an organizer had participated in past violent protests or had previously been disruptive, it may indicate that a heightened security posture is warranted.

[164] Nevertheless, the Commission is concerned about the practice of conducting extensive checks into the backgrounds of individuals believed to be protest organizers or participants where there is no independent and reasonable suspicion that these individuals might be involved in any criminal activity, and where there is no intelligence or other information indicating that the protests and demonstrations being organized might result in violence or other unlawful acts. In the Commission's view, there is limited value in conducting "work ups" on persons who have only come to the attention of the RCMP because they have organized a protest or demonstration (as is their constitutional right), or indicated their intention to participate in one (as is also their constitutional right). In these circumstances, the Commission questions whether it will always be reasonable or appropriate to run such checks, particularly where the information obtained is compiled into a "profile" or "work up" and retained.

[165] In the case of Person G, the RCMP generated a detailed profile about an individual where indications were that she had been open and forthcoming with the RCMP about the nature of the event she was associated with. From the information provided, it does not appear that any criminal issues (or, in fact, any other lesser issues) were identified. There did not appear to be a significant threat level associated with the Idle No More event scheduled for the day of the Joint Review Panel hearing in Kelowna on January 28, 2013.

[166] The information before the Commission does not reveal whether the sources consulted in the preparation of the "mini profile" for Person G included police or other government databases (or if other criminal intelligence products were generated from such databases), although the Commission notes that requests were made by RCMP members to consult police databases in her case as well as in the cases of others. It is

reasonable to assume that the information obtained about Person G was linked to her British Columbia driver's licence, which contains details such as an address, date of birth, height, weight, eye colour, and hair colour.[168] The information linked to an individual's driver's licence (or, indeed, the driver's licence number itself) is not typically publicly available information characteristic of an open source, and is quite clearly personal information that is generally protected by the *Privacy Act*. It is therefore also reasonable to assume that this information was obtained from a police or government database. This is significant because personal information that is not publicly available cannot be collected, used or disclosed by federal government institutions except in accordance with the *Privacy Act*.[169]

[167] At the initial stage of a background check or other intelligence assessment, it will not always be immediately clear if the information collected is related to a criminal or national security threat as opposed to lawful advocacy, protest, or dissent. That information may require analysis to determine whether a criminal threat exists. In this sense, it is not unreasonable to compile information to gain a current intelligence profile of an individual. However, if and when it was determined that there were no criminal or other national security threats related to Person G (or information otherwise necessary to the policing of the hearings), the use and retention of her personal information should not have continued.

[168] Beyond the fact that the Commission was provided with the "mini profile" and other documents making reference to Person G's personal information in 2014, however, the materials before the Commission do not reveal the uses made of her personal information or the length of time that the RCMP retained that information. The information was provided to the "E" Division Criminal Intelligence Section and to an RCMP civilian Criminal Intelligence Analyst at the Kelowna Detachment the day after it was compiled. There is no indication in the materials provided that this information was disseminated further. It is unclear at what point this information was linked with the results of the police database checks that were requested.

[169] Although the Commission is concerned about this issue, there is insufficient information to support a finding that it was unreasonable to use and retain Person G's personal information. That being said, the Commission finds that there is a lack of policy and/or guidance to RCMP members on this issue.

[170] Where there is no link between the information obtained and criminal activity, the information no longer serves a law enforcement or criminal intelligence purpose. The Commission must emphasize, as previously stated in this report, that the RCMP's national security mandate expressly excludes lawful advocacy, protest or dissent except where such advocacy, protest or dissent is carried on in conjunction with an act defined as a threat to the security of Canada under the CSIS Act. Consistent with this limitation,

[168] Within the "mini profile" of Person G is a note under the heading "Address" that reads "(d/l)." Along with her driver's licence number itself, this is a further indication that Person G's driver's licence information was accessed.
[169] *Privacy Act*, *supra* note 55 at s 4, 7, 8, and 69(2).

the Commission recommends that the RCMP develop policy/guidelines to require that any personal information, including that of individuals engaged in lawful advocacy, protest or dissent, should not be retained once it has been established that there is no criminal or national security nexus or that it is otherwise no longer necessary for the purposes for which it was collected. All records of such personal information, including personal information compiled into "profiles," should be purged and/or destroyed as soon as is practicable and in accordance with applicable law.

FINDING NO. 9: There is insufficient information to support a finding that it was unreasonable to retain the profile and the personal information of Person G.

FINDING NO. 10: The RCMP lacks clear policy/guidance as to the use and retention of personal information in circumstances where it is determined that there is no nexus to criminal activity.

RECOMMENDATION NO. 5: That the RCMP develop a policy providing that where the RCMP obtains personal information that is determined to have no nexus to criminal activity, the information should not be retained.

[171] In the other specific instances reviewed by the Commission, the Commission concludes that the RCMP checks were not unreasonable per se. The police have a public safety mandate and were assisting the NEB by request. Even absent indications of any criminal activity or a notable threat level, the RCMP was faced with questions as to the amount of disruption a given protest or demonstration might cause, and whether there was any risk to the NEB personnel, hearing participants, venue staff and guests, and the public. In answering these questions, they were acting not only in a law enforcement capacity but in an intelligence-gathering capacity. Previous hearings in Vancouver had faced large and active demonstrations that included aggressive elements, and on one occasion protesters had even entered the hearing room and disrupted the proceedings. There was, to some extent, apprehension (albeit largely on the part of the NEB) that similar aggressive protest tactics or disruptions could be repeated in Kelowna.

[172] It appears that Person E in particular was perceived as potentially posing a threat to the conduct of the hearing, and the RCMP accordingly sought intelligence regarding her and her group. Despite references to "work ups" being conducted, the materials before the Commission indicate only that checks were run on Person E (beyond the fact that information about Person E was provided to the Commission, the materials do not reveal whether a profile was created or whether any personal information was retained). In the absence of further information, the Commission finds that such checks were not unreasonable. The Commission makes the same findings about the checks likely run on Persons A and B.

FINDING NO.11: It was not unreasonable to conduct open source and internal database checks in the other specific instances reviewed by the Commission.

[173] It is the Commission's view that one of the most effective sources of information was direct communication with event organizers, who often reached out to the police themselves. The Commission reiterates the recommendation made by Justice Ted Hughes in the APEC Report, "The RCMP should continue to follow, and enhance where appropriate, its existing open door policy of meeting and working with the leadership of protest groups, well in advance of a planned public order event, with a view to both police and protestors achieving their objectives in an environment that avoids unnecessary confrontation."[170] This is also consistent with the recommendation made in a report of the Police Executive Research Forum that, as early as practicable, police make contact with protest leaders as an "overt" part of the intelligence-gathering process.[171] This provides the opportunity to solicit the organizers' support and cooperation for planning a safe and peaceful protest, to inform the organizers of police expectations and objectives, and to obtain information. A model of this approach that has been applied with success by the RCMP from time to time is known as the "measured approach."[172, 173]

[174] The Commission notes that RCMP members did contact and/or work with organizers from time to time, but as a means of gathering the best information available, and of facilitating a trust relationship between police and protesters, the RCMP should consider liaising directly with event organizers whenever possible. This would greatly facilitate the gathering of critical information about planned events such as the organizers' intentions, the anticipated turnout, and potential problem areas.

SECOND ALLEGATION: The RCMP engaged in covert intelligence gathering and/or infiltration of peaceful organizations.

[175] The e-mails reviewed by the BCCLA also led to the following allegation:

> [S]ome of the RCMP's information is derived from "confidential sources" who may be directly connected or involved with advocacy groups such as Idle No More. This strongly suggests that the RCMP is engaged in covert intelligence gathering and/or infiltration of peaceful organizations whose sole purpose is to give voice to their members' concerns and viewpoints on matters of significant public interest. Again, BCCLA is troubled that the RCMP would infiltrate and/or covertly gather

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[170] Commission for Public Complaints Against the RCMP, *Commission Interim Report Following a Public Hearing Into the Complaints regarding the events that took place in connection with demonstrations during the Asia Pacific Economic Cooperation Conference in Vancouver, B.C., in November 1997 at the UBC Campus and Richmond detachments of the RCMP* (Ottawa: Civilian Review and Complaints Commission for the Royal Canadian Mounted Police, July 31, 2001).

[171] Police Executive Research Forum, *Mass Demonstrations: Identifying Issues and Successful Approaches*, (Washington, D.C.: Police Executive Research Forum, 2006), p. 32.

[172] "The goal of the measured approach is to prevent violence through relationship building and consultation with community groups prior to and during public order events. Without an understanding of the issues by both parties, achieved through a 'listening to understand' philosophy, violence may become the only option." For a discussion of the police (and particularly the RCMP's) experience with the measured approach, see Robinson, D. W., "The Measured Approach: The Key to Conflict Resolution, Getting the Dialogue Started", (2003), online: http://dtpr.lib.athabascau.ca/files/maisproject/RobinsonDwightProject.pdf (accessed April 10, 2017).

[173] The Commission notes that there is no national training or model for this approach, however.

> intelligence regarding groups whose members are peacefully exercising their *Charter*-protected assembly and expression rights.[174]

[176] The Commission's review of the file materials revealed that Sergeant Steve Barton and Corporal Rob Robertson did attend an event in plain clothes for the purpose of making discreet observations. The activist workshop entitled "Enbridge No More – Workshop: Pipelines and Provincial Organizing" (also discussed above), was scheduled for January 27, 2013, the day before the Joint Review Panel hearing in Kelowna. The Facebook description of the workshop stated, "Come for an afternoon of workshops and skills training that will provide tools and strategies to build solidarity and organizing for rallies and for the upcoming provincial election." Although a Criminal Intelligence Analyst noted that the event was organized to prepare for the Joint Review Panel hearing, it was also anticipated to be "very peaceful" and its details had been forwarded for awareness only. Nevertheless, the NEB was aware of the workshop, and it "was a worry" to them, according to an e-mail from a representative of Tocra, Inc. to an RCMP Superintendent of the Southeast District.

[177] On January 23, 2013, Corporal Albrecht, the NCO in charge of the Kelowna Municipal Detachment's Target Team, reported that he and Sergeant Barton had been in contact with sources in Vancouver, including the "E" Division INSET, regarding the demonstrations organized in opposition to the Northern Gateway Project to learn more about what they might encounter. A member of the INSET had informed them that "black clad anarchists [*sic*] types" had been coming out to the Vancouver protests, but believed that members of this group would have a difficult time travelling to Kelowna owing to limited resources. He nevertheless felt that the upcoming "Enbridge No More" workshop would be a "great barometer" to gauge whether significant numbers of anarchists would be coming to Kelowna for the upcoming hearing.

[178] Sergeant Barton also reported that the "E" Division INSET had told him that they have found the monitoring of workshops "to be of assistance in gauging the possible local attendance of future protests or events in the area and/or the aggressiveness or the types of people that may attend." He acknowledged that it was unlikely that "the anarchist types" would attend the workshop, but he stated that he and Corporal Albrecht believed that it could give them an idea of the local interest and "the tone of the locals." According to Sergeant Barton, the purpose of their attendance would be "to make passive observations, etc and not to engage in activity that might cross over into a[n] [undercover operation]."

[179] On the afternoon of January 27, 2013, Sergeant Barton and Corporal Robertson visited the Kelowna United Church, where the workshop was to take place. Before entering the church, Sergeant Barton observed several vehicles arrive and noted their licence plate numbers and described the occupants, all of whom appeared to be in their 60s. As more people began to filter in, Sergeant Barton went inside the church. He made the following observations:

[174] BCCLA complaint, p. 4.

> Crowd of approx 19-21 persons at this time. Mixed male and female. Age range from mid-20's to 70's. Average age approx 50-60's. White dark haired female, 35-40 yrs, organizing event taking charge. Getting people to put on name tags, put chairs into a circle. Tables set up with pamphlets and petitions. Group from Kootneys (Nelson) present with "no pipeline" banners and placards. No anti government signs or pamphlets observed, no overt talk of violence. Definitely vocal concerns about the pipeline and wanting to get their voices heard. One older male from Kootney contingent talking to Sgt. Barton about making a loud scene, etc and wanting to work with the concerned First Nations chiefs. Same male concerned CSIS spies might be in attendance.
>
> No particular radicals obvious. [*sic* throughout]

[180] Sergeant Barton left the event when the group arranged their chairs into a circle to begin dialogue. He noted that the tone of the group appeared to be non-violent. He and Corporal Robertson then recorded about 18 licence plate numbers from vehicles in the church's rear parking lot, including one vehicle with a male inside that was observed to have a "Don't Frack With my Water" bumper sticker. The information provided to the Commission does not reveal what, if anything, was done with these licence plate numbers, but it is reasonable to assume that these numbers were run through police databases and that any noteworthy information obtained from such checks would have been included in intelligence products generated by the RCMP.

[181] Sergeant Barton and Corporal Robertson noted more participants entering the church, bringing the total attendance to approximately 30 people, and then departed.

[182] The January 28, 2013, "Enbridge No More" event was peaceful, as organizers had stated it would be, with numerous speeches given inside of the hearing venue. Approximately 100 supporters were in attendance. First Nations Policing members and members of the Kelowna City Detachment were engaged and worked closely with the organizers, keeping informed of updates. The media were present and there were no signs of agitators or civil disobedience.

[183] RCMP policy defines an undercover operation as ". . . an investigative technique used by a peace officer or agent to seek or acquire evidence or intelligence through misrepresentation, pretext or guise."[175] An undercover police officer typically utilizes an assumed name and identity. Furthermore, cover teams are assigned to the operator to ensure their safety and to monitor the operation for threats and risks.[176] Undercover operators are specifically trained and must have qualified for a National Headquarters undercover operator number.[177] Additionally, all undercover operations require prior

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[175] RCMP *Operational Manual*, chap 30. "Undercover Operations, General", s 1.
[176] Commission for Public Complaints Against the RCMP, *Public Interest Investigation Report into RCMP Undercover Operations During the 2010 G8/G20 Summits* (File No. PC-2012-2748), p. 5 [CPC 2010 G8/G20 Report].
[177] RCMP *Operational Manual*, chap 30, *supra* note 175 at s 4. In exceptional circumstances, a temporary operator number may be issued to a member who does not have a permanent National Headquarters number, but this must be approved by National Headquarters. See RCMP *Operational Manual*, chap 30.6. "Undercover Operations, Approval", s 3.2.

approval.[178] This process involves the completion of an operational plan;[179] final approval of a plan, depending on the nature of the operation, may be required from the Divisional Criminal Operations Officer or their delegate or, for a major undercover operation, the RCMP Headquarters in Ottawa.

[184] In contrast, "plainclothes police operations" have been defined as "operations in which a police officer retains his or her identity as a police officer . . . ."[180] They are not subject to the detailed approval process that undercover operations are. One Ontario Superior Court of Justice decision observed that plainclothes police officers "may be assigned to support undercover operations, and are considered to be in a covert role, [but] they are not undercover operatives and are not trained as such."[181] Their function is to "hide in plain sight" or "blend in" by being dressed as a civilian, not to take on a particular role.

[185] Intelligence "provides a means for the police to adequately deploy and use resources as and when they are most needed, as well as . . . targeted arrests of individuals suspected of instigating violence."[182] Undercover operations have played a role in such intelligence gathering in previous demonstrations.[183] Bearing in mind that the present instance involves what was termed a **plainclothes operation** and not an undercover operation, the Commission has previously concluded that the police use of undercover operators to gather information with respect to protests has been appropriate where the operators acted in accordance with applicable law and policy and did not, for example, act as agents provocateurs.[184] In the Commission for Public Complaints Against the RCMP's[185] Public Interest Investigation Report into RCMP Undercover Operations During the 2010 G8/G20 Summits, the Commission found that RCMP undercover operators were deployed in "intelligence probes" with instructions to obtain whatever information they could with respect to the likelihood that criminal activity or violence was planned, and report back.[186] The Commission for Public Complaints Against the RCMP found no indication of direct or indirect instructions to influence or direct any of the persons they were asked to target.

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[178] RCMP *Operational Manual*, chap 30.6., ibid.
[179] *Idem*, s 2.1.
[180] CPC 2010 G8/G20 Report, *supra* note 176 at p. 5.
[181] *Canadian Broadcasting Corp. v Ontario (Attorney General)*, 2015 ONSC 3131, 2015 CarswellOnt 11443 (Ont SCJ) at paras 29–30.
[182] Commission for Public Complaints Against the RCMP, *Public Interest Investigation into RCMP Member Conduct Related to the 2010 G8 and G20 Summits, Final Report*, (May 2012), at 28, online: http://www.crcc-ccetp.gc.ca/en/public-interest-investigation-rcmp-member-conduct-related-2010-g8-and-g20-summits-0.
[183] CPC 2010 G8/G20 Report, *supra* note 175 at p. 7.
[184] "Agent provocateur" (French for "inciting agent") is a person, typically a police officer or other official agent, who acts to induce or incite others to commit rash or illegal acts for the purpose of discrediting or criminally implicating them.
[185] The Commission for Public Complaints Against the RCMP was the predecessor of the present Commission, which was established by the November 2014 amendments to the RCMP Act.
[186] CPC 2010 G8/G20 Report, *supra* note 176 at p. 5.

[186] The Commission acknowledges the importance of timely and accurate intelligence to the RCMP, particularly when it is faced with controversial public events that can attract potentially large protests and demonstrations. There is always the potential for violent or otherwise unlawful behaviour to erupt in such situations, even where the overwhelming majority of those assembled are peacefully exercising their constitutional rights. The RCMP must protect the public and the hearing participants and it must respond to requests for assistance from the NEB. Nevertheless, the threat level that existed during the Joint Review Panel hearing process was radically different than that facing the 2010 G8/G20 Summits. The 2010 G8/G20 Summits were international events involving a gathering of world leaders. They attracted international attention and immense opposition. Previous summits and similar international meetings had a history of large, disruptive protests that included property damage, clashes with police, and large numbers of arrests. The 2010 G20 Summit drew protests of up to 10,000 people in size, and resulted in over 1,000 arrests.

[187] In contrast, the Joint Review Panel hearings were small and comparatively local in scale. They did not involve world leaders or attract international elements. They moved from site to site, frequently being held in smaller cities or communities where large numbers of protesters were unlikely to gather. The protests and demonstrations that occurred during the Joint Review Panel hearings, as well as those that were more broadly part of the anti-pipeline or Idle No More movement in British Columbia in general, were typically non-violent and uneventful. Only in Vancouver did the protests feature any unrest or disruption, and even there the great majority of protesters were peaceful.

[188] Plainclothes operations may also require the expenditure of police resources such as overtime pay, which was an issue in this case. This makes it important for the RCMP to appropriately balance competing priorities in determining how to allocate limited resources, raising the question of whether the RCMP's response in this case was proportionate to the circumstances.

[189] However, what remains is that Sergeant Barton and Corporal Robertson attended an event that was open to the public. There they made passive observations about the workshop before leaving shortly afterwards. The workshop held in Kelowna on January 27, 2013, had been assessed as likely being "very peaceful," but it had been recommended by the "E" Division INSET that RCMP members attend the workshop in order to gauge the mood and likely intentions of those present. The Commission does not find that this conduct amounted to an unreasonable search, as the workshop was open to the public and anyone (including the police) was free to enter the church, such that there was no reasonable expectation of privacy. Although the RCMP members who attended in a plainclothes capacity intended to create the impression that they were not police officers, there is no indication that they crossed the threshold into an undercover operation. It might have been preferable for the members to attend in uniform and engage in a direct dialogue with the organizers and attendees but, in these specific circumstances, the Commission is satisfied that the RCMP's actions were reasonable.

FINDING NO. 12: It was reasonable for the RCMP to attend the workshop and make observations.

[190] The RCMP's recording of the licence plate numbers of vehicles parked in the church parking lot requires a separate examination. In the context of highway traffic duties (and other law enforcement duties such as the recovery of stolen vehicles), police are generally entitled to note and check licence plate numbers against database records, even at random. The RCMP routinely runs checks of licence plate numbers in the course of daily operations. In the context of the surveillance conducted here, however, the Commission notes that the members did not stop or detain any motorists, and were not acting under any highway traffic authority. Instead, they were recording information from parked vehicles (and presumably running checks on the numbers obtained). It is unclear whether this activity requires a legal authority but, assuming for the purposes of this analysis that such authority is necessary, the Commission understands the RCMP to have acted pursuant to common law police powers with respect to the duties of preservation of the peace and the prevention of crime.[187, 188]

[191] In the context of the police use of automatic licence plate recognition technology, the Information and Privacy Commissioner for British Columbia determined that a licence plate is "personal information" within the meaning of the British Columbia *Freedom of Information and Protection of Privacy Act*, meaning that it is "recorded information about an identifiable individual other than contact information."[189] The Information and Privacy Commissioner of Ontario has also made the determination that a licence plate is personal information.[190,191] It is probable that licence plates would also meet the definition of

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[187] See e.g. *Dedman*, *supra* note 41, in which the majority of the Supreme Court of Canada recognized that at common law "the principal duties of police officers are the preservation of the peace, the prevention of crime, and the protection of life and property . . . ."

[188] The test for whether a police officer has acted within his or her common law powers when the police officer's conduct is *prima facie* an unlawful interference with a person's liberty or property is: (a) whether the police conduct giving rise to the interference falls within the general scope of any duty imposed on the officer by statute or common law, and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with that duty: *R v Waterfield*, [1964] 1 QB 164, [1963] WLR 946, [1963] All ER 659 at pp. 170–171, *R v Mann*, 2004 SCC 52, [2004] 3 SCR 59 (SCC) at paras 24–26. The Commission is satisfied in the circumstances that surveillance activities such as recording and checking licence plate numbers fall under the common law duties of preservation of the peace and the prevention of crime, and that in the specific circumstances reviewed in this report, this conduct was a reasonable exercise of the powers associated with those duties.

[189] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F12-04*, *Use of Automated Licence Plate Recognition Technology by the Victoria Police Department*, pp. 16–18. The Information and Privacy Commissioner for British Columbia concluded that a licence plate number is personal information because the number can be readily and routinely linked to an individual and to information about that individual through police database checks.

[190] IPC Orders M-336 and MO-1863, and IPC Privacy Investigation MC-030023-1.See also Information and Privacy Commissioner of Ontario, *Guidance on the Use of Automated Licence Plate Recognition Systems by Police Services* (September 2016), online: https://www.ipc.on.ca/wp-content/uploads/2016/09/guidance-on-the-use-of-automated-licence-plate-recognition-systems-by-police-services-.pdf (accessed April 13, 2017).

[191] In Alberta, however, the Alberta Court of Appeal has ruled that a licence plate number is not personal information within the meaning of the Alberta *Personal Information Protection Act*, which is privacy legislation concerning the private sector. Leave to appeal this decision was denied by the Supreme Court of Canada. See *Leon's Furniture Limited v Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94 (CanLII), online: http://canlii.ca/en/ab/abca/doc/2011/2011abca94/2011abca94.html (accessed April 13, 2017).

"personal information" within the meaning of the federal *Privacy Act* (which the RCMP is subject to), although it does not appear that the Privacy Commissioner of Canada has made any determinations about this question.[192] In this view of the law, the RCMP can collect licence plate numbers for the purpose of running checks so long as the collection relates directly to an operating program or activity of the RCMP. The RCMP would have the authority to use that information for the purpose for which it was collected or for a use consistent with that purpose.[193] As with all personal information, the RCMP could only share that information with another agency under limited circumstances.

[192] As noted above, the information provided does not reveal what the RCMP did with the licence plate numbers collected, or what the RCMP did with any information obtained through any licence plate checks (if any were in fact conducted). Whether or not such checks were conducted, it is likely that most of the information available would be unremarkable. This raises concerns about whether the RCMP is retaining what may be personal information about individuals who the RCMP has no reason to believe are involved in criminal activity. The Commission finds that the RCMP lacks a policy or guidance regarding the collection, use, and retention of licence plate numbers and associated personal information for intelligence purposes. The Commission recommends that the RCMP develop a policy that provides that where there is no link between this information and criminal activity, the information no longer serves a law enforcement or criminal intelligence purpose and should not be retained. All records of such information should be purged and/or destroyed as soon as is practicable and in accordance with applicable law.

[193] In the specific instances reviewed by the Commission, the Commission finds that the RCMP's collection of licence plate numbers for criminal intelligence purposes was not unreasonable. The licence plate numbers were collected in support of operations within the RCMP's mandate and there is no indication that any information obtained was shared outside the RCMP.

FINDING NO. 13: It was not unreasonable to collect licence plate numbers for intelligence-gathering purposes.

FINDING NO. 14: The RCMP lacks policy/guidance on the collection, use, and retention of licence plate numbers and associated personal information for intelligence purposes.

[192] However, in its 2012 Annual Report, the Office of the Privacy Commissioner of Canada noted its concerns about the automatic licence plate recognition technology being employed by the RCMP in British Columbia, stating that the retention of "non-hit" data (that did not match a list of stolen vehicles, suspended drivers, uninsured vehicles, etc.) was "ubiquitous surveillance of law-abiding Canadians who had committed no infraction." See Office of the Privacy Commissioner of Canada, *Three decades of protecting privacy in Canada*, Annual Report to Parliament 2011-2012, Report on the *Privacy Act*, p. 19, online: https://www.priv.gc.ca/media/1630/201112_pa_e.pdf (accessed April 13, 2017).

[193] *Privacy Act*, *supra* note 55, s 4.

RECOMMENDATION NO. 6: That the RCMP develop a policy providing that where a licence plate number and any associated personal information has no nexus to criminal activity, the information should not be retained.

THIRD ALLEGATION: The RCMP improperly disclosed information concerning various persons and groups.

a. Sharing Information with Natural Resources Canada

[194] The BCCLA noted that Tim O'Neil's April 19, 2013, e-mail was shared with Natural Resources Canada. The BCCLA states that Natural Resources Canada:

> . . . is a government institution that organizes biannual "classified briefings" in which it has been reported that the RCMP and CSIS share information about security matters, including the monitoring of environmental organizations and activists, with the NEB and representatives of the energy industry. Indeed, O'Neil's email concludes by inviting recipients to discuss their concerns with security officials who will be attending the next NRCan Classified Briefing meeting.[194]

[195] To the extent that this sub-allegation applies to the activities of the RCMP, the issue is whether or not the RCMP's information sharing with Natural Resources Canada was reasonable. While the Commission reviewed Mr. O'Neil's e-mail and found no indication there or in the voluminous materials provided by the RCMP that he copied the message to anyone associated with Natural Resources Canada, the Commission will conduct its analysis on the basis that the message was at some point sent to Natural Resources Canada personnel by Mr. O'Neil or another member of the RCMP.

[196] Mr. O'Neil's April 19, 2013, e-mail discussed the NEB's request for an assessment as to whether a credible threat existed to NEB members. The NEB had provided links to a video and other user-generated content that suggested threats to critical energy infrastructure (namely, pumping stations). Mr. O'Neil did not detect a direct or specific threat to the NEB or its members, but he noted that there was ongoing opposition to the Canadian petroleum industry, particularly the Alberta oil sands, and to oil pipelines. As the federal regulator of many aspects of oil sands and pipeline development, the NEB would likely become the target of protests and even threats.

[197] As discussed earlier in this report, the mandate of Natural Resources Canada includes the protection of critical energy infrastructure under federal jurisdiction. The RCMP and Natural Resources Canada are jointly responsible for the security of this critical infrastructure, and accordingly the RCMP and Natural Resources Canada share information and intelligence.[195] In the context of an RCMP assessment of a potential threat to the NEB and information concerning opposition to the Canadian petroleum

[194] BCCLA complaint, p. 3.
[195] Maher Arar Inquiry, *A New Review Mechanism for the RCMP's National Security* Activities, *supra* note 27 at p. 207.

industry, Natural Resources Canada's mandate means that it would be reasonable for the RCMP to provide National Resources Canada personnel with a copy of the message.

FINDING NO. 15: It was reasonable for the RCMP to share information about potential threats to energy critical infrastructure with Natural Resources Canada.

b. Sharing Information with the National Energy Board

i. The Information Shared with the National Energy Board Contained Confidential Source Information Regarding Events or Individuals Related to the National Energy Board hearings

[198] The BCCLA alleges that:

> Based on redactions made pursuant to sub-paragraph 16(1)(c)(ii) of the *Access to Information Act*, it appears that RCMP and NEB security officers shared confidential-source information regarding events or individuals related to the Board's hearings. BCCLA finds this particularly troubling, as it suggests that the RCMP has been sharing sensitive aspects of its investigative and law enforcement work with an independent federal agency that performs an adjudicative function, not to mention industry representatives who are parties in the same hearings. Such information sharing may compromise these groups' ability to participate fully and effectively before the NEB, as industry representatives may receive information that assists in advancing their position before the Board, and the Board itself may be privy to unproven yet highly prejudicial allegation against individuals, groups, or organizations appearing before it.[196]

[199] The BCCLA's complaint cited redacted documents that included an e-mail chain between a security advisor with the NEB, and a number of RCMP members.

[200] Subparagraph 16(1)(*c*)(ii) of the *Access to Information Act* states that the head of a government institution may refuse to disclose any record requested under that Act that contains information which, if disclosed, could reasonably be expected to be injurious to the enforcement of any law or to the conduct of lawful investigations, including information "(ii) that would reveal the identity of a confidential source of information . . . ."[197]

[201] The Commission finds that the information discussed by the RCMP and the NEB was not confidential source information, notwithstanding the invocation of subparagraph 16(1)(*c*)(ii) of the *Access to Information Act* as the basis for the redactions. Rather, the e-mail chain discussed the case of protest organizers who had approached the manager of a hotel where a Joint Review Panel hearing was to be held. The manager had contacted both the NEB and the RCMP about the protest organizers, and the manager's e-mail was quoted in the e-mail chain along with discussions that included

[196] BCCLA complaint, p. 3.
[197] *Access to Information Act*, RSC, 1985, c A-1, s 16(1)(*c*)(ii).

details such as her name and place of work. A second executive with the hotel chain also participated in the discussions, and his name and title and comments were also redacted. There is no indication in the information provided that these employees provided information confidentially or that they received any assurance that the information they provided would be kept confidential. In the Commission's view, certain redactions that were ostensibly made to protect confidential source information were in fact misapplied, albeit in what the Commission finds to be a good faith effort to protect the identity of third parties.

FINDING NO. 16: The RCMP did not share confidential source information with the National Energy Board.

ii. The Information Shared with the National Energy Board Went Beyond "Open Source" Material

[202] The BCCLA alleges that the RCMP shared "high level" intelligence with the NEB, stating:

> [W]e note that the documents released by the NEB indicate that the RCMP provided the Board with intelligence beyond the open-source information its own security staff were capable of gathering. For example, the NEB's "threat assessment" pertaining to its hearings in Kelowna and Prince Rupert confirm that the Board consulted with "national-level intelligence resources" of both the RCMP and CSIS, in addition to regional level and local RCMP detachments in Kelowna and Prince Rupert. BCCLA finds it troubling that the RCMP would provide such high-level intelligence to an arms-length government adjudicative body such as the NEB, particularly since the RCMP had no expectation of any criminal activity in connection with the Board's proceedings.[198]

[203] As a preliminary matter, the Commission must emphasize that it cannot comment on the actions of the NEB itself in consulting with the RCMP or CSIS, or on the actions of CSIS in providing any intelligence to the NEB. The Commission can only examine matters pertaining to any information or intelligence provided by the RCMP to the NEB.

[204] Documents such as the NEB security plan for the hearings in Terrace in June 2013 indicated that the NEB consulted with national-level RCMP intelligence teams and that no threats were identified to the safety and security of hearing attendees. The document revealed that there was ongoing liaison between the Terrace Detachment and NEB Security, however, and no threats were identified and thus no threat information was passed by the RCMP to the NEB. The RCMP and NEB security personnel continued to monitor open sources such as Twitter and Facebook, and found no indications of security threats or disruptions.

[205] The Commission reviewed other instances of information-sharing between the RCMP and the NEB, and did not find that "high level" intelligence was routinely shared.

[198] BCCLA complaint, p. 4.

National Level

[206] The public interest investigation revealed that the RCMP provided general information to the NEB, such as the January 24, 2014, RCMP CIIT document *Criminal Threats to the Canadian Petroleum Industry.* However, while this document is designated "Protected A – Canadian Eyes Only," it does not contain "high-level" intelligence or threat assessments related to the hearings or specific information about either criminal threats to the hearings or particular individuals. Additionally, the CIIT informed the Commission that they have no records that information was shared with other organizations or companies pertaining to persons and groups seeking to participate in NEB hearings.

"E" Division Level

[207] The RCMP and NEB worked closely together on security matters relating to the Joint Review Panel hearings. Information flowed both ways, with the RCMP and the NEB informing one another of upcoming protests and demonstrations related to the hearings. This information was normally obtained from open sources.

[208] With respect to the Prince Rupert hearings, on January 21, 2013, Mr. G (NEB Group Leader, Security) asked Staff Sergeant Steinhammer (Operations NCO, Prince Rupert Detachment) to inquire as to whether there were any changes to the intelligence picture in Prince Rupert. Staff Sergeant Steinhammer replied, "We have had no intel with regards to the hearings." As noted above, on February 15, 2013, Mr. G asked Staff Sergeant Steinhammer if he had any threat information with respect to a group called "The People's Summit on the Northern Gateway Project" in the context of the Prince Rupert Joint Review Panel hearings. Staff Sergeant Steinhammer replied, "None at all."

[209] On January 31, 2013, NEB security personnel learned through a media report that the conservation group Sierra Club Canada was considering whether to sanction civil disobedience as a means of opposing the Northern Gateway Project. This raised a concern that the Joint Review Panel hearings could become more "active" than they had been anticipating. The NEB requested that the RCMP develop a threat risk assessment in advance of the Prince Rupert hearings with an emphasis on the likelihood of aggressive protest activities related to the Northern Gateway Project or the Joint Review Panel hearings. The RCMP agreed but, owing to time constraints, the assessment was based on an examination of past events and present conditions.

[210] As noted above, the NEB has a security mandate with respect to critical infrastructure such as pipelines, and works with the RCMP to ensure their protection as well as the safety and security of its personnel and of the Joint Review Panel hearings. The Commission found that the RCMP did not unduly share sensitive information or intelligence with the NEB, but that the RCMP responded to requests for information and threat assessments pertaining to matters directly related to the NEB's responsibilities.

FINDING NO. 17: It was reasonable in the circumstances for the RCMP to share intelligence and threat assessments with the NEB.

iii. Information Shared with the National Energy Board Contained Personal Information about Specific Individuals

[211] The BCCLA alleges that:

> It appears highly likely that the "intelligence" shared with the NEB and industry representatives includes personal information about specific individuals. We further note that the Board subsequently shared some of this information with Tocra Inc., a private firm that provides security consulting services for the petroleum and natural gas industries.[199]

National Level

[212] The RCMP's CIIT reported that there is no specific RCMP policy on information sharing between the RCMP and other organizations relating to various persons and groups seeking to participate in the NEB hearings. However, the RCMP does have a User Access Agreement ("UAA") with the NEB specific to the information sharing requirements associated to SIR. The CIIT explained that the purpose of the UAA is to ensure that RCMP information, along with submissions to the SIR system are protected. The CIIT noted that the RCMP has UAAs with more than 100 Canadian companies. The SIR library contains documents of interest to owners and operators of critical infrastructure prepared by other law enforcement agencies, academics, members of the private sector and the RCMP. There is no information specific to any investigations and there is no personal information available to private sector system users.

[213] The CIIT informed the Commission that it does not provide information specific to criminal investigations to public or private sector partners, and does not provide them with names or other personal information of possible suspects in a criminal investigation. The exception would be information shared with the police of the local jurisdiction to facilitate their investigation or the RCMP's investigation, and in the case of an insider threat investigation where the company would be engaged in the investigation of its employee. The CIIT noted that it shares criminal threat information with private sector owners and operators of critical infrastructure to facilitate the protection of the infrastructure, its employees and the general public and to ensure its ability to deliver services to Canadians. The CIIT maintains that assessments are specific to criminal threats and do not infringe on legal, non-violent, protest and dissent.

"E" Division Level

[214] The Commission's review of the materials provided determined that the RCMP **did** share personal information about a specific individual on one occasion. On January 18, 2013, a security advisor for the NEB was copied on an e-mail from the

[199] BCCLA complaint, pp. 3–4.

Operations Officer of the Kelowna Detachment that was sent to a number of RCMP members regarding an upcoming Idle No More protest. As is common in e-mail chains where a given message is a reply to a previous message, the e-mail copied to the security advisor quoted the complete text of an earlier e-mail that described the event and referred to Person G as having contacted the RCMP about it. This quoted e-mail included her name and telephone number.[200] The security advisor subsequently included a representative of the private security firm Tocra, Inc. in a reply such that the information about Person G was again quoted in its entirety within that message.

[215] The Commission understands the communication of Person G's name and telephone number from the RCMP to the NEB to be a disclosure with *Privacy Act* implications. As discussed above, the *Privacy Act* generally prohibits the disclosure of personal information by a government institution without the consent of the individual to whom the information relates unless one of a number of statutory exceptions applies. Here, Person G took the initiative in reaching out to the RCMP, and it is reasonable to conclude that she provided the RCMP with her contact information to communicate with them about policing matters relating to the upcoming demonstration. There is no indication that she consented to the disclosure of this information to the NEB.

[216] One relevant statutory exception to the disclosure prohibition noted above is "consistent use disclosure," where the disclosure of personal information is for the purpose for which the information was obtained or for a use consistent with that purpose. The consistent use disclosure exception is the most feasible justification for disclosing personal information in this case, as the Commission does not find that another exception, such as the public interest exception, would apply. However, the Commission is not satisfied that the disclosure of this personal information to the NEB was for a consistent use. The RCMP inspector who sent the e-mail in question appears to have included the NEB as a recipient to inform them of the upcoming event, which was to take place at or near the hearing site at the hotel. There was no operational purpose consistent with the RCMP's role with respect to the Joint Review Panel hearing in Kelowna for providing this personal information to the NEB. The Commission is also not satisfied that the NEB had a "need to know" or a "right to know" this information, as required by RCMP policy.

[217] For the above reasons, the Commission finds this disclosure of personal information to be unreasonable.

FINDING NO. 18: It was unreasonable for the RCMP to share the personal information of a protest organizer with the National Energy Board.

[200] The Supreme Court of Canada has ruled that the meaning of "personal information" under the *Privacy Act* is to be construed broadly. As such, it is clear that section 3 of the *Privacy Act* protects an individual's telephone number as personal information, as it is information about an identifiable individual analogous to a home address. An individual's name is also treated as personal information under the *Privacy Act* where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about that individual. See *Dagg v Canada (Minister of Finance)*, 1997 CarswellNat 870, [1997] 2 SCR 403 at paras 68–69.

RECOMMENDATION NO. 7: That the Kelowna Detachment review all policies concerning the collection, retention and disclosure of personal information and take action to ensure that personal information is disclosed in accordance with legislation and policy.

[218] Regarding the allegation that the "Board subsequently shared some of this information with Tocra Inc., a private firm that provides security consulting services for the petroleum and natural gas industries," and which was under contract to augment the NEB security group, the Commission cannot comment on the NEB's information sharing practices.

THE ALLEGED "CHILLING EFFECT" OF THE RCMP'S ACTIVITIES

[219] Freedom of expression is guaranteed by paragraph 2(*b*) of the Charter. At paragraphs 2(*c*) and 2(*d*), the Charter also guarantees the rights to peaceful assembly and freedom of association, which are closely linked to the exercise of freedom of expression by their very exercise. In its complaint, the BCCLA noted that "[p]rotecting democratic discourse and participation in decision-making is a core rationale for these freedoms,"[201] and pointed to the repeated emphasis by the Supreme Court of Canada on the vital importance that free expression has to Canadian society and democracy.

[220] The BCCLA is particularly concerned about the "chilling effect" that it believes the RCMP's intelligence gathering and information sharing would have on participation in NEB proceedings and the exercise of the right to freedom of expression. A "chilling effect" refers to the reluctance of individuals to exercise their constitutional rights (particularly freedom of expression) as a result of state activity that gives rise to a fear of being penalized. According to the BCCLA:

> Any state action that discourages or deters individuals from engaging in free expression infringes section 2(b) of the *Charter*. Such violations are particularly egregious when they restrict expression concerning public affairs. BCCLA maintains that monitoring, surveillance, and information sharing with other government agencies and private sector interests creates a chilling effect for groups and individuals who may wish to engage in public discourse or participate in proceedings before the [NEB]. Police monitoring may also deter those who simply wish to meet with or join a group to learn more about a matter of public debate or otherwise exchange information or share views with others in their community. Indeed, BCCLA has already heard from several affected groups that members and prospective partners of their organizations have expressed serious concerns and reluctance to participate in light of recent media reports of RCMP monitoring.[202]

[221] The Commission has not received any information indicating that the RCMP engaged in monitoring, surveillance, intelligence gathering or information sharing pertaining to individuals who sought only to participate in the NEB Joint Review Panel

[201] BCCLA complaint, pp. 4.
[202] BCCLA complaint, pp. 4–5.

hearings.[203] The information before the Commission reveals only efforts to identify threats of criminal activities at the hearings or at public protests and demonstrations related to the hearings (as well as in regard to public events taking place in the context of the larger Idle No More movement).

[222] With that said, it is clear that activities such as seeking to participate in an NEB hearing or in a public protest or demonstration are exactly the types of activities that have been characterized by the courts as protected expression. Equally, there is no doubt that freedom of expression is of paramount importance to a democratic society—indeed, "a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions."[204] Nevertheless, the right of freedom of expression is not absolute. The courts have repeatedly and consistently found that reasonable limitations to the freedom of expression may be justified under section 1 of the Charter.[205]

[223] The courts have articulated a test to determine whether the Charter right to freedom of expression has been infringed. The following questions must be answered:

- Does the activity at issue constitute expression within the meaning of paragraph 2(*b*)?
- Does the activity's method or location oust the protection?
- Does the impugned state conduct/legislation infringe freedom of expression by its purpose or effect?
- If the impugned state conduct/legislation infringes freedom of expression, is it nonetheless saved under section 1 of the Charter?[206]

[224] If a court were to find that RCMP conduct in this case had a chilling effect on the exercise of freedom of expression, this finding would very likely lead to the conclusion that the conduct in question had violated the Charter.

[225] Canadian courts have previously considered chilling effect claims regarding state or police conduct.[207] The Commission notes that the legal threshold for establishing that there is a chilling effect is high. The case law indicates that the courts have generally not found such an effect to have been established by the evidence in cases where it was an issue. The 2015 decision of the Ontario Superior Court of Justice in *Canadian Broadcasting Corp. v Ontario (Attorney General*)[208] (which dealt with media-presence

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[203] The Commission notes that the NEB identified what it saw as potential activists in a list of participants for an upcoming hearing and identified them to the RCMP, but there is no indication that the RCMP was monitoring or conducting surveillance or checks on participants in the hearings per se.
[204] *Edmonton Journal (The) v Alberta (Attorney General)*, 1989 CarswellAlta 198, [1989] 2 SCR 1326, [1989] SCJ No. 124 at para 78.
[205] Charter, *supra* note 73 at s 1: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
[206] *Montreal (City) v 2952-1366 Quebec Inc.*, 2005 SCC 62.
[207] See e.g. *R v Khawaja*, 2012 SCC 69 [*Khawaja*]; *Canadian Broadcasting Corp. v Ontario (Attorney General)*, 2015 ONSC 3131, 2015 CarswellOnt 11443 [*Canadian Broadcasting Corp.*].
[208] *Canadian Broadcasting Corp*., ibid.

surveillance, a technique where plainclothes police blend in with the media to conduct surveillance during a public protest but without going so far as to actually impersonate journalists) set out how a chilling effect is to be proven:

> 150 Courts have used different expressions to express the onus on an applicant in a constitutional application to establish that the impugned legislation or practice violates s. 2 of the *Charter*. However, the essence of the required connection is the same and has been settled for decades: the applicant must establish a "direct link" (*Moysa*, at p. 1581 S.C.R.) or a "causal connection between the [impugned practice or legislation] and the chilling of expression" (*R. v. Khawaja*, [2012] S.J.C. No. 69, 2012 SCC 69 ("*Khawaja*"), *per* McLachlin C.J.C., at para. 81).
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> 151 There are two ways that such a causal connection can be established. Generally, the applicant is required to lead evidence as to the "chilling effect" of the impugned practice on the *Charter* freedom. In exceptional cases, the chilling effect may be "self-evident" or "can be inferred from known facts and experience" (*Moysa*, at p. 1581 S.C.R.; *Khawaja*, at paras. 79-80).
>
> 152 The standard to establish that a chilling effect is "self-evident", or "can be inferred from known facts and experience" is high. A court will only make such a finding when "no reasonable person would dispute . . . [the] chilling effect" of the impugned practice or law on the *Charter* freedom (*Khawaja*, at para. 79), or when it is "indisputable" (*Moysa*, at p. 1581 S.C.R.) or "exceptional" (*Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, [1990] S.C.J. No. 92 ("*Danson*"), *per* Sopinka J., at p. 1101 S.C.R.).[209]

[226] Expert evidence is not always required to establish a causal connection between an impugned state practice and a Charter violation, but generally objective evidence is required by the courts.[210] In the end, the judge in *Canadian Broadcasting Corp. v Ontario (Attorney General)* was not satisfied that sufficient evidence was presented to establish a causal connection between "media-presence surveillance" and any restriction on freedom of expression. On the contrary, the Court remarked that anyone attending a protest was well aware that they might be watched or filmed so any chill already existed, apart from the police tactic of media-presence surveillance.[211]

[227] The nature of the evidence raised in support of a chilling effect claim should not be speculative or anecdotal. In *Corp. of the Canadian Civil Liberties Assn. v Toronto (City) Police Service*,[212] the Ontario Superior Court of Justice considered a chilling effect claim with respect to the conduct of the police in the use of long-range acoustic devices ("LRADs") in protest situations. The Court rejected what it concluded was speculative and anecdotal evidence presented concerning the use of such devices and the chilling effect this might have on the attendance of protesters who would otherwise wish to participate in the G20 Summit protests. The evidence before the judge did not enable "any reasonable prognostication about how many people may or may not attend the applicants'

[209] *Idem* at paras 150–152.
[210] *Idem* at paras 194–195.
[211] *Idem* at para 225.
[212] *Corp. of the Canadian Civil Liberties Assn. v Toronto (City) Police Service*, 2010 ONSC 3525.

planned demonstration and march."[213] The judge also saw "no evidentiary basis to support a causal link between the use of LRADs and any demonstrable 'chilling effect' on the potential number of demonstrators at the applicants' activities [that] weekend."[214]

[228] Of course, as noted earlier in this report, it is not the Commission's role to determine whether the constitutional rights of persons seeking to participate in the NEB hearings or in protests and demonstrations have been "chilled" or otherwise infringed by the actions of the RCMP. That role belongs to the courts. However, the Commission can consider whether the conduct of the RCMP is consistent with Charter principles.

[229] Although discussed in general terms, the scope of the Commission's review of the RCMP's conduct is limited to the actual incidents disclosed by the information before the Commission. The Commission cannot predict how future RCMP conduct, potentially different from the conduct reviewed here in significant ways, might impact Charter rights.

[230] As a starting point, the Commission notes that those considering participating in public protests and demonstrations, particularly those at or near NEB hearings, very likely knew that their activities could be subject to police monitoring. As such, any chilling effect on the right of freedom of expression likely already existed even in the absence of any knowledge of the actual monitoring and surveillance activities conducted by the RCMP here. This would likely make it difficult to establish that the RCMP's activities have had a chilling effect on participation.

[231] In terms of the RCMP's monitoring and surveillance of protests and demonstrations, the RCMP has a legitimate duty to preserve the peace and to prevent crime. The RCMP's attendance at hearings, protests and demonstrations, and even its surveillance of these public events, was consistent with that duty. Furthermore, such monitoring and surveillance is not necessarily inconsistent with the right to freedom of expression or of the related Charter rights of freedom of peaceful assembly and freedom of association. Indeed, the public and participants alike might well expect the police to be present at public events like protests and demonstrations in the event that acts of violence—which are not a protected form of expression[215]—break out. Nevertheless, the Commission has recommended that any video or images recorded of a peaceful protest or demonstration not be retained.

[232] The RCMP's monitoring of open sources to obtain information about protests and demonstrations aided in ascertaining the approximate attendance of such events and the likely disposition of attendees. The Commission determined that this information collection was reasonable in the circumstances, and that it was confined to content that was viewable by any member of the public. It is not clear that such activity limited the right to freedom of expression. As with acts of violence, threats of violence (which were not

[213] *Idem* at para 113.
[214] Ibid.
[215] *Khawaja*, *supra* note 207 at para 70.

found here but appeared to be the focus of the RCMP's monitoring) are not a Charter-protected form of expression.[216]

[233] As noted above, the Commission does have concerns about checks conducted by the RCMP, with particular focus on the retention of information obtained concerning individuals who were not suspected of any criminal activity but who had been identified as organizers or participants in an upcoming protest or demonstration or other public order event. Although the Commission was not prepared to find that the checks conducted were unreasonable per se, these checks appear to have been of limited value, and the use and retention of personal information obtained about these individuals is problematic and potentially unreasonable where there is no criminal nexus. The Commission has recommended that any information obtained from such checks not be retained when it is determined that there is no criminal nexus. It is, furthermore, likely that at least some individuals who learned of such checks would be greatly concerned. Nevertheless, it is not clear that such checks are inconsistent with the Charter right to freedom of expression.

[234] The fact that the RCMP sent plainclothes members to attend a meeting related to activist endeavours and public order events in order to obtain information about the other attendees and the group as a whole also has the potential to cause concern. In the specific circumstances discussed above, however, the RCMP members attended the meeting for a limited purpose and remained for a limited duration. It is unlikely that a court would find that such conduct would chill or otherwise infringe a Charter right.

[235] However, it is conceivable that the collection of the licence plate numbers (and the presumed checks run on those numbers through police databases) of the meeting's attendees could be problematic from a chilling effect perspective. This information gathering was lawful in that a search warrant would not have been required, and the Commission did not find that the activity was unreasonable in the circumstances. Nevertheless, reasonable individuals may legitimately wonder what the RCMP did with this information and how long it will be retained. The RCMP did not indicate what information they hoped to obtain from the licence plate numbers (for instance, an indication that the owner of that plate number had committed acts of violence at previous public events) or what use was made of any information obtained. The Commission has recommended that the RCMP develop a policy providing that any information obtained not be retained when it is determined that there is no criminal nexus. Again, however, any determination of the potential Charter implications of this activity would have to be made by a court provided with appropriate evidence.

[236] In general, the RCMP's information sharing does not appear inconsistent with Charter rights to freedom of expression, peaceful assembly, and association. Although the Commission found that the RCMP had unreasonably shared personal information in one instance, this sharing is inconsistent with RCMP policy and with the *Privacy Act* and does not appear to be accepted practice. The RCMP typically shared information with the

[216] Ibid.

NEB in a reasonable manner and did not otherwise provide the NEB with sensitive or personal information.

[237] In the event that a court did find that knowledge of the specific activities of the RCMP here discouraged individuals from organizing or even participating in a protest or demonstration above and beyond the existing chill created by an awareness of police monitoring in general, the court would have to determine whether that infringement was a reasonable limit under section 1 of the Charter. It is arguable that such police conduct would be saved under section 1 of the Charter on the basis that it was justified as a minimal impairment of the protesters' rights to freedom of expression, assembly, and association. Despite this, the Commission reiterates its concerns and urges the RCMP to exercise restraint in its surveillance and intelligence-gathering activities when the threat level is otherwise determined to be low.

CONCLUSION

[238] The allegations raised by the BCCLA highlight the tension between national security/policing public order events and the exercise of the rights essential to a free and democratic society. As stressed by the Royal Commission of Inquiry into Certain Activities of the RCMP (better known as the McDonald Commission), national security requirements must be reconciled with the requirements of democracy. The Royal Commission of Inquiry into Certain Activities of the RCMP also regarded ". . . responsible government, the rule of law, and the right to dissent as among the essential requirements of our system of democracy."[217] Similarly, the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar concluded that while the RCMP's criminal intelligence-gathering activities should continue, it was critical that the RCMP remain within its law enforcement mandate and that, to the extent that Canada's response to terrorism has blurred the distinction between the roles of the RCMP and CSIS, the distinction between policing and security intelligence must be restored, respected and preserved.[218]

[239] The Commission has carefully reviewed the RCMP's actions in examining these allegations, and has considered the relevant law and policy. For the most part, the Commission has found that the RCMP acted reasonably in responding to the law enforcement and public order challenges presented by the NEB hearings and the protests and demonstrations that took place in British Columbia in response. To the extent that the RCMP acted unreasonably, the incident in question appeared limited in scope.

[240] The Commission urges the RCMP to exercise restraint in its surveillance and intelligence-gathering activities concerning events where there is little if any indication that violence or other criminal acts are likely to occur. The RCMP should employ a

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[217] Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security Under the Law*, Second Report, vol. 1, p. 44, para 19 (Chair: D. C. McDonald), online: http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/mcdonald1979-81-eng/mcdonald1979-81-eng.htm (accessed November 14, 2016).

[218] Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, pp. 102, 118, and 312.

well-defined measured approach to public order events and work directly with protest organizers whenever possible. The Commission has recommended that the RCMP develop appropriate policies and/or guidance to govern its collection and retention of information, and that the RCMP not retain personal information where it is established that there is no criminal nexus and the events for which it has been collected have concluded. It is hoped that the findings and recommendations contained in this report will assist the RCMP to make improvements, where appropriate, to the ways in which it prepares for and responds to public order events.

[241] Pursuant to subsection 45.76(1) of the RCMP Act, the Commission respectfully submits its Public Interest Investigation Report.

Ian McPhail, Q.C.
Chairperson

APPENDIX A – Complaint of the British Columbia Civil Liberties Association, dated February 6, 2014

Protected when completed (under the *Privacy Act*) / Protégé une fois complété (en vertu de la *Loi sur la protection des renseignements personnels*)

Commission for Public Complaints Against the Royal Canadian Mounted Police / Commission des plaintes du public contre la Gendarmerie royale du Canada

FORMAL COMPLAINT – PLAINTE OFFICIELLE

NAME / NOM :	**British Columbia Civil Liberties Association**
CPC FILE NO. / N° DE DOSSIER DE LA CPP :	**2014-0380**
CPC CROSS REF. NO. / N° DE RENVOI DE LA CPP :	

COMPLAINT DATE / DATE DE LA PLAINTE :
DAY / JOUR: 7 — MONTH / MOIS: February — YEAR / ANNÉE: 2014

PREPARED BY COMPLAINTS ANALYST / PRÉPARÉ PAR L'ANALYSTE DES PLAINTES :
Chris Beach

COMPLAINT MADE / PLAINTE DÉPOSÉE :
- ☐ BY TELEPHONE / PAR TÉLÉPHONE
- ☒ BY LETTER OR FAX / PAR COURRIER OU PAR TÉLÉCOPIEUR
- ☐ BY EMAIL / PAR COURRIEL
- ☐ IN PERSON / EN PERSONNE

ATTACHMENTS ARE IDENTIFIED AS FOLLOWS / LES PIÈCES JOINTES SONT IDENTIFIÉES COMME SUIT :

A five-page letter, plus cover-page, received by the Commission by fax on February 6, 2014. Total: 6 pages.

A single-page third-party authorization form, plus two-pages of additional information, received by the Commission on February 7, 2014, by fax. Total: 3 pages

A five-page letter, plus 45 pages of additional information, received by the Commission on February 12, 2014, by mail. Total: 50 pages.

Total: 59 pages.

DATE COMPLAINT FORWARDED TO RCMP / DATE D'ACHEMINEMENT DE LA PLAINTE À LA GRC :
DAY / JOUR: 18 — MONTH / MOIS: February — YEAR / ANNÉE: 2014

DIVISION :

DETACHMENT / DÉTACHEMENT :

THE SPECIFIC ALLEGATIONS OF MISCONDUCT ARE AS FOLLOWS / LES ALLÉGATIONS D'INCONDUITE SONT LES SUIVANTES :

The British Columbia Civil Liberties Association (BCCLA) is complaining about the conduct of Staff Sergeant Steinhammer, Tim O'Neil, and other, unidentified members of the RCMP in 2013 and 2014 in that one or more have:

1. improperly monitored activities of various persons and groups participating or seeking to participate in National Energy Board hearings; and
2. improperly disclosed information concerning various persons and groups.

ADDITIONAL INFORMATION / RENSEIGNEMENTS SUPPLÉMENTAIRES : **None**

P.O. Box 88689 Surrey, BC V3W 0X1 1-800-665-6878 1-866-432-5837 TTY (ATS) (604) 501-4095 FAX www.cpc-cpp.gc.ca

CPC 001B (06/08)

Protected when completed (under the *Privacy Act*) / Protégé une fois complété (en vertu de la *Loi sur la protection des renseignements personnels*)

Commission for Public Complaints Against the Royal Canadian Mounted Police / Commission des plaintes du public contre la Gendarmerie royale du Canada

COMPLAINT FORM – FORMULAIRE DE PLAINTE

File No: 2014-0380

COMPLAINANT INFORMATION / RENSEIGNEMENTS AU SUJET DU PLAIGNANT

1. FAMILY NAME / NOM DE FAMILLE :
British Columbia Civil Liberties Association
GIVEN NAME AND INITIAL / PRÉNOM ET INITIALES :

2. DATE OF BIRTH / DATE DE NAISSANCE :
DAY / JOUR MONTH / MOIS YEAR / ANNÉE
Unknown
GENDER: ☐ MALE ☐ FEMALE
SEXE : ☐ HOMME ☐ FEMME

3. MAILING ADDRESS / ADRESSE POSTALE :
PHYSICAL ADDRESS IF DIFFERENT FROM MAILING ADDRESS / ADRESSE MUNICIPALE SI ELLE DIFFÈRE DE L'ADRESSE POSTALE :

4. HOME TEL. / TÉL. MAISON :
BUSINESS TEL. / TÉL. TRAVAIL :
CELL / CELLULAIRE :
FAX / TÉLÉCOPIEUR :
E-MAIL / COURRIEL :
CONTACT FOR MESSAGES / POUR LAISSER UN MESSAGE :
NAME / NOM :
TEL. NUMBER / NUMÉRO DE TÉL. :

5. PREFERRED LANGUAGE OF CORRESPONDENCE / LANGUE DE CORRESPONDANCE PRÉFÉRÉE ☒ ENGLISH / ANGLAIS ☐ FRANÇAIS / FRENCH

6. WERE YOU THE PERSON INVOLVED IN THE INCIDENT BEING COMPLAINED OF? / L'INCIDENT FAISANT L'OBJET DE LA PLAINTE VOUS CONCERNE-T-IL DIRECTEMENT? ☒ YES / OUI ☐ NO / NON

IF NOT, WHAT IS THE NAME AND CONTACT INFORMATION OF THE PERSON INVOLVED? / SI NON, QUELS SONT LE NOM ET LES COORDONNÉES DE LA PERSONNE CONCERNÉE?

7. IF YOU WERE GIVEN A FILE NUMBER BY THE RCMP WITH RESPECT TO THE INCIDENT BEING COMPLAINED OF, PLEASE PROVIDE IT / SI LA GRC VOUS A DONNÉ UN NUMÉRO DE DOSSIER CONCERNANT L'INCIDENT, VEUILLEZ LE FOURNIR
RCMP FILE NO. / N° DE DOSSIER DE LA GRC : N/A

8. DID YOU SIGN A COMPLAINT WITH THE RCMP ABOUT THE CONDUCT OF THE RCMP MEMBERS INVOLVED IN THIS INCIDENT? / AVEZ-VOUS SIGNÉ UNE PLAINTE À LA GRC AU SUJET DE LA CONDUITE DES MEMBRES DE LA GRC CONCERNÉS? ☐ YES / OUI ☒ NO / NON

IF YES, WHEN AND WHERE DID YOU SIGN THE COMPLAINT? / SI OUI, QUAND ET OÙ L'AVEZ-VOUS SIGNÉE?

DID YOU SIGN AN AGREEMENT WITH THE RCMP TO RESOLVE THE COMPLAINT INFORMALLY? / AVEZ-VOUS CONCLU UNE ENTENTE AVEC LA GRC POUR RÉGLER LA PLAINTE À L'AMIABLE? ☐ YES / OUI ☒ NO / NON

9. DO YOU WISH THE COMMISSION AND THE RCMP TO COMMUNICATE DIRECTLY WITH A LEGAL REPRESENTATIVE OR AN ADVOCATE INSTEAD OF YOURSELF? IF SO, PLEASE PROVIDE THE FULL NAME, ADDRESS AND TELEPHONE NUMBER OF YOUR LEGAL REPRESENTATIVE OR ADVOCATE / VOULEZ-VOUS QUE LA COMMISSION ET LA GRC COMMUNIQUENT DIRECTEMENT AVEC UN REPRÉSENTANT LÉGAL OU UN PORTE-PAROLE PLUTÔT QU'AVEC VOUS? SI OUI, VEUILLEZ FOURNIR LE NOM AU COMPLET, L'ADRESSE ET LE NUMÉRO DE TÉLÉPHONE DE VOTRE REPRÉSENTANT LÉGAL OU DE VOTRE PORTE-PAROLE

Mr. Paul Champ
MAILING ADDRESS / ADRESSE POSTALE CHAMP & ASSOCIATES
EQUITY CHAMBERS 43 FLORENCE STREET OTTAWA, ON K2P 0W6
BUSINESS TEL. / TÉL. TRAVAIL 613-237-4740
FAX / TÉLÉCOPIEUR 613-232-2680

PLEASE NOTIFY THE COMMISSION IF ANY OF YOUR CONTACT INFORMATION CHANGES PRIOR TO THE DISPOSITION OF YOUR COMPLAINT /

Commission for Public Complaints Against the Royal Canadian Mounted Police

Commission des plaintes du public contre la Gendarmerie royale du Canada

PRIÈRE D'AVISER LA COMMISSION DE TOUT CHANGEMENT DE COORDONNÉES AVANT QUE VOTRE PLAINTE NE SOIT RÉGLÉE

CIRCUMSTANCES OF COMPLAINT / CIRCONSTANCES DE LA PLAINTE
(COMPLETE AS MUCH AS POSSIBLE / FOURNIR AUTANT DE RENSEIGNEMENTS QUE POSSIBLE)

10. DATE OF INCIDENT / DATE DE L'INCIDENT : DAY / JOUR: Various — MONTH / MOIS: Various — YEAR / ANNÉE: 2013 and 2014	11. TIME OF INCIDENT / HEURE DE L'INCIDENT : Various	12. CITY AND PROVINCE/TERRITORY OF INCIDENT / LIEU DE L'INCIDENT (PROVINCE/TERRITOIRE, VILLE) : British Columbia

13. DESCRIBE ANY INJURIES SUFFERED / DÉCRIRE TOUTE BLESSURE INFLIGÉE
N/A

14. IF PHOTOS WERE TAKEN OF ANY INJURIES, WHO TOOK THE PHOTOS? / LES BLESSURES ONT-ELLES ÉTÉ PHOTOGRAPHIÉES? SI OUI, QUI A PRIS LES PHOTOS?
N/A

15. IF THERE WAS MEDICAL TREATMENT FOR ANY INJURIES, PLEASE PROVIDE THE NAME OF THE DOCTOR AND MEDICAL FACILITY / SI LES BLESSURES ONT ÉTÉ TRAITÉES, VEUILLEZ DONNER LE NOM DU MÉDECIN ET DU CENTRE HOSPITALIER
N/A

16. DESCRIBE ANY EVIDENCE TO SUPPORT YOUR COMPLAINT / DÉCRIVEZ TOUTE PREUVE À L'APPUI DE VOTRE PLAINTE
N/A

DETAILS OF COMPLAINT / DÉTAILS DE LA PLAINTE

17. PLEASE DESCRIBE THE INCIDENT AS COMPLETELY AS POSSIBLE (CONTINUE ON ADDITIONAL PAGES, IF NECESSARY) / DÉCRIVEZ L'INCIDENT DE FAÇON DÉTAILLÉE (ANNEXEZ D'AUTRES FEUILLES AU BESOIN)
Please refer to the attached documents.

18. WHAT WOULD YOU LIKE TO ACHIEVE THROUGH THIS COMPLAINT PROCESS? / QUELS OBJECTIFS SOUHAITEZ-VOUS ATTEINDRE EN DÉPOSANT CETTE PLAINTE?
To be determined by the investigator.

19. THE COMPLAINT IS ABOUT THE CONDUCT OF THE FOLLOWING RCMP MEMBER(S) (CONTINUE ON ADDITIONAL PAGES, IF NECESSARY) / LA PLAINTE VISE LE(S) MEMBRE(S) DE LA GRC SUIVANT(S) (ANNEXEZ D'AUTRES FEUILLES AU BESOIN)

NAME AND RANK / NOM ET GRADE : Unidentified, Unknown	DETACHMENT / DÉTACHEMENT :
NAME AND RANK / NOM ET GRADE : Steinhammer, Staff Sergeant	DETACHMENT / DÉTACHEMENT :
NAME AND RANK / NOM ET GRADE : O'Neil, Tim	DETACHMENT / DÉTACHEMENT :

20. WITNESS(ES) (MAY INCLUDE RCMP MEMBERS YOU ARE NOT COMPLAINING ABOUT) (CONTINUE ON ADDITIONAL PAGES, IF NECESSARY) / TÉMOIN(S) (IL PEUT S'AGIR DE MEMBRES DE LA GRC DONT LA CONDUITE NE FAIT PAS L'OBJET DE LA PLAINTE) (ANNEXEZ D'AUTRES FEUILLES AU BESOIN)

FAMILY NAME / NOM DE FAMILLE : N/A GIVEN NAME AND INITIAL / PRÉNOM ET INITIALES :	ADDRESS / ADRESSE : TELEPHONE / TÉLÉPHONE :
RELATIONSHIP TO COMPLAINANT / LIEN AVEC LE PLAIGNANT :	

Protected when completed (under the *Privacy Act*) / Protégé une fois complété (en vertu de la *Loi sur la protection des renseignements personnels*)

Commission for Public Complaints Against the Royal Canadian Mounted Police

Commission des plaintes du public contre la Gendarmerie royale du Canada

FAMILY NAME / NOM DE FAMILLE :	ADDRESS / ADRESSE :
GIVEN NAME AND INITIAL / PRÉNOM ET INITIALES :	TELEPHONE / TÉLÉPHONE :
RELATIONSHIP TO COMPLAINANT / LIEN AVEC LE PLAIGNANT :	

Note: By submitting the Complaint Form, you are authorizing the Commission for Public Complaints Against the RCMP to collect your personal information. This information is being collected solely for purposes related to Part VII of the *RCMP Act*. The Complaint Form along with all other relevant documentation may be forwarded to the RCMP for investigation pursuant to subsection 45.35(3) of the *RCMP Act*. Accordingly, an RCMP complaint investigator may contact you to provide a statement.

The information is held in Personal Information Bank CPC PPU 005 and you have a right to access this information in accordance with the *Privacy Act*.

Nota : En soumettant le Formulaire de plainte, vous autorisez la Commission des plaintes du public contre la GRC à recueillir vos renseignements personnels. Ces renseignements seront recueillis seulement à des fins reliées au processus prévu à la partie VII de la *Loi sur la GRC*. Le Formulaire de plainte ainsi que tous les documents pertinents peuvent être acheminés à la GRC pour une enquête en vertu du paragraphe 45.35(3) de la *Loi sur la GRC*. Par conséquent, un enquêteur de la GRC pourrait vous demander de donner une déclaration.

Les renseignements sont conservés dans le fichier de renseignements personnels CPP PPU 005 et vous pouvez y accéder conformément à la *Loi sur la protection des renseignements personnels*.

COMPLAINT FORM COMPLETED BY /

CE FORMULAIRE A ÉTÉ COMPLÉTÉ PAR: **Chris Beach**

P.O. Box 88689 Surrey, BC V3W 0X1 1-800-665-6878 1-866-432-5837 TTY (ATS) (604) 501-4095 FAX www.cpc-cpp.gc.ca

Champ & Associates

www.champlaw.ca

Equity Chambers
43 Florence Street / 43, rue Florence
Ottawa, Ontario K2P 0W6
Tel: 613-237-4740
Fax/Téléc :(613)232-2680

FAX COVER SHEET / PAGE COUVERTURE

TRANSMITTED TO/NUMÉRO DU DESTINATAIRE : **(604) 501-4095**

TO/ DESTINATAIRE: Ian McPhail, QC, Chair
Commission for Public Complaints against the RCMP

FROM/ EXPÉDITEUR: Paul Champ

RE/OBJET: **Surveillance of Canadian Citizens and Information Sharing with the National Energy Board**

DATE: February 6, 2014

MESSAGE: Enclosed documents sent by mail only.

Pages including cover sheet/Nombre de pages (incluant celle-ci): 6

Champ & Associates
www.champlaw.ca

Equity Chambers
43 Florence Street

FAX:
604-501-4095
Fax cover sheet to state:
"Enclosed documents sent by mail only."

Our File: 1555

February 6, 2014

BY MAIL AND FACSIMILE

Ian McPhail, QC
Chair, Commission for Public Complaints against the R
National Intake Office
PO Box 88689
Surrey, BC V3W 0X1

Dear Mr McPhail:

Re: Surveillance of Canadian Citizens and Information Sharing with the National Energy Board

We are legal counsel for the British Columbia Civil Liberties Association ("BCCLA"). By this letter, our client is making a complaint pursuant to section 45.35(1) of the *Royal Canadian Mounted Police Act* regarding the improper and unlawful actions of Royal Canadian Mounted Police ("RCMP") members in gathering information about Canadian citizens and groups engaging in peaceful and lawful expressive activities, and sharing it with other government bodies and private sector actors.

As set out in greater detail below, recent media reports indicate that the National Energy Board ("NEB" or the "Board") has engaged in systematic information and intelligence gathering about organizations seeking to participate in the Board's Northern Gateway Project hearings. Records obtained under the *Access to Information Act* confirm that this information and intelligence gathering was undertaken with the cooperation and involvement of the RCMP and other law enforcement agencies, and that the RCMP participates in sharing intelligence information with the Board's security personnel, the Canadian Security Intelligence Service ("CSIS"), and private petroleum industry security firms. The records suggest that the targeted organizations are viewed as potential security risks simply because they advocate for the protection of the environment.

This complaint is directed at all RCMP members and officers participating in or commanding the impugned activities described in more detail in the body of this letter. In brief, BCCLA has serious concerns about the scope and extent of the RCMP's intelligence gathering activities and its practice of monitoring groups and organizations that seek to peacefully participate in public discourse about energy-related programs such as the Northern Gateway Project. BCCLA is particularly concerned about the chilling effect that

such intelligence gathering and sharing will have on participation in the Board's proceedings, as it seeks to criminalize what is intended to be a forum for public expression and engagement in decision-making processes regarding projects of significant public interest. These activities violate sections 2(b), 2(c), 2(d) and 8 of the *Canadian Charter of Rights and Freedoms*.

Background and Specific Concerns

For the past few years, BCCLA has become increasingly alarmed by reports about the nature and scope of the RCMP's interest in organizations engaged in environmental advocacy. Last year, the media reported on internal RCMP documents referring to "a growing radicalized environmentalist faction within Canadian society that is opposed to Canada's energy sector policies".[1] Subsequent media reports have suggested that protests and opposition relating to the petroleum industry are regarded as threats to national security by the RCMP and other government agencies.[2]

Most recently, the media has reported that the RCMP worked and shared information with the NEB about so-called "radicalised environmentalist" groups seeking to participate in the Board's hearings regarding the Northern Gateway Project.[3] These groups, which include Leadnow, ForestEthics Advocacy, the Council of Canadians, the Dogwood Initiative, EcoSociety, and the Sierra Club of British Columbia, have well-established records of engagement and advocacy on a wide range of public issues. Also included was the relatively newer social and political movement for indigeous rights, Idle No More. None of these groups are criminal organizations, nor do they have any history of advocating, encouraging, or participating in criminal activity.

BCCLA has reviewed the *Access to Information Act* records upon which these recent media reports were based, and has also been contacted by many individuals involved with these organizations. BCCLA has serious concerns about the RCMP's involvement and conduct in this matter. In particular, we note the following:

- RCMP members have maintained a visible presence at NEB hearings when there are no grounds for security concerns. Courts and tribunals conduct hearings every day across Canada without the presence of police or other security personnel.

- RCMP S/Sgt VK Steinhammer notified an NEB security officer of an Idle No More protest that was scheduled to take place on the Prince Rupert courthouse lawn on a Sunday afternoon.[4] Despite confirming that the RCMP anticipated the protest would

[1] Jim Bronskill, "RCMP Concerned About 'Radicalized Environmentalist' Groups Such As Greenpeace: Report," *The Canadian Press*, July 29, 2012.
[2] Stephen Leahy, "Canada's environmental activists seen as 'threat to national security'," *The Guardian*, February 14, 2013.
[3] Shawn McCarthy, "CSIS, RCMP monitored activist groups before Northern Gateway hearings," *The Globe and Mail*, November 21, 2013; Krystle Alarcon and Matthew Millar, "Harper government under fire for spying on environmental groups," *The Vancouver Observer*, November 21, 2013; Matthew Millar, "Harper government officials, spies meet with energy industry in Ottawa," *The Vancouver Observer*, November 22, 2013.
[4] Email of S/Sgt VK Steinhammer to R. Garber re "Security for upcoming round of Northern Gateway hearings," dated April 19, 2013 [A0008929_11-000011-12].

be peaceful, S/Sgt Steinhammer nevertheless advised that the RCMP would be "monitoring" this event. BCCLA is troubled that the RCMP would deem it necessary to monitor peaceful gatherings at which it has no expectation of criminal behaviour, threat to public safety or need to ensure the safety of demonstrators.

- Tim O'Neil, a Senior Criminal Intelligence Research Specialist with the RCMP's Critical Infrastructure Intelligence Team ("CITT"), wrote to Board staff regarding the risk of interference with NEB hearings by groups opposed to oilsands and pipeline development.[5] Despite confirming that CITT has no intelligence indicating a criminal threat to the NEB or its members, O'Neil advises that CITT "will continue to monitor all aspects of the anti-petroleum industry movement," requests that an SPROS/SIR National Security database file be opened for this matter, and notes that this information is also being shared with CSIS. Again, BCCLA is troubled that the RCMP and CSIS would deem it necessary to monitor the activities of groups which it does not suspect of any criminality.

- Tim O'Neil's April 19, 2013 message was also copied to members of Natural Resources Canada, a government institution that organizes biannual "classified briefings" in which it has been reported that the RCMP and CSIS share information about security matters, including the monitoring of environmental organizations and activists, with the NEB and representatives of the energy industry.[6] Indeed, O'Neil's email concludes by inviting recipients to discuss their concerns with security officials who will be attending the next NRCan Classified Briefing meeting.

- Based on redactions made pursuant to sub-paragraph 16(1)(c)(ii) of the *Access to Information Act*, it appears that RCMP and NEB security officers shared confidential-source information regarding events or individuals related to the Board's hearings.[7] BCCLA finds this particularly troubling, as it suggests that the RCMP has been sharing sensitive aspects of its investigative and law enforcement work with an independent federal agency that performs an adjudicative function, not to mention industry representatives who are parties in the same hearings. Such information sharing may compromise these groups' ability to participate fully and effectively before the NEB, as industry representatives may be receive information that assists in advancing their position before the Board, and the Board itself may be made privy to unproven yet highly prejudicial allegations against individuals, groups, or organizations appearing before it.

- It appears highly likely that the "intelligence" shared with the NEB and industry representatives includes personal information about specific individuals. We further note that the Board subsequently shared some of this information with Tocra Inc, a

[5] Email of T. O'Neil to R. Garber and 23 other recipients re "Security Concerns - National Energy Board," dated April 19, 2013 [A0008929_14-000014-16].
[6] Matthew Millar, "Harper government's extensive spying on anti-oilsands groups revealed in FOIs," The Vancouver Observer, November 19, 2013; Matthew Millar, "Harper government officials, spies meet with energy industry in Ottawa," The Vancouver Observer, November 22, 2013.
[7] See, for example, email chain dated January 18-21, 2013 [A0008929_87-000087-91]; email chain dated January 18, 2013 [A0008929_92-000092-93]; undated document addressed to NEB Panel and ENG Hearing Kelowna - Information Summary, dated January 22, 2013 [A0008929_80-000080-86].

private firm that provides security consulting services for the petroleum and natural gas industries.

- These emails also indicate that some of the RCMP's information is derived from "confidential sources" who may be directly connected or involved with advocacy groups such as Idle No More. This strongly suggests that the RCMP is engaged in covert intelligence gathering and/or infiltration of peaceful organizations whose sole purpose is to give voice to their members' concerns and viewpoints on matters of significant public interest. Again, BCCLA is troubled that the RCMP would infiltrate and/or covertly gather intelligence regarding groups whose members are peacefully exercising their *Charter*-protected assembly and expression rights.

- Finally, we note that the documents released by the NEB indicate that the RCMPprovided the Board with intelligence beyond the open-source information its own security staff were capable of gathering. For example, the NEB's "threat assessment" pertaining to its hearings in Kelowna and Prince Rupert confirm that the Board consulted with "national-level intelligence resources" of both the RCMP and CSIS, in addition to regional level and local RCMP detachments in Kelowna and Prince Rupert.[8] BCCLA finds it troubling that the RCMP would provide such high-level intelligence to an arms-length government adjudicative body such as the NEB, particularly since the RCMP had no expectation of any criminal activity in connection with the Board's proceedings.

Chilling Effect on Free Expression and Democratic Participation

Freedom of expression is among the most fundamental of rights possessed by Canadians, and is guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*. Similarly, sections 2(c) and (d) of the *Charter* protect historically powerful modes of collective expression, namely peaceful assembly and association. Protecting democratic discourse and participation in decision-making is a core rationale for these freedoms. The Supreme Court of Canada has repeatedly emphasized the paramount importance of free expression to Canadian society. As Chief Justice McLachlin stated in *Grant v Torstar Corp*, "free expression is essential to the proper functioning of democratic governance." For this reason, "freewheeling debate on matters of public interest is to be encouraged" because the truth-seeking function of public debate is dependent on the free flow of information and expression of diverse opinions.[9]

Any state action that discourages or deters individuals from engaging in free expression infringes section 2(b) of the *Charter*. Such violations are particularly egregious when they restrict expression concerning public affairs. BCCLA maintains that monitoring, surveillance, and information sharing with other government agencies and private sector interests creates a chilling effect for groups and individuals who may wish to engage in

[8] National Energy Board, "Appendix 9: Enbridge Northern Gateway Project Integrated Security, Logistics and Communications Plan: Kelowna," dated January 24, 2013 [excerpt at A0008929_61-000061]; National Energy Board, "Appendix 11: Enbridge Northern Gateway Project Security Plan: Prince Rupert," dated January 23, 2013 [A0008929_77-000077]; also see Email of R. Garber re Prince Rupert security assessment, dated January 31, 2013 [A0008929_37-000037-38].

[9] *Grant v Torstar Corp*, 2009 SCC 61 at paras. 48 and 52.

public discourse or participate in proceedings before the Board. Police monitoring may also deter those who simply wish to meet with or join a group to learn more about a matter of public debate or otherwise exchange information or share views with others in their community. Indeed, BCCLA has already heard from several of the affected groups that members and prospective members of their organizations have expressed serious concerns and reluctance to participate in light of recent media reports of RCMP monitoring.[10]

BCCLA also notes that individuals and groups have a reasonable expectation of privacy in meeting and discussing matters of public interest or planning ways of lawfully exercising their *Charter*-protected assembly and expression rights. If the RCMP is involved in infiltrating these groups or is otherwise relying on confidential informants or covert intelligence gathering, then an inquiry must also be conducted into whether such activities amount to an unreasonable search in violation of section 8 of the *Charter*.

Finally, and in addition to this chilling effect on rights of free expression, assembly, and association, BCCLA is also concerned that the RCMP's ongoing collaboration and information sharing with the NEB and other interested parties may undermine the fairness of the Board's proceedings. In this regard, BCCLA is concerned that disclosing to the NEB that certain groups are of interest to or under investigation by the RCMP may prejudice their credibility when they appear before the Board as intervening parties. At a minimum, it strikes us as highly improper for the RCMP to gather information about a party to a judicial proceeding and to share that information directly with the tribunal and with another party to the proceeding, Enbridge. The disclosure of intelligence information to the Board or other interested parties may compromise the right of these groups or individuals to participate in or even attend proceedings in which they have clearly expressed an interest.

Conclusion

In light of all the foregoing, BCCLA asks that the Commission undertake a full investigation of the allegations described in this complaint and those RCMP members who are or may have been involved in targeting groups participating or seeking to participate in NEB hearings. We trust you will appreciate the urgency of this matter, and look forward to hearing from you regarding next steps in the complaint process as soon as possible. We remain available to address any questions or furnish any additional information which you may require in the course of your inquiry into this matter.

Yours truly,

Paul Champ

c: J. Paterson, Executive Director, BCCLA

[10] BCCLA is prepared to provide the Commission with statements or other information from affected individuals and groups as to the impact of news reports of RCMP surveillance on group membership and participation upon request or at such later stage as may be appropriate.

APPENDIX B – Public Interest Investigation, dated February 20, 2014

Commission for Public Complaints Against the Royal Canadian Mounted Police

Commission des plaintes du public contre la Gendarmerie royale du Canada

Office of the Chair

Bag Service 1722, Station B
Ottawa, Ontario
Canada K1P 0B3

Cabinet du Président

Service de sac 1722, succursale B
Ottawa (Ontario)
Canada K1P 0B3

File No.: PC-2014-0380

February 20, 2014

The Honourable Steven Blaney, P.C., M.P.
Minister of Public Safety
269 Laurier Avenue West
Ottawa, ON K1A 0P8

Dear Minister:

Re: Public Interest Investigation into the Complaint of the British Columbia Civil Liberties Association

The Commission has received a public complaint from the British Columbia Civil Liberties Association regarding Staff Sergeant Steinhammer, Tim O'Neil and other unidentified members of the RCMP (attached hereto). I consider it advisable in the public interest to investigate this complaint pursuant to subsection 45.43(1) of the *RCMP Act*, and am accordingly initiating such investigation.

I have also notified the Commissioner of the RCMP in accordance with the requirements of the *RCMP Act.*

Yours truly,

Ian McPhail, Q.C.
Interim Chair

Att.

Canada

Commission for Public Complaints Against the
Royal Canadian Mounted Police

Commission des plaintes du public contre la
Gendarmerie royale du Canada

Office of the Chair

Bag Service 1722, Station B
Ottawa, Ontario
Canada K1P 0B3

Cabinet du Président

Service de sac 1722, succursale B
Ottawa (Ontario)
Canada K1P 0B3

File No.: PC-2014-0380

February 20, 2014

Commissioner Robert W. Paulson
Attention: Manager, National Public Complaints Unit
Royal Canadian Mounted Police
73 Leikin Drive, M5 Building,
3rd Floor, Suite 101, Mailstop #47
Ottawa, ON K1A 0R2

Dear Commissioner:

Re: Public Interest Investigation into the Complaint of the British Columbia Civil Liberties Association

The Commission has received a public complaint from the British Columbia Civil Liberties Association regarding Staff Sergeant Steinhammer, Tim O'Neil and other unidentified members of the RCMP (attached hereto). I consider it advisable in the public interest to investigate this complaint pursuant to subsection 45.43(1) of the *RCMP Act*, and am accordingly initiating such investigation.

In order to expedite the Commission's investigation into this complaint, I request that the RCMP designate an official with whom the Commission's investigator can liaise in order to determine what documents and further information are necessary in the context of this investigation.

I also request that you notify the subject members identified to date of this complaint, and confirm same.

Yours truly,

Ian McPhail, Q.C.
Interim Chair

Att.

Canada

APPENDIX C – Summary of Findings and Recommendations

FINDINGS

FINDING NO. 1: It was reasonable for the RCMP to provide a visible presence at the National Energy Board hearings.

FINDING NO. 2: It was reasonable for the RCMP to monitor the Prince Rupert protest.

FINDING NO. 3: It was reasonable for the RCMP to monitor events for the purpose of identifying criminal activity.

FINDING NO. 4: The RCMP acted reasonably in monitoring the demonstrations.

FINDING NO. 5: It was reasonable to video-record the demonstrations.

FINDING NO. 6: As demonstrated by the RCMP's reliance on a closed-circuit surveillance camera policy, the RCMP lacks a clear policy with respect to video-recording public order events such as demonstrations and protests.

FINDING NO. 7: It was reasonable for the RCMP to monitor open sources for information about upcoming protests and demonstrations.

FINDING NO. 8: The RCMP's current policy on the use of open sources does not provide clear guidance as to the collection, use, and retention of personal information obtained from social media where there is no criminal nexus.

FINDING NO. 9: There is insufficient information to support a finding that it was unreasonable to retain the profile and the personal information of Person G.

FINDING NO. 10: The RCMP lacks clear policy/guidance as to the use and retention of personal information in circumstances where it is determined that there is no nexus to criminal activity.

FINDING NO.11: It was not unreasonable to conduct open source and internal database checks in the other specific instances reviewed by the Commission.

FINDING NO. 12: It was reasonable for the RCMP to attend the workshop and make observations.

FINDING NO. 13: It was not unreasonable to collect licence plate numbers for intelligence-gathering purposes.

FINDING NO. 14: The RCMP lacks policy/guidance on the collection, use, and retention of licence plate numbers and associated personal information for intelligence purposes.

FINDING NO. 15: It was reasonable for the RCMP to share information about potential threats to energy critical infrastructure with Natural Resources Canada.

FINDING NO. 16: The RCMP did not share confidential source information with the National Energy Board.

FINDING NO. 17: It was reasonable in the circumstances for the RCMP to share intelligence and threat assessments with the NEB.

FINDING NO. 18: It was unreasonable for the RCMP to share the personal information of a protest organizer with the National Energy Board.

RECOMMENDATIONS

RECOMMENDATION NO. 1: That the RCMP consider implementing a specific policy regarding video-recording protests and demonstrations, setting out criteria and limits for video-recording protests and demonstrations and for video retention periods.

RECOMMENDATION NO. 2: In particular, that all recordings and images of peaceful protests and demonstrations be destroyed as soon as is practicable.

RECOMMENDATION NO. 3: That the RCMP provide clear policy guidance describing what personal information from social media sites can be collected, the uses that can be made of it, and what steps should be taken to ensure its reliability.

RECOMMENDATION NO. 4: That the RCMP policy require the destruction of records obtained from social media sources containing personal information (such as screen captures of social media sites) once it is determined that there is no criminal nexus regarding the information.

RECOMMENDATION NO. 5: That the RCMP develop a policy providing that where the RCMP obtains personal information that is determined to have no nexus to criminal activity, the information should not be retained.

RECOMMENDATION NO. 6: That the RCMP develop a policy providing that where a licence plate number and any associated personal information has no nexus to criminal activity, the information should not be retained.

RECOMMENDATION NO. 7: That the Kelowna Detachment review all policies concerning the collection, retention and disclosure of personal information and take action to ensure that personal information is disclosed in accordance with legislation and policy.

RCMP Commissioner's Response

CRCC report following a Public Interest Investigation regarding allegations that the RCMP improperly monitored and disclosed information of persons and groups seeking to participate in National Energy Board hearings

Royal Canadian Mounted Police
Commissioner

Gendarmerie royale du Canada
Commissaire

Guided by Integrity, Honesty, Professionalism, Compassion, Respect and Accountability

Les valeurs de la GRC reposent sur l'intégrité, l'honnêteté,
le professionalisme, la compassion, le respect et la responsabilisation

NOV 20 2020

PROTECTED "A"

Ms. Michelaine Lahaie
Chairperson
Civilian Review and Complaints Commission
for the RCMP
P.O. Box 1722, Station "B"
Ottawa, Ontario
K1P 0B3

Dear Ms. Lahaie:

I acknowledge receipt of the Commission's report regarding the public interest investigation into allegations that the RCMP improperly monitored and disclosed information of persons and groups seeking to participate in National Energy Board (NEB) hearings, file number PC-2014-0380.

I have completed a review of this matter, including the findings and recommendations set out in the Commission's interim report.

I agree with Finding No. 1 that it was reasonable for the RCMP to provide a visible presence at the NEB hearings.

I agree with Finding No. 2 that it was reasonable for the RCMP to monitor the Prince Rupert protest.

I agree with Finding No. 3 that it was reasonable for the RCMP to monitor events for the purpose of identifying criminal activity.

I agree with Finding No. 4 that the RCMP acted reasonably in monitoring the demonstrations.

I agree with Finding No. 5 that it was reasonable to video-record the demonstrations.

I agree with Finding No. 6 that, as demonstrated by the RCMP's reliance on a closed-circuit surveillance camera policy, the RCMP lacks a clear policy with respect to video-recording public order events such as demonstrations and protests.

I support Recommendation No. 1 that the RCMP consider implementing a specific policy regarding video-recording protests and demonstrations, setting out criteria and limits for video-recording protests and demonstrations and for video retention periods.

There are operational policies currently under development for the policing of public assemblies that will include a section on video recording of protests and demonstrations and references to existing policies on Information Management (IM) and retention periods for recorded media. Other existing policies will be reviewed to determine if there is a need to amend those policies to include a section on video recording events such as those noted above. I will direct that provisions be added in the new policy for policing public assemblies and in the existing *Operational Manual* (OM) policy 55.2 "Aboriginal Demonstrations and Protests" and OM 37.7 "Labour Disputes" on the video recording of protests and demonstrations, which will provide general criteria for this practice and include references to the RCMP policies on IM for the retention periods of recorded media.

I support Recommendation No. 2 that, in particular, all recordings and images of peaceful protests and demonstrations be destroyed as soon as is practicable.

At the time of the NEB hearings, there was limited policy on video recording of protests or demonstrations. OM 16.4 "Closed Circuit Video Equipment" was in effect at the relevant time. It provided that, if no significant events occurred, the recordings were to be considered transitory records retained for a prescribed period set by the detachment commanders. This policy has since been amended and retention periods are now found in the RCMP policy on IM of recorded media, such as video recordings. The RCMP manages information obtained in the execution of its duties in accordance with the *Privacy Act* and RCMP policies on IM. Retention periods for recorded media is defined in *Information Management Manual* 2.3 "Operational Information Resources". We will take the opportunity to review and confirm current policies to ensure that the recorded media is destroyed as soon as practicable.

I agree with Finding No. 7 that it was reasonable for the RCMP to monitor open sources for information about upcoming protests and demonstrations.

I agree with Finding No. 8 that the RCMP's current policy on the use of open sources does not provide clear guidance as to the collection, use, and retention of personal information obtained from social media where there is no criminal nexus.

You will recall that in my response to the anti-shale gas protests in Kent County, New Brunswick I generally agreed to a similar finding. The Force adopted its first policy on this issue, namely OM 26.5 "Using the Internet for Criminal Investigations and Intelligence", in March 2015. On July 15, 2019, the original version of OM 26.5. was amended and is now titled "Using the Internet for Open Source Intelligence and Criminal Investigations". That policy update changed the roles and responsibilities of the Tactical Internet Operational Support Unit and unit commanders and aligned policy with the most recent technology developments in the area of open-source intelligence (OSI) collection. It did not modify the core provisions found in the original version.

The response in Kent County was based on the information that was known at that time and as provided by the various policy centers that were consulted for that report. Since my June 17, 2020, response on Kent County I have reviewed a draft of the report for the OSI Audit. I have also reviewed your Final Report on Kent County, released on November 12, 2020.

When OM 26.5 – "Using the Internet for Criminal Investigations and Intelligence" came into effect in 2015 and after being reviewed in 2019, it was felt the policy was adequate. Despite the policy being in place, the 2020 OSI Audit revealed that it was not well-known and compliance levels were very low among those persons interviewed. The Audit identified opportunities to develop a more robust governance framework and to review and strengthen the current OM 26.5 policy and any other policies related to the collection, storage, and retention of OSI. The Audit Report and Management Action Plan will be available when it is published.

Based on the foregoing, I support Recommendation No. 3 that the RCMP provide clear policy guidance describing what personal information from social media sites can be collected, the uses that can be made of it, and what steps should be taken to ensure its reliability. I will direct that this be done as part of the Management Action Plan for the Audit of OSI.

I support, in part, Recommendation No. 4 that the RCMP policy require the destruction of records obtained from social media sources containing personal information (such as screen captures of social media sites) once it is determined that there is no criminal nexus regarding the information.

There is already IM policy that provides retention periods once information is added to an operational file. That information is then protected by legislation, namely the *Privacy Act* and the *Access to Information Act*, as well as the RCMP Access to Information and Privacy Branch processes and IM policy.

As already noted, since my response to a similar recommendation on the Kent County protests, I have become aware of new information. RCMP policies on OSI and IM will be reviewed and strengthened as it relates to the retention of

records obtained from social media through the OSI Audit report and Management Action Plan. I will direct that this recommendation be actioned as part of that work.

I agree with Finding No. 9 that there is insufficient information to support a finding that it was unreasonable to retain the profile and the personal information of Person G.

I agree with Finding No. 10 that the RCMP lacks clear policy/guidance as to the use and retention of personal information in circumstances where it is determined that there is no nexus to criminal activity.

I support Recommendation No. 5 that the RCMP develop a policy providing that where the RCMP obtains personal information that is determined to have no nexus to criminal activity, the information should not be retained.

The RCMP takes its legislated obligations to safeguard all personal information very seriously, whether or not there is a nexus to criminal activity. In the context of OSI and for law enforcement or criminal intelligence purposes, I will direct that information retention related policy be amended and if required, new policy developed.

I agree with Finding No. 11 that it was not unreasonable to conduct open source and internal database checks in the other specific instances reviewed by the Commission.

I agree with Finding No. 12 that it was reasonable for the RCMP to attend the workshop and make observations.

I agree with Finding No. 13 that it was not unreasonable to collect licence plate numbers for intelligence-gathering purposes.

I agree with Finding No. 14 that the RCMP lacks policy/guidance on the collection, use, and retention of licence plate numbers and associated personal information for intelligence purposes.

I support Recommendation No. 6 that the RCMP develop a policy providing that where a licence plate number and any associated personal information has no nexus to criminal activity, the information should not be retained.

Over the years, there have been differing legal decisions and opinions on whether licence plate numbers constitute personal information. Therefore, it does merit further examination for that reason. This can be included with the review of various policies as part of the OSI Audit Management Action Plan. I will direct that this be done.

I agree with Finding No. 15 that it was reasonable for the RCMP to share information about potential threats to energy critical infrastructure with Natural Resources Canada.

I agree with Finding No. 16 that the RCMP did not share confidential source information with the NEB.

I agree with Finding No. 17 that it was reasonable in the circumstances for the RCMP to share intelligence and threat assessments with the NEB.

I agree with Finding No. 18 that it was unreasonable for the RCMP to share the personal information of a protest organizer with the NEB.

I support Recommendation No. 6 that the Kelowna Detachment review all policies concerning the collection, retention, and disclosure of personal information and take action to ensure that personal information is disclosed in accordance with legislation and policy.

The report only identified one incident that occurred several years ago. As such, it was not commonplace or systemic in Kelowna Detachment. Many, if not the majority of, personnel have likely transferred since this occurred. However, it is prudent to have the Kelowna Detachment Commander review policies as set out in the recommendation. In addition to what has been recommended, I will also direct the "E" Division Criminal Operations Officers review the same policies.

I look forward to receiving your final report on this matter.

Kindest regards,

Brenda Lucki
Commissioner

Final Report

PUBLIC INTEREST INVESTIGATION INTO THE EVENTS AND THE ACTIONS OF THE RCMP MEMBERS INVOLVED IN THE NATIONAL ENERGY BOARD HEARINGS IN BRITISH COLUMBIA

CIVILIAN REVIEW AND COMPLAINTS COMMISSION FOR THE ROYAL CANADIAN MOUNTED POLICE

COMMISSION'S FINAL REPORT

PUBLIC INTEREST INVESTIGATION REGARDING ALLEGATIONS THAT THE RCMP IMPROPERLY MONITORED AND DISCLOSED INFORMATION OF PERSONS AND GROUPS SEEKING TO PARTICIPATE IN NATIONAL ENERGY BOARD HEARINGS

Royal Canadian Mounted Police Act
Subsection 45.76(3)

Complainant

British Columbia Civil Liberties Association

COMMISSION'S FINAL REPORT

Background

[1] On February 6, 2014, the British Columbia Civil Liberties Association (BCCLA) filed a complaint with the Commission for Public Complaints Against the Royal Canadian Mounted Police (now the Civilian Review and Complaints Commission for the Royal Canadian Mounted Police, hereinafter "the Commission"), concerning the conduct of RCMP members engaged in monitoring, gathering intelligence, and sharing information about various people. These people were seeking to participate in National Energy Board hearings about a proposed pipeline and were engaging in peaceful protests and demonstrations, primarily in British Columbia.

[2] The BCCLA's complaint to the Commission alleged that, based upon documents provided pursuant to an *Access to Information Act* request, members of the RCMP:

(1) Improperly monitored activities of various persons and groups seeking participation in NEB hearings;
(2) Improperly engaged in covert intelligence gathering and/or infiltration of peaceful organizations; and
(3) Improperly disclosed information concerning persons and groups.

The Commission's Public Interest Investigation and Interim Report

[3] On February 20, 2014, the Commission notified the Minister of Public Safety and the RCMP Commissioner that it would conduct a public interest investigation into the BCCLA's complaint. On June 23, 2017, the Commission issued its Interim Report. This report sets out the full details of the incidents and the subsequent investigation and is attached as **Schedule 1**. It should be read in conjunction with this report.

[4] In its Interim Report, the Commission made the following findings:

1) It was reasonable for the RCMP to provide a visible presence at the National Energy Board hearings.

2) It was reasonable for the RCMP to monitor the Prince Rupert protest.

3) It was reasonable for the RCMP to monitor events for the purpose of identifying criminal activity.

4) The RCMP acted reasonably in monitoring the demonstrations.

5) It was reasonable to video-record the demonstrations.

6) As demonstrated by the RCMP's reliance on a closed-circuit surveillance camera policy, the RCMP lacks a clear policy with respect to video-recording public order events such as demonstrations and protests.

7) It was reasonable for the RCMP to monitor open sources for information about upcoming protests and demonstrations.

8) The RCMP's current policy on the use of open sources does not provide clear guidance as to the collection, use, and retention of personal information obtained from social media where there is no criminal nexus.

9) There is insufficient information to support a finding that it was unreasonable to retain the profile and the personal information of Person G.

10) The RCMP lacks clear policy/guidance as to the use and retention of personal information in circumstances where it is determined that there is no nexus to criminal activity.

11) It was not unreasonable to conduct open source and internal database checks in the other specific instances reviewed by the Commission.

12) It was reasonable for the RCMP to attend the workshop and make observations.

13) It was not unreasonable to collect licence plate numbers for intelligence-gathering purposes.

14) The RCMP lacks policy/guidance on the collection, use, and retention of licence plate numbers and associated personal information for intelligence purposes.

15) It was reasonable for the RCMP to share information about potential threats to energy critical infrastructure with Natural Resources Canada.

16) The RCMP did not share confidential source information with the National Energy Board.

17) It was reasonable in the circumstances for the RCMP to share intelligence and threat assessments with the National Energy Board.

18) It was unreasonable for the RCMP to share the personal information of a protest organizer with the National Energy Board.

With respect to these findings, the Commission made the following recommendations:

1) That the RCMP consider implementing a specific policy regarding video-recording protests and demonstrations, setting out criteria and limits for video-recording protests and demonstrations and for video retention periods.

2) In particular, that all recordings and images of peaceful protests and demonstrations be destroyed as soon as is practicable.

3) That the RCMP provide clear policy guidance describing what personal information from social media sites can be collected, the uses that can be made of it, and what steps should be taken to ensure its reliability.

4) That the RCMP policy require the destruction of records obtained from social media sources containing personal information (such as screen captures of social media sites) once it is determined that there is no criminal nexus regarding the information.

5) That the RCMP develop a policy providing that where the RCMP obtains personal information that is determined to have no nexus to criminal activity, the information should not be retained.

6) That the RCMP develop a policy providing that where a licence plate number and any associated personal information has no nexus to criminal activity, the information should not be retained.

7) That the Kelowna Detachment review all policies concerning the collection, retention and disclosure of personal information and take action to ensure that personal information is disclosed in accordance with legislation and policy.

The RCMP Commissioner's Response

[5] Section 45.76(2) of the *Royal Canadian Mounted Police Act* (RCMP Act) requires the RCMP Commissioner to provide a written response indicating any further action that has been or will be taken in light of the findings and recommendations contained in the Commission's Interim Report. The RCMP Commissioner must also provide reasons for not acting on any of the findings or recommendations.

[6] On November 20, 2020, the Commission received a response from RCMP Commissioner Brenda Lucki. The full response is attached as **Schedule 2**.

[7] At the outset, it should be noted that the Commission recently released its *Final Report after Commissioner's Response to Commission's Interim Report Following a Chairperson-Initiated Complaint Investigation into the RCMP's Response to Anti-Shale*

Gas Protests in Kent County, New Brunswick.[1] When the Commission issued its interim report for that investigation,[2] the Commission included some of the analysis and recommendations from the Interim Report in this case. The RCMP Commissioner's response to the Kent County Interim Report strongly rejected the Commission's recommendations (identical to those in the Interim Report in this case) about limits to the collection and retention of intelligence about protesters from open sources such as social media accounts. The Kent County Final Report reiterated and clarified the Commission's recommendations following a critical analysis of the RCMP Commissioner's response. While some of that analysis is revisited in the next section below, the parties and interested readers should refer to paragraphs 78–105 of the Kent County Final Report for vital context relevant to the Final Report in this case.

[8] In her response to the Interim Report in this case, RCMP Commissioner Lucki agreed with all the Commission's findings, and she supported the Commission's recommendations in nearly all respects.

Recommendation 1: RCMP Commissioner supports developing video policy

[9] The RCMP Commissioner stated that the RCMP was developing policies on policing public assemblies that would include video-recording protests and demonstrations. These policies would refer to the RCMP's existing policies on information management and retention periods. The RCMP Commissioner indicated that she will direct that this new policy, as well as some of the RCMP's existing policies, be amended to provide general criteria on video-recording protests and demonstrations.

Recommendation 2: RCMP Commissioner supports destroying recordings

[10] The RCMP Commissioner stated that the RCMP's policy has been amended such that the retention of recorded media (including video recordings) is managed under its *Information Management Manual*. The RCMP Commissioner stated that the RCMP will review and confirm current policies to ensure that the recorded media is destroyed as soon as practicable.

Recommendation 3: RCMP Commissioner supports clarity for open source policy

[11] The RCMP Commissioner stated that, although the RCMP now has a policy about using the Internet for criminal investigations and intelligence, a 2020 audit of its

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[1] Commission File Number PC 2013-2339. The *Commission's Final Report after Commissioner's Response to Commission's Interim Report Following a Chairperson-Initiated Complaint Investigation into the RCMP's Response to Anti-Shale Gas Protests in Kent County, New Brunswick* can be found on the Commission's website at: https://www.crcc-ccetp.gc.ca/en/FACR-anti-shale-Gas-Protests-Kent-County ("Kent County Final Report").

[2] Specifically, the Interim Report adopted Recommendations 3, 4, and 5. See the *Commission's Interim Report Following a Chairperson-initiated Complaint and Public Interest Investigation into the RCMP's Response to Anti-shale Gas Protests in Kent County, New Brunswick,* which can be found on the Commission's website at: https://www.crcc-ccetp.gc.ca/en/commissions-interim-report-anti-shale-Gas-Protests-Kent-County ("Kent County Interim Report").

open-source intelligence policy revealed that the policy was not well understood and that compliance was low. The RCMP plans to review and strengthen this policy as well as other policies concerning the collection, storage and retention of personal information obtained from “open-source intelligence” sources such as social media sites.

Recommendation 4: RCMP Commissioner partially supports destruction of social media records

[12] According to the RCMP Commissioner, once records containing personal information (such as social media screen captures) are added to an operational file, existing information management policy dictates the retention period for that information. The RCMP Commissioner stated that the *Privacy Act* and the *Access to Information Act*, which govern the collection and disclosure of personal information by federal government agencies, protect that personal information.

[13] With that said, the RCMP Commissioner stated that she had received new information since providing her response to the Kent County Interim Report (including the 2020 audit of open-source intelligence policy and the Kent County Final Report). Therefore, she stated that the RCMP policies on open-source intelligence and information management would be “reviewed and strengthened” in terms of retaining records that were obtained from social media. The RCMP Commissioner indicated that she will direct that Recommendation 4 be implemented as part of that work.

Recommendation 5: RCMP Commissioner supports disposing of personal information

[14] The RCMP Commissioner noted that the RCMP takes its obligation to safeguard personal information seriously. As such, the RCMP Commissioner stated that she would direct that in the context of open-source intelligence for law enforcement or criminal intelligence purposes, the information retention policy would be amended. The RCMP will also develop new policy if needed.

Recommendation 6: RCMP Commissioner supports developing licence plate information policy

[15] According to the RCMP Commissioner, there is some debate about whether licence plate numbers can be considered personal information, and so the issue warrants further consideration. As such, the RCMP will direct that this examination be included with the review of the RCMP’s policies under the RCMP’s Open Source Intelligence Audit Management Action Plan.

Recommendation 7: RCMP Commissioner supports reviewing policies

[16] Finally, the RCMP Commissioner supported Recommendation 7, that the Kelowna Detachment review all policies concerning the collection, retention and disclosure of personal information and take action to ensure that personal information is disclosed in

accordance with legislation and policy. Although many years have passed and many of the RCMP personnel who were at the Kelowna Detachment at the relevant times have moved on, it would be prudent for the Detachment Commander to review these policies. Similarly, the RCMP Commissioner will direct that the "E" Division (British Columbia) RCMP Criminal Operations Officers review these policies as well.

The Commission's Analysis

[17] The Commission welcomes the RCMP Commissioner's support of its recommendations in this case, particularly after her strong rejection, only five months earlier, of the Commission's identical recommendations in the Kent County Interim Report. For clarity and to be consistent with the Kent County Final Report, however, the Commission will modify Recommendation 3 to emphasize the Commission's conviction that clear guidance is needed about the collection, use and retention of personal information obtained from open sources.

A lack of clarity surrounding retention periods

[18] With respect to Recommendations 4 and 5, the Commission is concerned about the lack of clarity and detail in the RCMP Commissioner's response surrounding the relevant retention periods.

[19] In the RCMP Commissioner's response to Recommendation 2, she stated that the RCMP would destroy recorded media (such as videos) of peaceful protests and demonstrations "as soon as practicable." This adopts the language of the Commission's recommendation. The Commission understands "as soon as practicable" to mean expeditiously, or within a reasonably prompt time, while taking the circumstances into account.[3] This provides realistic flexibility while at the same time making it clear that the information is to be quickly destroyed without undue delays—and certainly not held for years as a matter of routine.

[20] However, the Commission made it clear in the Interim Report in this case and in the Kent County Final Report that it also intended Recommendations 4 and 5 to require the destruction of personal information "as soon as practicable," and retained for "no longer than strictly necessary to provide intelligence for the event or purpose for which it was collected."

[21] In the RCMP Commissioner's response, she did not provide any information or clarity about the standard that would be used regarding the destruction of personal information. Although the Commission is encouraged by the RCMP Commissioner's commitment to implement Recommendation 4 (at least in part) and Recommendation 5 as the RCMP reviews, updates, and develops policies concerning the collection, use,

[3] See, for example, the interpretation of this language in a criminal context by the Court of Appeal for Ontario in *R v Squires*, 59 OR (3d) 765, 2002 CanLII 44982. See also *R v Phillips*, 27 OAC 380, 1988 CanLII 198 (ONCA). These words were interpreted as meaning "expeditiously" in a different context in *Saikaley (Re)*, 2012 ONCA 92 (CanLII).

and retention of personal information from open sources, some uncertainty remains. Specifically, the RCMP Commissioner's remarks read in context suggest that such personal information might well be retained for as long as required by the RCMP's existing information management policies and under its interpretation of the *Privacy Act* and the *Access to Information Act*.

[22] The Commission's understanding of the current approach is that, once an intelligence report has been prepared that contains personal information and/or open-source intelligence, the RCMP considers it "Operational Information Resources of Business Value" and its policies require that such information be incorporated or linked into the operational file. The RCMP Commissioner has previously stated that RCMP employees are obligated to ensure that all information of business value is incorporated into the RCMP's Records Management Program. All open-source intelligence materials are included as supporting documents. They have the same retention period as the occurrence file itself (which can be many years depending on the nature of the file).

[23] In addition, the RCMP Commissioner wrote in her response to the Kent County Interim Report that the *Privacy Act* requires that any collection of personal information must be related to a specific operating file or program. As such, all personal information collected from social media posts are incorporated into the police operational file, "like any other piece of information collected during an investigation." The retention period of such personal information is also based on the retention period for that occurrence file, in keeping with RCMP policies on information management.

The Commission reiterates concerns about retaining personal information

[24] The Commission acknowledges that the RCMP Commissioner stated that she had considered the Kent County Final Report and other new information in accepting, or accepting in part, the Commission's recommendations here. The Commission also acknowledges the difficulty of crafting coherent policies for a national organization and the fact that rigid, blanket rules with fixed timelines would likely interfere with legitimate law enforcement and criminal intelligence or national security intelligence objectives. Some flexibility is required as the RCMP decides how to proceed.

[25] Nevertheless, by providing few details and by referring to the RCMP's information management policies and the *Privacy Act* without specific commitments, the Commission is concerned that the RCMP is maintaining its original position—that is, that the RCMP would retain the personal information of peaceful protesters, demonstrators, and activists for as long as the existing policies require. In other words, for as long as the RCMP sees fit.

[26] In its interim report in this case, the Commission wrote that RCMP policy should direct that personal information "be destroyed as soon as is practicable and in accordance with applicable law once it is determined that there is no criminal nexus or that the information is otherwise no longer necessary for the purposes for which it was collected." For clarity and consistency, the Commission will (as it did in the Kent County

Final Report) add this wording when making its final recommendation. For greater certainty, given that the RCMP Commissioner has accepted this recommendation without qualification and has stated that she will direct appropriate policy changes, the Commission understands that under the RCMP's amended policies the records in question will be destroyed "expeditiously" and that they will not routinely languish for years.

The* Privacy Act *does not prohibit the recommended changes

[27] Again, for consistency and clarity, the Commission reiterates that it does not accept the position (expressed in the RCMP Commissioner's response to the Kent County Interim Report) that the *Privacy Act* might well prohibit the disposal of personal information where there is no criminal or national security nexus.

[28] Section 6(1) of the *Privacy Act* states that personal information must be retained for a minimum period of at least two years[4] where it has been used for an "administrative purpose." The *Privacy Act* states that an administrative purpose, "in relation to the use of personal information about an individual, means the use of that information in a decision making process that directly affects that individual." This is to allow the affected individual reasonable time to obtain access to that information.

[29] In the Commission's analysis, it is unlikely that the use of personal information for generating intelligence products would qualify as an administrative purpose within the meaning of section 6(1) of the *Privacy Act*. In reality, the individual targeted by the intelligence assessment will almost certainly never know that any assessments were made involving their personal information, let alone be in a position to make a *Privacy Act* request about it. Furthermore, the overall purpose of the *Privacy Act* must be kept in mind in this discussion. This legislation was enacted to protect the privacy rights of individuals and to permit them to access and challenge the accuracy of the personal information that government agencies collect about them. Of course, the *Privacy Act* does not necessarily require the knowledge or consent of the individual whose personal information is collected,[5] nor does an individual always have a right of access in the case of law enforcement investigations.[6] Nevertheless, it appears contrary to the *Privacy Act*'s purpose to invoke this same legislation to justify the secret retention of information that is not required for any law enforcement purpose, where the information was collected when the very individuals the legislation was meant to protect are left unaware.

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[4] At least two years, per section 4(1)(*a*) of the *Privacy Regulations*. If an individual makes a request for their personal information, section 4(1)(*b*) also requires the institution to retain that information "until such time as the individual has had the opportunity to exercise all his rights under the Act." There is a further retention period of at least two years where personal information has been disclosed to an investigative body following a request for personal information under section 8(2)(*e*) of the *Privacy Act*. This section concerns disclosure of personal information to an investigative body for the purpose of enforcing any law of Canada or carrying out a lawful investigation. See Schedule II of the *Privacy Regulations* for the designated investigative bodies.

[5] See, for example, sections 5(1), 5(2), and 5(3) of the *Privacy Act*.

[6] See section 22 of the *Privacy Act*.

[30] Moreover, the *Privacy Act* does not set out mandatory retention times for information gathered during an investigation. Rather, government agencies are responsible for creating personal information banks for different types of information, which then have associated retention times. The existing RCMP Personal Information Bank for Operational Case Records (RCMP PPU 005), which would be that used for most investigational records, sets out a minimum retention time of two years for any collected information. To be clear, the Commission would find a two-year retention time to be unreasonable for the type of information discussed in this report. For that reason, the RCMP may very well need to create a new personal information bank or adjust the retention periods for existing personal information banks to meet the objective of the Commission's recommendations. It would not be appropriate for the RCMP to simply rely on the existing policy as a basis for retaining information for a minimum of two years.

The need to balance privacy and public safety

[31] There are legitimate reasons for the police to collect personal information from open sources, including for criminal and national security intelligence gathering and for investigations into offences.

[32] In the particular case of open-source intelligence gathering, however, the police may profile individuals for intelligence purposes without any suspicion that they intend to engage in criminal activity, or even that they have relevant information about a potential offence. They may only come to the police's attention because they have exercised their rights to freedom of expression and freedom of association. This is extremely concerning. Canadians have the right to expect that the police will not retain their personal information simply for engaging in peaceful protest.

[33] Of course, as explored in the Interim Report, the police have a legitimate interest in gathering intelligence to conduct risk assessments ahead of protests and demonstrations, and to establish a presence at such public order events to keep the peace. Not all protests are peaceful, and acts of violence threaten public safety and actually interfere with the exercise of the right of freedom of expression by peaceful protesters. It is reasonable for the police to assess the risk that some individuals might plan to disrupt an otherwise peaceful protest or demonstration with acts of violence. In that case, a criminal investigation might be appropriate. As found in the Interim Report, it is generally reasonable for the police to engage in some information gathering to protect the public against possible violence.

[34] However, the broad-scale collection of this type of information creates the risk that individuals will be targeted or profiled based on their political convictions or beliefs in certain causes. This raises the prospect of the "chilling effect"[7] on freedom of expression discussed by the BCCLA in their complaint.

[35] Although Canadians have a significantly reduced expectation of privacy on social media, they have not abandoned their privacy interests altogether. As such, where the RCMP obtains personal information in relation to public order events such as protests and demonstrations that have no identifiable nexus to criminal activity or threats to national security, this information should not be retained. That is to say, once the RCMP has determined that collected personal information has no legitimate law enforcement purpose, it must be disposed of as soon as practicable.

[36] As the Commission concluded in the Kent County Final Report, the RCMP made a policy choice to indiscriminately include and archive personal information about individuals engaged in lawful dissent, including by retaining copies of the social media posts in question as supporting documents. The RCMP decided on its own that all such information forms "business value" records. The Commission finds that the RCMP has cast an unreasonably wide net, and that clearer limits must be placed on the information being retained.

Final Privacy Recommendations

[37] While the Commission trusts that the RCMP is taking substantive action to address the above concerns, for the purposes of clarity and consistency the Commission has amended Final Recommendation 4 in the same way that it did in the Kent County Final Report. That is, the Commission will add a recommendation that the RCMP treat personal information obtained from open-source intelligence as a separate category of information. This may require the creation of a separate personal information bank, or modifications to the existing banks, as discussed above. Such a category would include "supporting documents" like screen shots of social media sites.

[38] Where the personal information in question has no criminal nexus or national security dimension, it should be kept for no longer than strictly necessary to provide intelligence for the event or purpose for which it was collected. Of course, if a criminal or national security nexus is identified, then the information would become part of the RCMP's operational case records and be subject to the usual retention periods.

[39] The Commission further adds the recommendation that, wherever possible, the RCMP should anonymize any information in an intelligence assessment or other product generated from personal information from open sources that the RCMP reasonably believes is necessary to understand a group or movement but which has no connection to criminal activity (or otherwise to the RCMP's national security mandate).

[7] As discussed in the Interim Report, a "chilling effect" refers to the reluctance of individuals to exercise their constitutional rights (particularly freedom of expression) because of state activity that gives rise to a fear of being penalized.

[40] Anonymized information could be included in an operational file where necessary to provide context or to support an assessment. With that said, where information from or about an individual was critical to the assessment (versus providing context or background), it might be necessary to retain their personal information. The Commission is mindful of the disclosure obligations of the police should a criminal prosecution or other proceeding, such as a public inquiry, involve a given operational file. This is not an easy issue for policy development. From an operational standpoint, the Commission acknowledges the need for the police to be able to exercise good judgment and operate with reasonable flexibility. Nevertheless, the net should not be cast wide, and the indiscriminate or widespread collection and retention of personal information of individuals exercising Charter-protected rights cannot be the goal.

The Commission recommends annual progress update

[41] Finally, the Commission is adding a new recommendation. Considering the serious and substantial nature of the Commission's concerns, and the striking reversal in position and tone from the RCMP Commissioner's response to the Kent County Interim Report, the Commission recommends that the RCMP provide the Commission with an annual update on its progress in implementing these recommendations until the implementation is completed.

The Commission's Final Findings and Recommendations

[42] Consequently, the Commission makes its final findings and recommendations as follows.

FINAL FINDINGS

1) It was reasonable for the RCMP to provide a visible presence at the National Energy Board hearings.

2) It was reasonable for the RCMP to monitor the Prince Rupert protest.

3) It was reasonable for the RCMP to monitor events for the purpose of identifying criminal activity.

4) The RCMP acted reasonably in monitoring the demonstrations.

5) It was reasonable to video-record the demonstrations.

6) As demonstrated by the RCMP's reliance on a closed-circuit surveillance camera policy, the RCMP lacks a clear policy with respect to video recording public order events such as demonstrations and protests.

7) It was reasonable for the RCMP to monitor open sources for information about upcoming protests and demonstrations.

8) The RCMP's current policy on the use of open sources does not provide clear guidance as to the collection, use, and retention of personal information obtained from social media where there is no criminal nexus.

9) There is insufficient information to support a finding that it was unreasonable to retain the profile and the personal information of Person G.

10) The RCMP lacks clear policy/guidance as to the use and retention of personal information in circumstances where it is determined that there is no nexus to criminal activity.

11) It was not unreasonable to conduct open source and internal database checks in the other specific instances reviewed by the Commission.

12) It was reasonable for the RCMP to attend the workshop and make observations.

13) It was not unreasonable to collect licence plate numbers for intelligence-gathering purposes.

14) The RCMP lacks policy/guidance on the collection, use, and retention of licence plate numbers and associated personal information for intelligence purposes.

15) It was reasonable for the RCMP to share information about potential threats to energy critical infrastructure with Natural Resources Canada.

16) The RCMP did not share confidential source information with the National Energy Board.

17) It was reasonable in the circumstances for the RCMP to share intelligence and threat assessments with the National Energy Board.

18) It was unreasonable for the RCMP to share the personal information of a protest organizer with the National Energy Board.

FINAL RECOMMENDATIONS

1) That the RCMP consider implementing a specific policy regarding video-recording protests and demonstrations, setting out criteria and limits for video-recording protests and demonstrations and for video retention periods.

2) In particular, that all recordings and images of peaceful protests and demonstrations be destroyed as soon as is practicable.

3) That, in addition to the *Privacy Act* and the RCMP's existing policy and training, the RCMP provide clear policy guidance setting out defined and reasonably constrained intelligence and law enforcement parameters with respect to the collection of personal information from open sources such as social media sites, the uses that can be made of it, and what steps should be taken to ensure its reliability.

4) That RCMP policy treat personal information and supporting documents obtained from social media sources containing personal information (such as screen captures of social media sites) as a separate category of records. This may require the creation of a new personal information bank or amendment of the minimum retention times for existing personal information banks. This category of records should be kept for no longer than strictly necessary to provide intelligence for the event or purpose for which it was collected where it is established that there is no criminal nexus or national security dimension.

   Additionally, where an intelligence assessment or other product generated from open sources is to be retained, RCMP policy should require the anonymization or destruction of any personal information within that assessment where there is no connection to criminal activity or to the RCMP's national security mandate (such as where the personal information relates to lawful dissent).

5) That the RCMP develop policies providing that personal information obtained with respect to public order events like protests and demonstrations should be destroyed as soon as practicable and in accordance with applicable law once it is determined that there is no criminal nexus or that the information is otherwise no longer necessary for the purposes for which it was collected.

6) That the RCMP develop a policy providing that where a licence plate number and any associated personal information has no nexus to criminal activity, the information should not be retained.

7) That the Kelowna Detachment review all policies concerning the collection, retention and disclosure of personal information and take action to ensure that personal information is disclosed in accordance with legislation and policy.

8) That the RCMP provide the Commission with an annual update on its progress in implementing the Commission's recommendations until the implementation is completed.

COMMENT ON THE RCMP'S UNACCEPTABLE DELAY

[43] The Commission must also comment on the tremendous delay in receiving the RCMP Commissioner's Response in this case. Nearly three and a half years elapsed from the time the Commission issued its Interim Report to the time the RCMP Commissioner responded, despite a requirement in the RCMP Act for the Commissioner to respond, "as soon as feasible."

[44] Crucially, this was not a case where the RCMP Commissioner disagreed with the Commission's findings or where the facts of the case were particularly complex. Nor was the delay caused by the RCMP's implementation of the Commission's recommendations. Instead, it appears to have taken over three years before the RCMP even began to review the Interim Report. Furthermore, the RCMP failed to meet several self-imposed deadlines,[8] and the RCMP Commissioner's Response arrived only after the BCCLA filed an application for judicial review, seeking an order to compel the RCMP Commissioner to respond.

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

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

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[8] The history of the delays to the RCMP Commissioner's response is lengthy. For example, on June 10, 2019, the Director of the RCMP National Public Complaints Directorate said that due to resourcing issues and competing priorities, it was not possible at that time "to even approximate a date by which the . . . Commissioner's Response will be completed."

On July 8, 2020, the Commission Chairperson wrote to the RCMP Commissioner and informed her that if the Commission had not received the Commissioner's Response by October 6, 2020, the Commission would take the extraordinary step of releasing the Interim Report to the complainant BCCLA. The RCMP Commissioner replied that the response would be prioritized so that the RCMP would meet this timeline.

On October 4, 2020, the Director of the RCMP National Public Complaints Directorate informed the Commission that the Commissioner's Response would not be ready by October 6, 2020, as planned. He stated that his hope was to have the Commissioner's Response ready by November 7, 2020.

On November 6, 2020, the Commission wrote to the Director of the RCMP National Public Complaints Directorate to ask whether the Commission would receive the RCMP Commissioner's Response by November 7, 2020. That day, the Director of the RCMP National Public Complaints Directorate informed the Commission that it would not meet this deadline but hoped to have the Commissioner's Response not later than November 20, 2020. The complainant BCCLA filed an application for judicial review in Federal Court on November 9, 2020. The RCMP Commissioner provided her response on November 20, 2020.

CONCLUSION

[47] Pursuant to subsection 45.76(3) of the RCMP Act, the Commission respectfully submits its Final Report, and accordingly the Commission's mandate in this matter is ended.

Michelaine Lahaie
Chairperson