IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Re Brake; Anderson v. Nalcor Energy,* 2019 NLCA 17
Date: March 28, 2019
Docket Number: 201701H0027

IN THE MATTER OF
an application by Justin Brake to vacate an *ex parte* injunction issued on October 16, 2016 and an *ex parte* contempt appearance order issued on October, 24, 2016

AND IN THE MATTER OF
an appeal by Justin Brake from a decision of a Justice of the Supreme Court of Newfoundland and Labrador dismissing the applications.

AND BETWEEN:

ANDREA ANDERSON, JIM LEARNING, JOHN LEARNING, KIRK LETHBRIDGE AND PERSONS UNKNOWN	APPELLANTS

AND:

NALCOR ENERGY AND MUSKRAT FALLS CORPORATION	RESPONDENTS

AND

ABORIGINAL PEOPLES TELEVISION NETWORK	INTERVENOR

Coram: Green, White and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201608G159
(2017 NLTD(G) 51)

Appeal Heard: December 12, 2017
Judgment Rendered: March 28, 2019

Reasons for Judgment by: Green J.A.
Concurred in by: White and O'Brien JJ.A.

Counsel for the Appellants: Geoffrey E. Budden/Allison Conway
Counsel for the Respondents: Thomas Kendell Q.C.
Counsel for the Intervenor: Erin E. Best

Green J.A.:

[1] The use of injunctions, especially those granted on an *ex parte* basis, against individuals involved in or present at social protests brings into focus the tension that exists between the need to protect property rights and economic interests and the importance of avoiding interference with other important societal and legal values.

[2] An injunction can be a very blunt instrument. Unless carefully crafted in its scope and judiciously applied in its enforcement, it risks wrapping within its purview persons who were not part of the mischief to which the original injunctive remedy was directed and also risks unnecessarily trenching upon such other important constitutional and legal values like freedom of association, freedom of the press and, in appropriate cases like the present one, the protection of rights pertaining to indigenous interests.

[3] The case under appeal engages some of these considerations.

Background

[4] The events giving rise to the issues under appeal took place against the backdrop of the development by the respondents in Labrador of a hydro-electric generating station and related infrastructure on the lower section of the Churchill River at Muskrat Falls. A construction camp was created to service the nearby

construction site. The camp and construction site were connected to the Trans-Labrador Highway by a roadway constructed by or for the respondents over wilderness land that was formerly Crown land although it had also been used by indigenous groups. The Crown had purported to transfer control of this land to the respondents to facilitate the construction project.

[5] The Muskrat Falls project has not been without controversy. Objections to various aspects of the project and to decisions made in respect thereof, including decisions impacting land usage surrounding the site and the Churchill River, have resulted in demonstrations and protests by indigenous groups (see, for example, a description of an earlier protest in this Court's previous decision in *Nunatukavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46, 358 Nfld. & P.E.I.R. 123). A popular place for conducting such protests, including the one under consideration in this appeal, is the intersection of the camp access road with the Trans Labrador Highway. At that location the access road connects with the Trans Labrador Highway at right angles. A short distance from the intersection the respondents have erected a locked gate across the access road, thereby controlling who can proceed down the road and access the camp and construction site.

[6] The events involved in this appeal resulted from one of the protests at the intersection in question. I will let the applications judge pick up the narrative:

> [6] There have been a number of protests against the Muskrat Falls Project since its commencement and in October of 2016 a further protest occurred whereby a group of people established a blockade on the access road leading from the Trans-Labrador Highway to the Muskrat Falls construction site. The effect of this blockade was to obstruct or interfere with access to and from the site by persons and vehicles seeking lawful entrance to and exit from the site. It was as a result of this blockade that Nalcor applied on an *ex parte* basis for injunctive relief on October 16, 2016 and was granted the Injunction Order. The effect of the Injunction Order was that the named Respondents and any other person having notice of the Injunction Order were enjoined and restrained from certain activities. The operative part of the Injunction Order provide as follows:
>
> > IT IS HEREBY ORDERED THAT until further Order of this Court the Respondents and any other person acting under their instruction and anyone having notice of this Order, be strictly enjoined and restrained, until the final disposition of this action or further order of the Court from:
> >
> > (a) With respect to any person or persons seeking lawful entrance to or exit from the Muskrat Falls construction site, whether such person or persons is or are on foot or in a vehicle of any type, hindering,

> delaying, stopping, obstructing or in any other manner interfering with such person or persons, at any time or for any length of time, including by the presence, temporary or otherwise, of one or more persons and/or the placement, temporary or otherwise, of one or more objects on any portion of any highway, roadway, driveway or laneway which is intended or ordinarily used for vehicular access to Muskrat Falls construction site or to any portion of such premises;
>
> (b) Stationing persons on or otherwise trespassing on the Muskrat Falls construction site;
>
> (c) Ordering, aiding, abetting, counselling, or encouraging in any manner whatsoever, either directly or indirectly, any person to commit the acts enjoined or any of them;
>
> AND IT IS FURTHERED ORDERED THAT law enforcement officials shall enforce the terms of this Order and further shall promptly and fully terminate any activity undertaken in contravention of this Order;
>
> [7] Despite the Injunction Order, the size and intensity of the protest grew larger and the blockade of the access road continued. On October 22, 2016 one of the protesters cut the lock on the gate to the construction site and approximately 50 people including Mr. Brake trespassed unto the site in violation of the Injunction Order. Some of the individuals proceeded via an access road within the site to an accommodations complex which they then occupied. Additional protesters remained at the entrance to the site where they continued to hinder, delay, stop and obstruct persons and vehicles from entering the construction site contrary to the Injunction Order.

[7] As a result of these events the respondents applied *ex parte* on October 24, 2016 for an order directing the High Sheriff to cause certain individuals named in the application and any other individuals found to be unlawfully occupying the construction site to appear in court to show cause why they should not be held in contempt for failing to comply with the injunction. The applications judge issued an appearance order to 22 named individuals, including Justin Brake, the appellant in this appeal, requiring each of them to appear and show cause why each should not be held in contempt. Mr. Brake's appearance date was set for November 1, 2016.

[8] Pursuant to the original *ex parte* injunction order and before Mr. Brake's appearance date, the respondents appeared in Court on an *inter partes* appearance date to deal with the question of whether the *ex parte* injunction should be continued until trial. Mr. Brake did not appear at this hearing. Indeed, there was no basis for his doing so. He was not a named defendant in the proceeding. At most he might have been considered to be included in the

category of “Persons Unknown” who were also denominated as defendants in the proceeding (although, as will be explained later, he did not fall into that category either). In any event, the category of Persons Unknown would not have legal representation even if those in that category could be said individually to have had notice of the *inter partes* hearing.

[9] Instead, Mr. Brake filed his own application seeking to vacate the e*x parte* injunction order and the contempt appearance notice as they applied to him. The grounds of that application were based on his status as a journalist which differentiated him from the other protesters. His position was that his presence at the protest site was to report on the activities and not to engage as a protester as such. He submitted those facts should have been disclosed by the respondents to the Court and that failure to so disclose constituted a failure to make full and frank disclosure of a material fact potentially bearing on the outcome of the respondents’ applications, thereby disentitling the respondents to the relief they were seeking.

[10] Mr. Brake’s application was ultimately heard by the applications judge on February 14, 2017.

The Applications Judge’s Decision

[11] The applications judge dismissed Mr. Brake’s application. He concluded that Mr. Brake’s status as a working journalist was not a material fact and that even if it was he would in any event have declined to exercise his discretion to vacate the injunction and contempt appearance orders. He summarized his view of the applicable legal principles as follows:

> [24] My view of the foregoing authorities leads me to the following conclusions:
>
> 1) A non-disclosure or misstatement can only result in the vacating of an *ex parte* order where it is material;
>
> 2) A material non-disclosure of misstatement will not automatically mean an *ex parte* order will be vacated; and
>
> 3) Whether an *ex parte* order, obtained where there is a material, non-disclosure or misstatement, should be vacated is a discretionary decision of the court.

[12] The judge declined to itemize with particularity the factors that would be applicable to the exercise of discretion to vacate an *ex parte* contempt appearance order but instead contented himself with the general observation:

> [25] … [C]onsideration of the particular type of *ex parte* order and its purpose and impact is consistent with the underlying rationale behind the duty of full and frank disclosure applicable to applicants for *ex parte* orders and in particular the concern about the potential injustice to the person impacted by the order without having the opportunity to be heard. The more consequential the impact of the *ex parte* order the greater the potential injustice to the person impacted by it and the greater likelihood it will be vacated in the event of material non-disclosure.

[13] The primary ground for the dismissal by the applications judge of Mr. Brake's application was that the fact that he was a working journalist was not, in the judge's view, a material fact because it would not have affected the outcome of the respondents' applications.

[14] He reasoned as follows:

> [29] The essential fact that Mr. Brake argues that was material was that at all relevant times he was a journalist actively engaged in covering a news story namely the protests against the Muskrat Falls Project. It is agreed that Nalcor was aware of this fact at the time they made their *ex parte* applications. It was further agreed that Nalcor was not aware of any unlawful activities on the part of Mr. Brake other than the fact he trespassed on the Muskrat Falls construction site. It was acknowledged by Mr. Brake for the purposes of the hearing of this application that his trespassing was in violation of the Injunction Order. Finally, Mr. Brake specifically acknowledged that there was no suggestion that Nalcor was intentionally attempting to mislead the court by deliberately withholding these facts from the court.

[15] I pause at this point to note that the parties do not agree that the judge was correct in his characterization that Mr. Brake conceded that he "was in violation of the Injunction Order." Mr. Brake did, however, concede that he did trespass on property of the respondents.

[16] The judge continued:

> [31] How is it that it is "plain and obvious" that the fact of the Applicant being engaged as a journalist" was material? To be a material fact it must be a fact that objectively viewed may have affected the outcome of the *ex parte* applications. <u>It is my view that in order for this to be the case then Mr. Brake, as a journalist, must have had some special status or right that applied to the protests against the Muskrat Falls Project, including his trespass on the Muskrat Falls construction site in contravention of the Injunction Order</u>. The nature of such special status or right would have to have been such that if known, it may have changed the outcome of the *ex parte* applications.

(Emphasis added.)

[17] The judge then went on to consider whether Mr. Brake had in fact any such "special status or right" and concluded that he did not. Rejecting Mr. Brake's claim of special status by virtue of the "freedom of the press" provision in section 2(b) of the *Canadian Charter of Rights and Freedoms*, and relying on the Federal Court decision in *MacLeod v. Canada (Armed Forces)*, [1991] 1 F.C. 114, 2 C.R. (3d) 213, he concluded:

> [37] … Mr. Brake did not have any special status in this case because of the fact he is a journalist. He was no more entitled to violate the Injunction Order by trespassing on the Muskrat Falls construction site than any non-journalists named in the Contempt Appearance Order who trespassed on the site.

[18] As a result of this conclusion, the judge ruled that the fact that Mr. Brake was a journalist "was not a material fact … and need not have been brought to the Court's attention on the application for the *ex parte* orders" (paragraph 38). Accordingly, there was no basis for setting aside the orders on the basis of material non-disclosure.

[19] Although this ruling was sufficient, in accordance with the judge's analysis, to dispose of the matter, he nevertheless went on to consider whether, even if the fact had been material, he should have exercised his discretion to set aside the orders. He concluded he would not have done so.

[20] He relied on the following factors: (i) "the Injunction Order was not directed specifically at Mr. Brake and had no consequence for him as long as he complied with it" (paragraph 42); (ii) although the Contempt Appearance Order had some consequences for Mr. Brake they were not "very serious" and were "insignificant" because it only required him to appear in Court to respond to the contempt allegation and did not expose him to arrest so long as he left the project site (paragraphs 42-43); (iii) the failure to identify Mr. Brake as a journalist was not "intentional" (paragraph 44); and (iv) Mr. Brake still had the ability to challenge the injunction and the contempt allegation (paragraph 45).

[21] For those reasons, the judge concluded that Mr.Brake did not suffer any prejudice. He concluded that he would not in any event exercise his discretion to vacate the orders even if the fact that Mr. Brake was acting as a journalist had been a material fact that should have been disclosed.

Issues and Scope of Appeal

[22] The issues directly engaged in this appeal are whether the applications judge erred in concluding that Mr. Brake's position as a working journalist was

not a material fact that should have been disclosed by the respondents to the Court on the *ex parte* application for the issuance of the contempt appearance notice. If the judge did err in not concluding that Mr. Brake's journalistic status was a material fact, a second issue must also be addressed: whether the applications judge, having been apprised of this fact, should have exercised his discretion to vacate the impugned order?

[23] The standard of appellate review that is applicable to these issues, which involve discretionary decisions, is that enunciated in *Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311 and *Langor v. Spurrell* (1997), 157 Nfld.& P.E.I.R. 301: the decisions should be entitled to deference unless it can be said that the discretion was exercised (i) beyond jurisdiction, (ii) contrary to principle, (iii) on the basis of a palpable and overriding error in the appreciation of the evidence, or (iv) in a manner that would result in manifest injustice.

[24] With respect to the ruling that Mr. Brake's position as a journalist was not a material fact, there is no dispute over the facts. The issue involves essentially the question of whether the judge identified and applied the proper legal principle for determining what constitutes a material fact. That is a legal question upon which the judge must be correct. If he did not apply the correct principle, then his discretionary decision is not entitled to deference and this Court may then proceed to exercise the discretion by applying the proper principles that have been identified on appeal (*Langor v. Spurrell*). That includes whether Mr. Brake's position as a journalist meets the legal test for being a material fact and whether, assuming it does, the Court's discretion nevertheless should be exercised not to set aside the impugned order.

[25] The Aboriginal Peoples Television Network (APTN) applied for and was granted leave to intervene on this appeal. The focus of their intervention was a concern about the impact that the granting of injunctions could have on the reporting of aboriginal protests dealing primarily with protection of indigenous land use. APTN's intervention, which essentially supported the appellant's argument, is summed up in its factum as follows:

> APTN's position on this intervention is that context must inform materiality. Where the target of an *ex parte* order is a working journalist covering an Aboriginal-led land protection, both the applicant's duty of disclosure, and the Court's exercise of discretion when asked to issue or review the order, must be evaluated within this broader context. The basis for this requirement, in APTN's submission, comes from the interaction of the freedom of the press enshrined in section 2(b) of the *Charter* with the constitutional protection of aboriginal rights and the overarching objective of reconciliation …

[26] Before addressing the specific issues, however, it is necessary to consider a number of broader questions at stake in order to place the considerations relating to exercise of discretion to invoke the contempt process in proper context. These include the nature of the claims being asserted by the respondents, the scope of the injunction order, and the principles applicable for the exercise of discretion relative to granting leave to apply for a contempt order. First, however, I believe it is also necessary to reflect generally on certain problems that the use of injunctions in mass protest cases potentially present.

The Problems of Overbreadth and Indeterminacy of Reach

[27] In *Nunatukuvut Community Council*, a decision dealing with a permanent injunction following a hearing on the merits concerning another protest relating to Muskrat Falls, this Court expressed concern about ensuring clarity with respect to the reach of an injunction order:

> [94] The purpose of an injunction is not to protect a claimant's core rights but to enjoin only the *behaviour* which has led to the breach of those rights. It is not appropriate to provide a blanket protection to all of the rights of Nalcor flowing from the authorizations and permits it received, only those portions of those rights that have been wrongfully interfered with.
>
> [95] … The court has to be cautious in drawing the terms of the order that it does not unnecessarily interfere with the rights and interests of the defendant in circumstances that are not necessary to enjoin the defendant's wrongful behaviour.
>
> [96] … to enjoin all actions of any kind that might interfere with access and construction – when they had not occurred and were not threatened – was too broad …

[28] The point being made in *Nunatukavut Community Council* was that the establishment of a cause of action leading to the decision to grant an injunction is not a free ticket to protection by injunction of every legal and proprietary right held by the injunction-seeker. Only those rights which the claimant has asserted have been interfered with *in the lawsuit* are eligible for protection by injunction and the consequent contempt power, and then only if the court decides to exercise its discretion to grant an injunction and only to the extent they have been interfered with or threatened to be interfered with. Other rights, especially proprietary rights, that are not in issue in the lawsuit should not be protected. The protection of those rights should be left to separate action and the justification for issuance of an injunction (as opposed to some other remedy) in those circumstances.

[29] The court considering granting an injunction should therefore be cautious to ensure that the language employed in the injunction prohibition does not extend to enjoining activities that are not being complained about. To do otherwise risks dragging persons and activities under the umbrella of injunction protection that cannot be justified by the claims that have been advanced.

[30] The observations in *Nunatukuvut Community Council* apply with equal force to the granting of interim and interlocutory injunctions. They also apply to the interpretation of the scope of an injunction when it comes to its later enforcement. Even if, by infelicitous drafting, the injunction purports to wrap within its prohibitions more than is necessary to protect the rights that have been asserted by the claimant, the court should attempt to give to the injunction language a purposive interpretation that will, to the extent possible, limit its reach to its original intended purpose. Furthermore, the true purpose and scope of the injunction should in any event be a factor to be considered by the court when it is subsequently asked to invoke its contempt power.

[31] Related to this problem is the concern over use of injunctions against "Persons Unknown" or a fictional "John Doe". See generally on this subject Julia E. Lawn, "The John Doe Injunction in Mass Protest Cases" (1998), 56 U.T.Fac.L.Rev 101. The use of such terminology to extend the potential reach of an injunction risks wrapping within its strictures people who may not be within its intended ambit and will not have had an opportunity to contest its application. It also risks ensnaring unnamed third parties in subsequent contempt proceedings in circumstances that place them at disadvantage.

[32] Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters Canada Ltd., 2017; Looseleaf ed. updated to November 2018, Rel. No. 27) at para. 6.270 makes the following observation:

> It has been forcefully argued that the willingness to enforce injunctions against non-parties has been taken too far [Berryman, "Injunctions – The Ability to Bind Non-Parties" (2002), 81 Can. Bar Rev. 207]. The net of liability is not cast too wide where the plaintiff is able to show that the non-party has deliberately agreed to flout the order at the instigation of the defendant. However, <u>the court must be cautious not to hold in contempt a party who acts independently of the defendant and who may exercise a right distinct from that of the defendant.</u> Such a person has not yet had his or her day in court and should not be bound by an order made in an action to which he or she was not a party and as the English Court of Appeal stated, the court must take into account "the potential injustice to unidentified [parties] of giving permission to enforce the orders against them, possibly by criminal process, <u>without considering their individual circumstances</u>" [*Astellas Pharma Ltd. v. Stop Huntingdon Animal Cruelty (SHAC),* [2011] EWCA Civ. 752, at para 20]. The court should not simply delegate to the

> police the power to determine who is covered by the injunction: the alleged contemnors are entitled to their day in court.

(Emphasis added. Citations omitted, except to the extent indicated.)

[33] Julia Lawn also writes about the problem of overbreadth with respect to John Doe injunctions. She observes that:

> "A potentially overbroad order can result either from allowing a non-party to be bound by the order via John Doe or from the practice of permitting contempt prosecutions to go forward against non-parties" (at 123).
>
> "… [N]owhere in the jurisprudence is specific reference made to the obligation of plaintiffs to advance facts and issues pertaining to John Doe's case or to the care the judiciary must exercise in evaluating his interests. When 'John Doe' is used in place of the name of a known but unidentified person, John Doe's case and interests could be evaluated and discussed in the same way as in an ex parte application. In mass protest cases, a group affiliation may or may not exist with which to infuse the John Doe shell with some humanity. In the Clayoquot Sound and *Everywomen's* cases, some defendants caught by the John Doe orders were interest-group members. Others were not. For the purpose of the litigation, John Doe may not be part of a trade union with identifiable obstructionist goals. He may not be a member of an Indian band or other collectivity. The Court implicitly acknowledged that group identity would allow defendants to be more satisfactorily named in a protest injunction application in *Repap Manitoba Inc. v. Mathias Colomb Indian Band* [(1996), 47 C.P.C. (3d) 118 (Man. C.A.)]. The Court removed the provisions referring to persons unknown and substituted the name of the Indian Band whose members were objecting to logging in their traditional territory. Where possible, then, courts should turn their minds to the position of a potential John Doe" (at 125).

(Emphasis added. Citations omitted except where noted)

[34] I am satisfied that the foregoing concerns are real and legitimate. They should be taken into account, first, by a party seeking to enforce an injunction by invoking the court's contempt power and, secondly, by the court when deciding whether to exercise its discretion to allow a contempt application to go forward.

[35] More specifically, the applicant for enforcement must be careful to describe the alleged role that the non-party played and why the non-party's actions in performing that role constituted a breach of the injunction prohibition, properly interpreted. If the role and type of participation is the same as others who are named parties or others who are clearly within the injunction's ambit, that should be stated and explained. On the other hand if there are identifiable and relevant differences between an alleged contemnor and the others as to the

role they were playing, those differences should be brought to the attention of the court. In other words, if a contempt proceeding is being proposed on a group basis, the key characteristics relevant to the potential contempt must be homogeneous if they are to be dealt with as a group; otherwise, there is no place for "guilt by association."

[36] Regarding the judge's role, he or she must, of course, rely on the information presented by the applicant for the contempt order. If that information is incomplete or inaccurate, there is a risk that the judge's discretion will be exercised on a wrong basis. That said, it must be remembered that the court has a special stake in a contempt proceeding that extends beyond merely providing a remedy to a party for enforcement of a civil obligation. Whenever the contempt power is invoked the reputation of the court as an institution responsible for the maintenance of the rule of law is engaged (See, e.g., *Health Care Corp. of St. John's v. Newfoundland and Labrador Association of Public and Private Employees* (2000), 196 Nfld. & P.E.I.R. 31 (N.F.S.C. (T.D.) at paragraphs 4-18). It is thus important for the judge to be vigilant in seeking to identify whether the alleged contemnors fall within the scope of the injunction and that there is a basis for allowing the contempt procedure to be invoked. Thus, even if nothing is said by the applicant regarding any special characteristic of an alleged contemnor, it will usually be wise for the judge to seek assurances from the applicant that there is no basis for treating any of the contemnors differently.

The Genesis of the Injunction and its Scope

[37] The injunction in this case arose out of a statement of claim issued by the respondents as plaintiffs on the same day as the application for the *ex parte* injunction. The statement of claim named as defendants four individuals (not including Mr. Brake) described as "residents of Labrador," as well as "Persons Unknown".

[38] The defendants, including the "Persons Unknown," were defined in paragraph 7 as:

> … those individuals who are engaged in unlawful conduct, the particulars of which are described below, which conduct has prejudiced and continues to prejudice the Plaintiff's property and contractual rights and interests.

[39] The conduct of which the respondents complained was described as establishing and maintaining a blockade at the access road by parking vehicles

thereon and congregating on the road thereby preventing the respondents and their contractors from accessing the construction camp and work site (statement of claim, paragraphs 11-13). The individuals were described as "protesters" (paragraph 12). It is clear from the statement of claim that the "Persons Unknown" against who claims were being made were those persons who were engaging in the alleged tortious and criminal activity, i.e., those who were actively engaged in the protest activities that were impeding or preventing access to the construction camp and site.

[40] Based on these activities the respondents alleged that the defendants committed torts of trespass, nuisance, intimidation, inducing breach of contract and interference with contractual relations, as well as several criminal offences (paragraphs 14-16). The respondents claimed they held a number of licenses of land in the surrounding area including two "exclusive" easements allowing them to construct and maintain certain access roads to and from the Trans Labrador Highway. They *prima facie* had a basis for alleging trespass and interference with other proprietary rights.

[41] The relief sought in respect of the claims included an injunction on both an interim and permanent basis restraining "the Defendants and any other person acting under their instruction and anyone having notice" of the injunction from: (i) hindering, delaying, stopping, obstructing or interfering with persons lawfully trying to enter or exit the project site, including placement of objects on the access road; (ii) "stationing persons on or otherwise trespassing on the Project Site"; and (iii) ordering, aiding abetting, counselling or encouraging any person to commit any of the enjoined acts. This language found its way into the *ex parte* injunction that was granted by the Court, except for the substitution of "Respondents" for "Defendants" and "Muskrat Falls construction site" for "Project Site". It is obvious that these terms are interchangeable.

[42] It is common ground that Mr. Brake was present during the protest on the access road, interviewing, taking notes, pictures and videos and writing, blogging and reporting on the events that were occurring. There is nothing to suggest that he was actively engaging in the protest activities or advocating for or otherwise supporting the protesters. Are these activities sufficient to potentially support a contempt charge? Assuming for the purpose of argument that a non-party can be bound by an injunction if by its literal terms it applies to him or her (a proposition that has been doubted: see, *Sharpe*, paragraph 6.260), two questions arise, considering Mr. Brake's role in the events: (i) could he be considered to be a person against whom the injunction was directed? And (ii) what actions of his, if any, were incidentally enjoined by the injunction?

Alternatively, even if he was not covered and technically bound by the injunction, could he nevertheless be subject to a potential contempt charge on the basis of either having aided and abetted the protesters or otherwise obstructed the administration of justice? (see *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048, 137 D.L.R. (4th) 633 at paragraphs 22-31).

[43] As to the first question, Mr. Brake could not be considered to be one of the "Defendants" named in the statement of claim (or "Respondents" named in the Injunction order) because he was not named as a defendant or respondent and he was not a "Person Unknown" inasmuch as he was not engaging in any of the activities that were described in paragraphs 11 to 13 of the statement of claim. Further, he could not be said to be "any other person acting under [the Defendants'/Respondents'] instruction" because there is no suggestion that he was acting under the instruction, direction or influence of the protesters. The only category into which Mr. Brake might therefore fall is "anyone having notice of such [this] order." What was this residual category supposed to include? Literally anyone? If so, it would include employees of the respondents who were reporting for work and it would include aboriginal persons who entered the area for the purpose of exercising traditional hunting and trapping rights unrelated to any protest. Those persons having notice of the order who were intended to be caught by the injunction were obviously only those who engaged in the behavior of which the respondents were complaining in their statement of claim, namely, the protest activity. Those persons who had notice of the injunction but who were not engaging in any of the prohibited activity could therefore ignore it.

[44] On the other hand, those persons, of any character, who had notice of the injunction would be caught by its terms if they engaged in any of the prohibited activity. That could in principle encompass Mr. Brake. Although he was not participating in the protest activity but only observing and reporting on it, the question nevertheless arises as to whether he was caught by the injunction's prohibition on "otherwise trespassing on the Muskrat Falls construction site." It is accepted that he passed through the security gate when the lock was broken and walked with the protesters to the accommodations building. In the absence of express or implied permission from the respondents, that would have constituted a technical trespass. In dealing with the matter, the applications judge proceeded on that assumption.

[45] But was the scope of the injunction to protect the respondents from *any* trespass relating to any of its property interests by any persons, even those not connected to or participating in the protest? It is true, of course, that trespass is a

tort actionable *per se* without the necessity for proof of any damage to the property being trespassed upon. The point was pithily put by Lord Camden in the famous case of *Entick v. Carrington*, [1765] EWHC KB J98, 95 ER 807, where he stressed that trespass can be established merely by "bruising the grass and even treading upon the soil."

[46] The use of the trespass claim here was to rely on the assertion of property rights as a means of achieving the objective of ensuring there was no interference with access to the construction camp and site. It was not to ensure, in the abstract, that there was no "bruising of the grass" by persons unconnected with the protest. In that sense, the injunction was not designed to protect property rights *per se*. It was not an injunction against trespass *contra mundum* and in all circumstances. The asserting of a trespass claim was only incidental to achieving the objective of stopping the protest.

[47] That is not to say that the respondents would not have the right to make a trespass claim to protect against mere "grass bruising." But they did not do so in the statement claim they filed. Had the respondents wanted to bar Mr. Brake from the area under their control because, say, they did not like his journalistic philosophy or just plainly did not like him and wanted to assert a trespass claim to prevent his very presence regardless of what he was doing, they could, in principle have done so. But then they would have had to allege other acts of trespass against him rather than trespasses in the course of blockading the access road, which he did not engage in. And, indeed, it would not follow that an injunction, a discretionary remedy, would necessarily be the remedy that would in such circumstances be granted.

[48] The allegations in the statement of claim (which, of course, were not directed against Mr. Brake, who was not named or identified as a defendant) and the resulting injunction which was designed solely to provide relief in respect of those allegations (which did not allege trespass except in conjunction with the protesters' activities) could not be said to have brought Mr. Brake within the umbrella of the injunction's prohibition which was to stop the protest and allow for free access to the construction site.

[49] It follows that Mr. Brake's actions on their face did not fall within the scope of the injunction.

The *Ex Parte* Application for Leave to Issue a Contempt Appearance Notice

[50] Perceiving non-compliance with the Injunction, the respondents applied *ex parte* under rule 53.02 of the *Rules of the Supreme Court, 1986* for leave to make a contempt application.

[51] The relevant rules state as follows:

> 53.02.(1) An application shall not be made to the Court for a contempt order unless the Court on an *ex parte* application first grants leave to make the application.
>
> (2) An application for an order granting leave under rule 53.02(1) shall be supported by an affidavit setting out
>
> (a) the name, address and description of applicant;
>
> (b) the name, address and description of the person sought to be committed; and
>
> (c) the facts in support of the grounds on which the contempt order is sought.
>
> (3) On the hearing of an application under rule 53.02(1), the Court may
>
> (a) order the application for a contempt order and any supporting affidavit to be served upon any person sought to be committed at least five days before the hearing, or as the Court otherwise orders;
>
> (b) dispense with service on any person of the application and any supporting affidavit; or
>
> (c) order service of the application and any supporting affidavit to be made by alternative service in accordance with rule 6.03 or substituted service in accordance with rule 6.04.
>
> (4) Unless the Court otherwise orders, an order granting leave under rule 53.02(1) shall lapse unless the application is personally served upon any person sought to be committed within twenty days from the date of the granting of the order.
>
> (5) A refusal of the Court to grant leave under rule 53.02(1) shall not prevent an applicant from subsequently making a fresh application to the Court for such order.
>
> 53.03. The Court may, on its own motion or on application, make an order in Form 53.03A directing the sheriff to cause any person to appear before the Court to show cause why that person should not be held in contempt of court and, if required, to perform or abide by such order as the Court may make, and the sheriff shall have power to take the person into custody and to hold the person if required by the order.

[52] The requirement for leave to be obtained before engaging the contempt process is an important screening device.

[53] In *True North Springs Ltd. v. Power Boland* (2000), 197 Nfld. & P.E.I.R. 143, 2000 CanLii 28323 (NFSC) I explained the significance this way:

> [6] The purpose of the leave requirement in Rule 53.02 is to enable the court to screen applications for contempt to ensure that persons will not be subjected to such processes unless there is some good and apparent reason for doing so. The invocation of the contempt power of the court is not to be undertaken lightly. It involves the serious allegation that the defendant is not a law-abiding citizen. It also places the alleged contemnor in direct opposition to the power of the court. As such, it engages issues involving the administration of justice generally and the maintenance of the rule of law, that transcend the interests of the litigants in obtaining the fruits of their litigation. Thus, the court, as an institution, has a direct stake in the decision as to whether, and the circumstances under which, the power of the court to punish for contempt should be invoked.

[54] The granting of leave should not therefore become a rubber stamping process. The judge considering the application should undertake a careful analysis, aided by the obligation of any applicant on an *ex parte* application to make full disclosure, to ensure that there is a basis for proceeding further, in the sense that there is a plausible case for the alleged contemnor to answer and that the matter is serious enough to merit a response from the court.

[55] Rule 53.02(2)(b) and (c) requires the applicant to provide to the court the name, address and “description” of the person sought to be committed and “the facts in support of the grounds on which the contempt order is sought.” The “description” of the alleged contemnor should include any special characteristic of the person that might be relevant to the determination as to whether he or she is within the umbrella of the injunctive prohibition. The requirement that “the facts” in support of the alleged contempt be provided requires the applicant to demonstrate that there is some plausible basis for proceeding further.

[56] In *True North Springs*, four factors were enunciated as being generally required before leave will be granted:

> [7] … the court will generally not give leave to make a contempt application unless it is satisfied that:

1. The application is made *bona fide* and not for some ulterior and improper purpose;

2. The alleged contemnor has been made aware of the existence of the court order that allegedly has not been complied with;

3. There is some *prima facie* evidentiary basis, beyond *de minimis*, for believing that there has been a breach of the order in question; and

4. It is in the interests of justice, from the point of view of the maintenance of the rule of law or ensuring the enforcement of the court's orders, that the contempt power be utilized.

[57] In *Hynes v. Suncor Energy Inc.*, 2016NLTD(G)117, Hall J. concluded that an additional consideration on the issue of leave is whether issuing a contempt order would be premature, in the sense that the alleged contemnor is making efforts to comply or that the order could be enforced by other less drastic means or to enforce it would work an injustice in the circumstances of the case (paragraphs 32, 41 and 54). I agree with these observations as well.

[58] Regarding the second and third factors in *True North Springs*, it is important to ensure that there is some basis for concluding that each of the elements of civil contempt could be satisfied if the matter were to proceed. Those elements are: (i) clear and unambiguous terms; (ii) notice of the terms to the defendant; (iii) breach of the terms; and (iv) *mens rea* (*Freedom Villages Inc. v. Gander (Town) & Turner*, 2008 NLTD 116, 277 Nfld. & P.E.I.R. 67 at para. 76). The *mens rea* required is merely "an intentional act or omission that is in fact in breach of a clear order"; it does not require a specific intention to disobey the order (*Carey v. Laiken* , 2015 SCC 17, [2015] 2 S.C.R. 79 at para. 38). In the case of multiple potential defendants, this analysis must be applied individually to each defendant. One cannot be guilty of contempt (or even be dragged into the contempt arena) simply by association with others who might *prima facie* appear to be possible contemnors.

[59] Because the application is made *ex parte*, there is a special obligation placed on the applicant to be scrupulously fair and balanced in the manner of presentation of the material before the judge. That includes an obligation to present any information known (or with reasonable inquiry could have been known), whether favourable or unfavourable, that may be material to the decision to be made. This Court in *Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.*, (1997) 150 Nfld. & P.E.I.R. 203 explained it this way:

> [18] On any *ex parte* application, the utmost good faith must be observed. That requires full and frank disclosure of all material facts known to the applicant or counsel that could reasonably be expected to have a bearing on the outcome of the application. Because counsel for the applicant is asking the judge to invoke a procedure that runs counter to the fundamental principle of justice that all sides of a dispute should be heard, counsel is under a super-added duty to the court and the other parties to ensure that as balanced a consideration of the issue is undertaken as is consonant with the circumstances.

[60] The application in this case sought an appearance order directed at 22 individuals, including Mr. Brake. It made allegations collectively against all accused contemnors. It alleged that the 22 were "engaged in unlawful conduct, being the failure or refusal to abide by the Injunction Order" (paragraph 4). It set out the terms of the Order and pleaded that it had been served on approximately 10 of the "Protesters" and had also been widely reported by local and provincial media outlets and on social media platforms. It is clear from the application that it was being alleged that Mr. Brake was one of the "Protesters" (paragraph 24 refers to the "Protesters" as including "the 22 Identified Contemnors") and that he along with the others continued to engage in unlawful activity in violation of the Injunction Order by hindering and deterring persons from seeking peaceful passage to and from the project site and by trespassing onto the site by cutting the lock on the security gate and occupying the accommodations building (paragraphs 19, 21, 22 and 24). No attempt was made to differentiate among the activities of the individuals accused of contempt and in particular there was nothing included to indicate that Mr. Brake was a journalist and that his role in the events was any different from what the others were doing. It is also clear that in alleging trespass as a breach of the injunction, the applicants were referring to the trespassing that necessarily followed from the fact that the protest activities were being conducted on property in which the respondents held possessory rights. They were not referring to trespassing that was unconnected with the protests. i.e. trespassing that consisted merely of "grass bruising" for its own sake.

[61] Although compliance with the threshold test for granting leave to issue the contempt appearance notices is not directly in issue on this appeal, I will observe that there was a basis for the applications judge to conclude that the factors mentioned in *True North Springs* and *Hynes* were satisfied. The affidavit supporting the application swore to the *bona fides* of the application and, indeed, there was no suggestion that the respondents were not acting in good faith. While the evidence is sparse on the issue of knowledge of the injunction on the part of Mr. Brake, it would be possible, I believe, for the applications judge,

applying the low threshold for granting leave, to draw an inference, based on the prevalence of the public knowledge of the order and its general terms, that there was a basis for concluding that Mr. Brake must have known of the order. On the basis strictly of the allegations in the application, verified by affidavit, of unlawful activity in contravention of the injunction, and including Mr. Brake under the same umbrella as all the others, it could be said there is some evidence beyond *de minimis* of breach of the order and from which an inference, based on knowledge and the actions described, that the breach involved intentional acts or omissions that were in fact in breach of the order. Further, the judge obviously considered that, given the volatility and public nature of the events and the declared safety concerns, the application was not premature, enforcement could not be achieved by less drastic means and that it was in the interests of justice that contempt proceedings be instituted. These last considerations are quintessentially discretionary decisions based on all the circumstances of the case. It would not be appropriate for me to second-guess the judge's view on these matters.

[62] But such an analysis presupposes that Mr. Brake's involvement was of the same character as all of the other protesters. We now know, however, that it was not the same. There is nothing to suggest that he was an active participant in the protest or that he was engaged in any of the actions which led to the granting of the injunction in the first place. Although he was present with the protesters and followed them as they trespassed on the construction site and occupied the buildings, his role was otherwise as a passive journalistic observer.

[63] He did, however, trespass on the site in the sense that he did not obtain prior express permission from the respondents to be there. Indeed, he acknowledged for the purpose of this appeal that he was technically a trespasser. Was that sufficient to lump him in with all of the others? I do not believe so.

[64] At the very least, his role in remaining in the presence of the protesters and in trespassing by following the others so he could observe and report on them raises serious questions as to whether he fell within the purview of the injunction. It is not trespassing *per se* (mere "bruising grass") that concerned the respondents but actions, including actions amounting to trespass, that obstructed and blockaded – and continued to obstruct and blockade - access to the site. If it is that aspect of trespass that is being enjoined, then the fact that Mr. Brake may have technically trespassed by following the protesters and reporting on their activities but not participating in any obstruction would not fall within the ambit of the injunction.

[65] Of course, if the respondents actually wanted to exercise their anti-"grass bruising" rights and insist on prohibiting *any* trespassing by Mr. Brake including when in pursuit of legitimate journalistic activities even unrelated to protests, no matter how innocuous, they could in principle have done so by asserting claims against him to that effect and perhaps (subject to other countervailing rights, if any) obtain an injunction directed specifically against Mr. Brake that would have the practical effect of shutting down his reporting activities because it would prevent him from accessing the area. In such circumstances, he would be then exposed to a potential contempt application if he chose to ignore such a specific prohibition. But that is not the current situation.

[66] Consequently, there was a significant difference between Mr. Brake's situation and the situation of the protesters. Mr. Brake was there solely because the protesters were there and only to report on and not participate in the protest. If for whatever reason the protesters stopped their activities, there would be no reason for Mr. Brake to remain either but not because he chose not to obstruct, blockade and trespass in support of the protest but because there would be nothing to report on anymore. These differences would have to be relevant to whether, in the circumstances, Mr. Brake was covered by the injunction and whether there was a *prima facie* case of contempt against him. In my view, they would be relevant on any application for leave to obtain a contempt order. It was incumbent on the respondents as applicants to bring these matters to the attention of the Court so that the Court could avoid applying the injunction in a manner that would give it a reach greater than was necessary to provide the relief needed to stop the behaviour that was being complained about.

The *Ex Parte* Application to Vacate the Injunction and the Contempt Appearance Notice

[67] The judge hearing the application to vacate the contempt appearance notice acknowledged the obligation faced by the respondents, as *ex parte* applicants for the original contempt appearance notice, to make, in the words of *Sparcott Engineering*, "full and frank disclosure of all material facts known to the applicant or counsel that could reasonably be expected to have a bearing on the outcome of the application." He correctly stressed that facts that were "material" were those that were material to or would have affected the outcome of the decision or the exercise of the judge's discretion.

[68] However, in applying the notion of materiality to the situation at hand, the judge concluded that for Mr. Brake's status as a journalist to be material he "must have had some <u>special status or right</u> that applied to his coverage of the

protests… including his trespass on the Muskrat Falls construction site" (Decision, paragraph 31).

(Emphasis added.)

[69] In considering himself bound to find some "special status or right" before finding materiality, the judge set the bar too high. It drove him to focus on whether Mr. Brake was clothed in some special status or right which he enjoyed as a journalist by virtue of the constitutional protection afforded to the "freedom of the press and other media of communication" by section 2(b) of the *Canadian Charter of Rights and Freedoms*. He concluded that no such special status or right existed. He relied on *MacLeod v Canada*. That case, however, addressed a different matter. In the context of reporting on an aboriginal protest from within a perimeter established by armed forces to contain the aboriginal group, *journalists* sought an injunction to prevent the armed forces from preventing delivery of food and supplies to them. The journalists relied on section 2(b) of the *Charter* as the basis of their claim. The Federal Court held that section 2(b) did not clothe the journalists with any immunity from the consequences of their decision to remain with the aboriginal group behind the perimeter and dismissed their claim.

[70] To succeed in their claim, the journalists in *MacLeod* had to establish some sort of legal right, as all litigants have to do. Mr. Brake, by contrast, was not seeking to require any positive action to prevent the breach of alleged *Charter* rights. He is simply saying that his differentiated role was a factor that should have been taken into account by – and therefore should have been disclosed to – the Court before subjecting him to the injunction and contempt processes.

[71] Whether one accepts that the quarter-century-old *MacLeod* decision is truly reflective of the current law on the status of journalists in light of the approach taken by the Supreme Court of Canada to the special role that journalists play in Canadian society in such cases as *Grant v. Torstar Corp*., 2009 SCC 61, [2009] 3 S.C.R. 640 and *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, its application in the context of the current case in any event does not end the matter. In the context of determining materiality requiring disclosure of the role of a person as a journalist on an *ex* parte application, there is nothing in *MacLeod* that postulates that the only way in which materiality can be established is to be able to place the journalist into a recognized and defined legal classification or to clothe him or her with a special legal right. All that is required is to show that the individual concerned has

characteristics (in this case, performing a journalistic role instead of a protester role) that might place him outside of the potential reach of the injunction. If that were so, then that would clearly be material to - and might reasonably affect - the decision to enmesh him in the contempt process. *That* is the test for materiality.

[72] In seeking some “special status or right” as a condition of finding Mr. Brake’s situation to be “material” without going on and considering whether, regardless of his legal or constitutional status, his role in the protest could potentially affect the outcome (because he was not within the scope of the injunction, the mere act of trespassing without participating in the protest not having been enjoined), the applications judge erred in law.

[73] I would, in any event, go further and state that Mr. Brake’s role as a journalist reporting on an indigenous land protest was, in itself, a factor of such significance that, regardless of whether he can be regarded as having some technical legal or constitutional status or right as a journalist, it should have been taken into account when considering whether to grant leave to issue the contempt appearance notice.

[74] In *Grant*, the Supreme Court recognized a new defence affecting the media in defamation law, of “responsible communication on matters of public interest”. In so doing, McLachlin C.J. stressed the importance of “sustaining the public exchange of information that is vital to modern Canadian society” (paragraph 86) and that “media reporting on matters of public interest engages the first [essential to proper functioning of democratic governance] and second [getting at the truth by a free exchange of ideas] rationales of the freedom of expression guarantee in the *Charter*” (paragraph 57).

[75] In *National Post,* the Court recognized that journalistic privilege relative to sources could be established on a case-by-case basis in connection with both testimony and documents that were subject to search warrants. Binnie J., writing for the majority, referred to the “special position of the media” (paragraph 3) and acknowledged that the “role of investigative journalism has expanded over the years to help fill what has been described as a democratic deficit in the transparency and accountability of our public institutions” (paragraph 55). In balancing applicable interests in deciding whether the privilege applied in a given case, Binnie J. stressed that the court should have “appropriate regard for the ‘special position of the media’ ” (paragraph 64). He also concluded that even where no privilege for protection of confidential sources is found to exist on a case by case basis, warrants and assistance orders against the media must take

into account the media's special position (paragraph 78) and that in granting warrants on an *ex parte* application, the judge should insert terms in the warrant "to protect the special position of the media and to permit the media ample time and opportunity to point out why, on the facts, the warrant should be set aside" (paragraph 84).

[76] The approach taken to, and the comments made about, the role of the media in Canadian society, while made in the specific contexts of defamation law and search and seizure law, inform us generally about the importance of ensuring that the media can perform effectively and of therefore factoring that consideration into any discretionary analysis potentially affecting the media's ability to perform its vital functions. See also *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R. 421 at 444.

[77] This applies equally to the granting of injunctions and the institution of contempt proceedings relative to enforcement of injunctions. Any potential significant effect of an injunction or a contempt order on the proper functioning of the press is a highly relevant factor in exercising the discretion as to whether the order should issue.

[78] I have already stated that the court should be cautious about drawing injunction orders and enforcing them by contempt in a manner that is unnecessary to achieve the objectives of granting the injunctive relief in the first place. This is especially so where an incidental effect of an injunction prohibition might be the undue and unnecessary interference with the *bona fide* exercise of the journalistic function. In the current case, to make Mr. Brake subject to a general "no trespass" prohibition would unduly and unnecessarily interfere with his function as a journalist when he was not a participant in the ongoing protests. The trespassing prohibition resulted, as I have said, not from a complaint about "bruising the grass" but from the existence of the protest. Mr. Brake's trespassing was contingent on the continuation of the protest. If it dissipated, so also would his trespassing have evaporated. The trespass prohibition was therefore only necessary to the extent that the protest continued and only if it was necessary to facilitate the protest activities.

[79] To give the injunction order and the contempt umbrella a reach wider than this unnecessarily risks impeding the media function for no good reason with the result that the public would be deprived of access to information of public interest. I agree with the observations of Karen Pugliese in her affidavit submitted by APTN:

> A court decision that does not recognize journalists as independent observers and reporters of events but instead places them on the same footing as participants imperils journalists' required independence and will inhibit them from embedding with protesters during conflicts.
>
> In my experience as a former journalist and currently Executive Director of News at APTN, it is in the public interest to have up-close, independent coverage of Aboriginal-led protests over Crown resource projects. Mr. Brake was providing this kind of coverage. But this coverage is threatened if journalists are faced with possible criminal or contempt charges for accessing protest sites. Many journalists would be deterred by the possibility of criminal or contempt charges and would choose instead to cover events from afar – or not at all.

[80] It is not a sufficient answer to this position to say that the journalist would always have the right to challenge the contempt order when ultimately brought into court. By that time, the potential damage to the reporting function may already have been done. Journalists may already have been deterred and the ability to report live on the spot may already have been seriously impacted. In my view, the potential "chilling effect" is real and significant and should be avoided if at all possible.

[81] The importance of considering the incidental effect of injunctions and contempt on the ability of the media to perform their jobs is, in my view, heightened in the context of the coverage of events about aboriginal issues. The evidence from APTN, which I accept, is that aboriginal communities have been historically underrepresented in the Canadian media. That makes freedom of the press to cover stories involving indigenous land issues even more vital.

[82] APTN made reference to the *Final Report of the Truth and Reconciliation Commission* and its comments on the relation between reconciliation and the media:

> The media play a critical role in educating the public, and through public scrutiny can hold the state accountable for its actions. In the Canadian context, the media can shape public memory and influence societal attitudes towards reconciliation.
>
> The Commission believes that in the coming years, media outlets and journalists will greatly influence whether or not reconciliation ultimately transforms the relationship between Aboriginal and non-Aboriginal peoples. To ensure that the colonial press truly becomes a thing of the past in twenty-first century Canada, the media must engage in its own acts of reconciliation with Aboriginal peoples. The media has a role to play in ensuring that public information both for and about Aboriginal peoples

> reflects their cultural diversity and provides fair and non-discriminatory reporting on Aboriginal issues.

(Pugliese Affidavit, Exhibit "U")

[83] To achieve the goal of reconciliation, better understanding of aboriginal peoples and aboriginal issues is needed. This places a heightened importance on ensuring that independently-reported information about aboriginal issues, including aboriginal protests, is available to the extent possible. Accordingly, where a journalist is covering aboriginal protests, his or her role should be a material fact disclosed and considered when an applicant seeks an *ex parte* order that may reasonably have the effect of interfering or unnecessarily restricting the journalist's coverage.

[84] Let me advance a series of non-exhaustive considerations that could inform parties and the court as to when it would be appropriate to regard the presence of a journalist in a protest as a material fact to be disclosed to and considered by the court when deciding to make an *ex parte* injunction order or an *ex parte* order granting leave to invoke the contempt process:

1. The person is engaged in apparent good faith in a news-gathering activity of a journalistic nature;
2. He or she is not actively assisting, participating with or advocating for the protesters about whom the reports are being made;
3. He or she does no act that could reasonably be considered as aiding or abetting the protestors in their protest actions or in breaching any order that has been already made;
4. He or she is not otherwise obstructing or interfering with those seeking to enforce the law or any order that has already been made or is not otherwise interfering with the administration of justice;
5. The matters being reported on are matters that can broadly be said to be matters of public interest. Particular consideration should be given to protests involving aboriginal issues.

[85] These considerations all apply to Mr. Brake's situation.

[86] Because of (a) my interpretation of the scope of the original injunction; (b) the importance of not unnecessarily or unduly impeding Mr. Brake's role as a journalist in reporting on the protests; and (c) the added concern to protect, to the extent possible, the reporting of aboriginal issues of public interest, I have

concluded that Mr. Brake's role as a journalist performing functions different from those of the other protesters was a material consideration as to whether the injunction and any contempt proceeding should have been directed at him. The applications judge was in error in not so concluding. The legal error of the applications judge in applying an incorrect standard for determining when a matter is a material fact justifies setting aside his resulting decision and requires this Court to substitute a decision based on the proper principles.

[87] The next question to be addressed is whether the remedy for non-disclosure of the forgoing material facts should be the setting aside of the *ex parte* orders. The applications judge correctly concluded that the non-disclosure of a material fact will not automatically result in a setting aside of the orders. The Court still has discretion to uphold the order as originally given.

[88] I would say, however, that as a general rule, where the non-disclosure of a material fact was of significance to the potential outcome, the normal response should be to set aside the order. This is because, regardless of whether the non-disclosure was intentional, the integrity of the original decision, reached as it was in the absence of knowledge of material facts, is in doubt. It is only in situations where the reviewing court is completely satisfied that had the material facts been known, the result would inevitably have been the same, that there would be justification for allowing the order to stand.

[89] In *O2 Electronics Inc. v. Sualin*, 2014 ONSC 5050, Perell J. identified a number of factors to be considered when exercising the discretion to dissolve an injunction in the face of a material non-disclosure. They included: (i) whether the non-disclosure was intentional or unintentional; (ii) a recognition that the urgency of the situation leading to the injunction application might explain why the information might not have been as fulsome as it otherwise might have been; (iii) the extent or pervasiveness of the non-disclosure; and (iv) the significance to the outcome of the application of the matters that were not disclosed to the court.

[90] While I would not disagree that these matters might have some relevance in a particular case, I remain of the view that unless it is clear that, considering the previously undisclosed facts, the decision would have been the same, the starting point ought to be that where the integrity of the original decision is compromised, it should be set aside. The fact that the applicant may not have engaged in contumacious or intentional behaviour does not repair the lack of integrity of the order. The presence or absence of intentional non-disclosure might be relevant to a decision to set aside the order as a means of punishing the

applicant for his or her handling of the matter but it has less relevance where the concern is the correctness of the order itself.

[91] In my view, the reasons given by the applications judge in this case (Decision, parapraphs 42-46) for concluding that even if the facts concerning Mr. Brake were material, he would not have set aside the orders were not sufficient to justify that conclusion. The judge's view that the injunction was not directed specifically at Mr. Brake and "had no consequence for him as long as he complied with it" misses the point. If he was not, as I have concluded, within the intended scope of the injunction prohibition, then being subjected to its unnecessary prohibitions had significant consequences for him and his news gathering activity – it prevented him from doing his job. Likewise, the judge's view that the consequences for Mr. Brake personally were insignificant because he could avoid arrest by simply appearing in court is not relevant. The point is that by doing his job, he *would* be exposing himself to potential arrest in circumstances where he should not have been constrained. Further, the fact that the non-disclosure was unintentional is of little consequence where the integrity of the order is in question, as it is here. Finally, the ability to challenge the injunction and contempt allegation in court is a benign consideration. That would apply to every case. In any event, as I mentioned earlier, by the time it comes to court, the damage would already have been done.

[92] I regard the material non-disclosure of Mr. Brake's role in the protest events as being very significant. It is a factor that, in my view, could have had a decisive impact on whether the injunction should have been applied to Mr. Brake at all, and certainly on whether he should have been enmeshed in the contempt process without careful consideration of the differences between his circumstances and those of the protesters.

[93] In my view, the non-disclosure here, both at the time of the application for the injunction and especially at the subsequent application for leave to proceed with the contempt process brings the integrity of the whole process as it applies to Mr. Brake into question. It justifies setting aside the orders as they apply to him. I make no comment on what effect, if any, non-disclosure relative to Mr. Brake might have on the effectiveness of the orders relative to others potentially affected by them. Because the orders are not under attack in this appeal by anybody other than Mr. Brake, the proper disposition is to leave them in place and to issue a declaration that Mr. Brake is not bound by the *ex parte* injunction issued on October 16, 2016 nor by the contempt appearance notice issued on October 24, 2016.

Disposition

[94] I would allow the appeal, set aside the decision of the applications judge denying Mr. Brake's application to vacate the injunction and the contempt appearance notice, and make the declarations indicated.

[95] As to costs, Mr. Brake should be entitled to his costs against the respondents on a party and party basis in this Court and in the court below. APTN was permitted to intervene on the basis that it would not seek costs against any party. Their intervention was useful and timely. They should also not be subject to any costs in favour of the appellants or respondents.

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J. D. Green J.A.

I concur: ________________________________

C. W. White J.A.

I concur: ________________________________

F. P. O'Brien J.A.