

CANADA / JUDGMENT

Cooper Creek Cedar Ltd. v. Ogden

2023 BCSC 465

COURT

Supreme Court of British Columbia

DECIDED

27 March 2023

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2023 BCSC 465 Cooper Creek Cedar Ltd. v. Ogden

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cooper Creek Cedar Ltd. v. Ogden,

2023 BCSC 465

Date: 20230327

Docket: 21051

Registry: Nelson

Between:

Cooper Creek Cedar Ltd.

Plaintiff

And

Jessica Dawn Ogden, Michael Donald Grabowsky, Brock Snyder, Tom Prior, John Doe, Jane Doe,
and Persons Unknown

Defendants

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for the Plaintiff:

M.D. Scheffelmaier

Counsel for Defendants:

N.J. Ross

B. Isitt, Articled Student

Place and Date of Hearing:

Nelson, B.C.

September 23, 2022

Place and Date of Judgment:

Nelson, B.C.

March 27, 2023

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Introduction

- [1] Cooper Creek Cedar Ltd. ("Cooper Creek") applies for an order that several third parties provide information to it regarding a number of social media accounts and a website associated with an entity called Last Stand West Kootenay ("LSWK"). The social media accounts include accounts associated with the LSWK entity and accounts apparently associated with nine individuals.
- [2] The order sought is a Norwich order, a type of equitable discovery order named for the decision of the House of Lords in in which such an order was first made: *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1973] 2 All E.R. 943 (H.L.). Norwich orders are used as a type of pre-trial discovery which, among other things, allows a rights-holder to identify anonymous wrongdoers: *Rogers Communications Inc. v. Voltage Pictures, LLC*, 2018 SCC 38 [Rogers] at para. 18. The remedy allows the court to order discovery against a third party against whom the applicant has no cause of action, and who is not a party to contemplated litigation.

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- [3] The third parties from whom information is sought by Cooper Creek are Facebook Canada Ltd. and Meta Platforms Inc. (collectively, "Facebook"), GoDaddy.com LLC ("GoDaddy"), and ConnectionPoint Systems Inc. ("ConnectionPoint"). The third parties were all served with this application; none responded.
- [4] In general terms, the information sought for each social media account is: the user's first and last name, their contact information, the date and time of registration of the account, and the IP address, date and time of the last 300 logins and logouts.
- [5] Applications for Norwich orders can be made without an action having been initiated. In this case, however, there is an extant action for an injunction and damages filed by Cooper Creek in 2019. Applications for Norwich orders can be made ex parte, which means without notice. In this case, however, one of the people about whom information was sought, Matthew Perry, appeared through counsel, and responded to the application.
- [6] This application arises in the context of a dispute about logging being conducted by Cooper Creek in the Salisbury Creek area, near Argenta and Johnsons Landing, British Columbia, located near the northeast corner of Kootenay Lake, north of Nelson, British Columbia.
- [7] Cooper Creek is the licensee under Forest License No. A30171 issued by the Ministry of Forests, Lands, Natural Resource Operations and Rural Development on behalf of His Majesty the King in Right of the Province of British Columbia. The license permits Cooper Creek to harvest timber within a specified area, including the Salisbury Creek area. That area is accessible only via the Salisbury Creek Forest Service Road ("Salisbury FSR").
- [8] Cooper Creek's logging activity in the Salisbury Creek area is opposed by some people due to environmental concerns. In opposition to it, various protest activities have occurred, including on or near the Salisbury FSR.
- [9] On August 19, 2019, Cooper Creek filed the notice of civil claim that originated the action within which this application was filed. In its notice of civil claim, Cooper Creek pleaded that the defendants' activities constituted tortious interference with contractual relations, interference with economic interests, obstruction, nuisance and blocking access to a public highway. It sought damages relating to an alleged blockade of the Salisbury FSR, and a pre-trial, interim and permanent injunction.
- [10] On August 27, 2019, Mr. Justice Groves granted an interim injunction (the "Injunction"). He ordered that the defendants, or anyone else with knowledge of the order, be restrained and enjoined from interfering, or counselling other persons to interfere, with the logging and related operations of Cooper Creek in and around Salisbury Creek. The Injunction included police enforcement measures.
- [11] The then existing blockade on Salisbury FSR was removed without police enforcement shortly after the Injunction was granted. Nothing of significance happened after the Injunction was granted until around April 2022. Cooper Creek had obtained cutting and road permits in 2019 and 2020, and planned to commence logging operations on April 26, 2022. A

number of persons engaged in protest activity on or near the Salisbury FSR starting sometime on or about that date. Specifically, it is alleged that on April 25, 2022, protesters blockaded Salisbury FSR, in breach of the Injunction. It is further alleged that Cooper Creek was unable as a result of this activity to proceed with its planned work for a period of time. It is alleged that this delay limited the time in which Cooper Creek could engage in its operations, and due to an upcoming increase in stumpage fees, caused it to suffer damages.

[12] On May 17, 2022, the RCMP arrested 17 protestors who allegedly were engaged in activities in breach of the Injunction. One of the persons arrested was the application respondent, Mr. Perry. Cooper Creek has initiated civil contempt proceedings against those 17 persons, but those proceedings have not yet progressed very far. While it is alleged that there was some further activity in breach of the Injunction after May 17, 2022, specifically on June 1 and 6, 2022, there is agreement that there has been no conduct in breach of the Injunction since about June 6, 2022.

[13] Mr. Perry does not admit that he or anyone else acted in breach of the Injunction.

Alleged facts regarding LSWK

[14] Cooper Creek alleges that, in late 2021, a Facebook page entitled "Last Stand West Kootenay" was created, and that an Instagram page entitled "laststandwestkootenay" was created at about the same time. A website with the URL <https://www.laststandwestkootenay.com/> was also created. The website is hosted on GoDaddy's server. I will refer to the entity, or entities, controlling the accounts and the website as LSWK.

[15] Cooper Creek alleges that, in April 2022, the individuals controlling LSWK began to publish posts that directed and coached the public to blockade the Salisbury FSR, encouraged the public to support the blockade, contained images of the blockade, and organized the blockade.

[16] Cooper Creek alleges that LSWK also made posts that call the validity of the Injunction into question.

[17] Cooper Creek alleges that LSWK provided links to an intake form in which the group's objectives, camp and blockade procedures are established, and a code of conduct for participants is provided (the "Intake Document"). Cooper Creek alleges that LSWK confirms in the Intake Document that the blockade was erected to prevent it from engaging in its lawful logging operations. Cooper Creek further alleges that the Intake Document encourages individuals attending the blockade to avoid the use of language acknowledging that they were participating in a blockade, and provides guidelines for how the group should engage with Cooper Creek's agents and the RCMP.

- [18] Cooper Creek alleges that, as a result of LSWK's posts, additional persons, beyond the defendants named in its action, attended the blockade. It further alleges that other social media accounts have shared LSWK's content, specifically relating to encouraging others to participate in the blockade, increasing both viewership of the content, and the number of people at the blockade.
- [19] Cooper Creek alleges that in May 2022 a fundraiser on the website FundRazr.com was created to support LSWK. The fundraiser website was hosted on ConnectionPoint's server.

Mr. Perry's response to the facts alleged regarding LSWK

- [20] Mr. Perry asserts that LSWK is not a formal entity with a membership list or structure. He says that LSWK refers to individuals who grouped together at a location known as Grouse Camp to support logging reform, the protection of valuable forest ecosystems, and Indigenous sovereignty.
- [21] Mr. Perry acknowledges that there are social media accounts called LSWK. Mr. Perry says he was not involved with any of those accounts. To his understanding, the LSWK social media accounts did not advocate that anyone breach any laws or the Injunction. He says that LSWK's posts called on people to take a variety of lawful activities such as letter writing, attending rallies, and attending at Grouse Camp to express opposition and bear witness to community opposition to Cooper Creek's logging activities.
- [22] Mr. Perry describes Grouse Camp as a community centre to protest logging activity on the Salisbury FSR to support the demands of the Sinixt Nation ("Sinixt") who have called for an end to resource development on their territory, and the residents of the Argenta and Johnsons Landing area who have made efforts to stop logging in the area for decades. According to Mr. Perry, Grouse Camp served as a point of community for those opposing logging in the area by Cooper Creek. A variety of events were held there, including weekly potlucks and prayer circles. Between five and 25 people stayed at Grouse Camp from time to time, and local residents would stop by to visit and bring donations. Mr. Perry says that Grouse Camp was located on the side of the Salisbury FSR, and denies that it blocked the road or obstructed traffic. For these reasons, he denies that the activities taking place at Grouse Camp are accurately described as a blockade.
- [23] Mr. Perry says that, during the time he was at Grouse Camp, and to his knowledge throughout the time it was in existence, there was not a "hard blockade" on the Salisbury FSR. He says that generally traffic was allowed to continue up to the area where logging was planned. He says that he understands that industrial traffic was stopped on two occasions by some people who had been staying at Grouse Camp, on May 17 and June 1, 2022. He was there on May 17, 2022. He says that he observed that only two people refused to leave the roadway prior to their arrest on that occasion.

- [24] Mr. Perry says that Grouse Camp was demolished on May 17, 2022, by either Cooper Creek staff or members of the RCMP.
- [25] Mr. Perry says that on or shortly after May 17, 2022, a gate was erected at the base of the Salisbury FSR, and since that time Cooper Creek has controlled road access to the area.
- [26] Mr. Perry says that since June 7, 2022 there has been no protest activity or encampments of any kind on the Salisbury FSR.

Analysis

Legal principles

- [27] As described by Abrioux J., as he then was, in *Equustek Solutions Inc. v. Jack*, 2014 BCSC 454 [Equustek] at para. 8, a Norwich order is a form of an equitable bill of discovery, which may be granted where the normal discovery process will not suffice. As such, it arises from the court's inherent jurisdiction. Further, at para. 10, Abrioux J. stated, citing *GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619 [GEA] at para. 76, that:
- [10] The principle underlying such equitable discovery is that:
- ... where discovery is absolutely necessary in order to enable a party to proceed with a bona fide claim, it is the duty of the Court to assist with the administration of justice by granting an order for discovery, unless some well-founded objection exists against the exercise of such jurisdiction.
- [28] In *Rogers* at para. 18, the Supreme Court of Canada endorsed the five-part test for obtaining a Norwich order articulated in *Alberta (Treasury Branches) v. Leahy*, 2000 ABQB 575 [Alberta Treasury] at para. 106, *aff'd* 2002 ABCA 101, leave to appeal *ref'd* [2002] S.C.C.A. No. 235. As summarized at para. 18 of *Rogers*, to obtain a Norwich order an applicant must establish:
1. that they have a bona fide claim against the unknown alleged wrongdoer;
 2. that the person from whom the discovery is sought is in some way involved in the matter under dispute, beyond being an innocent bystander;
 3. that the person from whom discovery is sought is the only practical source of information available;
 4. that the person from whom discovery is sought be indemnified for expenses arising out of compliance with the discovery order in addition to their legal costs; and
 5. that the public interests in favour of disclosure outweigh the legitimate privacy concerns.
- [29] *Rogers* was decided in the context of alleged copyright infringement. In other cases, the fifth factor has been described differently. For example, in *Procon Mining and Tunnelling Ltd. v. McNeil et al.*, 2007 BCSC 454 [Procon] at para. 28, Madam Justice Boyd stated it as "[w]hether the interests of justice favour the obtaining of that disclosure". See also *Equustek* at para. 13. This broader formulation seems most apt to the application before me, and I adopt it.

- [30] In Procon at para. 27, Boyd J. described the situations in which Norwich orders have been granted. They include: (1) where the information sought is necessary to identify wrongdoers; (2) to find and preserve evidence that may substantiate an action or determine whether an action exists against known or unknown wrongdoers; and (3) to trace and preserve assets. See also Equustek at para. 11. However, as Abrioux J. stated "[t]he circumstances in which such relief is appropriate are evolving": Equustek at para. 12.
- [31] In Procon, the defendants sought to set aside ex parte Norwich orders which had required financial institutions and the Canada Revenue Agency to provide records related to allegations of deceit and conspiracy.
- [32] Similarly, the plaintiffs in Equustek sought banking information about the defendants which was required to determine if other defendants should be named in their claim alleging that the defendants had conspired to design and manufacture a competing product using the plaintiffs' trade secrets.
- [33] In the present case, Cooper Creek relies upon the first two rationales for Norwich orders stated in Procon.
- [34] Cooper Creek submits that it has satisfied the five criteria set out in Rogers and the other case law. Mr. Perry's submissions focussed on the first and fifth. In my view, the third criterion must also be considered in this case. The second and the fourth are not in issue.

LSWK social media posts

- [35] Cooper Creek submits the LSWK social media posts it relies on encouraged people to blockade the Salisbury FSR. It is necessary to review the social media posts relied upon by Cooper Creek in some detail to determine if the Norwich order sought should be granted.
- [36] Cooper Creek sought information from Facebook about LSWK's Facebook and Instagram accounts. It also sought information from GoDaddy about LSWK's website, hosted on GoDaddy. It also sought information from ConnectonPoint about a fundraiser hosted on its website.
- [37] The LSWK Facebook page was created in August 2021, and renamed to its current name on January 15, 2022. On April 16, 2022, a post was made referring to a community outreach event at a local store. The post went on to state "LSWK has been notified that the Argenta Face is slated for logging in May. Join us! Message us! We won't let it happen."
- [38] On April 19, 2022, a post was made describing Cooper Creek's planned logging activities. It asked people to "take action", including by contacting the Minister of Land, Water and Sustainable Resources (the "Minister"), and signing a petition.
- [39] On April 25, 2022, an "Action Alert" was posted on the LSWK Facebook page. It states that LSWK set up camp that morning at the Argenta-Johnson's Landing Face. It states that LSWK is standing for the mountainside, various species of old growth trees, and wildlife. The post

says that they are calling for a rally at the base of the Salisbury FSR, and asks people to join them for "updates, action points, networking and more". The post says "we will stand in the way of industry in peaceful protest", and that they need people to come and maintain "this powerful peaceful community". The post asks people to message them for "schedule/intake" before joining, and to read and abide by their camp protocols. It also asks people to contact local politicians to ask for an immediate moratorium on logging in the area.

- [40] The April 25, 2022 post contained a link to an Intake Document and sign up calendar on Google Docs. The Intake Document provides information to prospective participants in what is referred to as the "Argenta Peaceful Protest". Among the "main points" listed is a direction that only one to three people are to be industry/police liaisons. A "main point" is that "when speaking with the public or industry workers = avoid using words like 'blocking the road' *Instead = Holding space .. peaceful protestor in support of Autonomous Sinixt." Under the heading "Relational Intentions" is stated "Holding space (sitting around fire, singing songs and having enriching conversations with fellow blockaders)".
- [41] The Intake Document also includes the "Code of Conduct", which includes principles such as being peaceful, respectful, inclusive and self-sufficient. "Camp Guidelines and Procedures" include that at least two people must be awake before work hours to greet industry officials or law enforcement. Those individuals are to inform them that the "blockade" has been established to protect old-growth forest and habitat. Only those persons who have read and agreed to the Code of Conduct are to be permitted to join the camp. Advice is given for what to do if company officials are gathering intelligence on the blockade. Advice is given that if company officials ask anyone about whether they will be permitted to go to work, "it is best to be vague about your intentions".
- [42] An April 26, 2022 post refers to industry officials having shown up the day before and informing them that they would start logging imminently. The post says that LSWK intended to continue in dialogue with industry, and again asked people to take action by writing the Minister or joining them at Grouse Camp. A link was once again provided to the Intake Document. A second April 26, 2022 post states that industry officials showed up a second time that day and "threatened to get through with an old injunction later this week". The post went on to state that they were "unsure if this old injunction holds jurisdiction, but we need numbers at camp tomorrow and Thursday to hold fast and show them what we stand for."
- [43] On April 27, 2022, LSWK posted an open invitation to a potluck at the Salisbury FSR later that week. On April 28, 2022, LSWK posted an invitation to another potluck and dance at the Salisbury FSR later that week. An April 30, 2022 post referred to both of these community events.

[44] The next LSWK posting included in Cooper Creek's materials is dated May 8, 2022. The post stated that law enforcement and industry had attended the camp and LSWK had communicated their willingness to "negotiate" with government and industry actors. There was also a call-out for supporters at the camp as they were expecting more visits from law enforcement and industry. It went on to state:

If you come to camp, please understand these main points:

- the current injunction is still a grey area, and we are still working on getting clarification on its validity
- we are legally protected and we have the right to peacefully hold space here at the Argenta-Johnsons Landing Face
- we are within our rights to protest, and stand OFF the road (not blocking)
- if you decide to block the road, you could potentially be met with a civil charge

[45] On May 15, 2022, LSWK posted about a solar eclipse gathering at the camp.

[46] On May 16, 2022, LSWK posted an update about the camp. They noted recent interactions with the RCMP. They asked for more presence at the camp that week. The camp protocol was referred to, and once again readers were encouraged to contact politicians. A second post on May 16, 2022 asked people to come to the camp the next day. The record indicates that 17 people were arrested the next day at the Salisbury FSR.

[47] The next LSWK post included in Cooper Creek's materials is dated May 25, 2022. It refers to the gate that Cooper Creek had erected on the Salisbury FSR, and decorations that had been put on it. On May 27, 2022, LSWK posted about a float they had in a parade in the nearby community of Kaslo on the May Day long weekend. That same day, LSWK made another post referring to their camp at a new location just before the entrance to the Salisbury FSR. They were having a potluck that night, and stated "we are not blocking the road in any way and intend to hold a peaceful space that is safe for everyone to join." They also wrote about upcoming drum circle and bird watching events.

[48] The next post is dated June 1, 2022. It refers to two elders, Mick and Eloise, who were stated to be "making a stand by sitting in front of the gate leading to cutblocks on the Argenta Johnson's Landing Face." LWSK was stated to be "near the site in solidarity and documenting the unfolding of this story. So far, logging trucks have shown up and have been unable to drive up the road." People were encouraged to come to the new camp, which was stated to be "completely off site and NEUTRAL." People were again encouraged to contact local officials and politicians. The post refers to and links to "our Fundrazr to help us cover legal fees and replace stolen items".

- [49] The next post is dated June 6, 2022. It refers to a person, Penny, who was taking a stand in favour of Pride Month. LSWK was stated to be "near the site in solidarity and documenting the unfolding of this story. So far, logging trucks have shown up and have been unable to drive up the road". The rest of the post is very similar to the June 1, 2022 post.
- [50] Many of the LSWK Facebook posts were also posted on LSWK's Instagram page. Some Instagram posts were unique, including one dated April 26, 2022, which asked people to come out to the camp, and stated "See you on the road." In general, the LSWK Instagram posts are very similar to the Facebook posts.
- [51] In many of LSWK's social media posts, a link was provided to a FundRazr page, which is stated to "Help Forest Defenders Save AJL Face Forest Habitat on Unceded Sinixt [homeland]". The FundRazr page describes LSWK's activities and objectives. It states that funds raised will be primarily used for legal costs, and may also be used for camp infrastructure and necessities, such as tarps, food, and travel costs.

Should a Norwich order be made in respect of the LSWK accounts?

- [52] As mentioned earlier, only the first, third and fifth factors set out in the case law are at issue. It is not disputed that the third parties from whom the discovery is sought are in some way involved in the dispute, beyond being an innocent bystander, or that Cooper Creek will indemnify the third parties for expenses arising out of compliance with the discovery order in addition to their legal costs.
- [53] Norwich orders are "not a dime a dozen remedies; they are rare and precious remedies": *Bergmanis v. Diamond*, 2012 ONSC 5762 at para. 50. Most Norwich orders have been made in the context of allegations of fraud, to trace and preserve assets. The present application appears to be novel, or nearly so, in seeking a Norwich order to obtain information about social media posts relating to civil disobedience. However, as stated by Abrioux J. at para. 12 of *Equustek*, the circumstances in which such relief may be appropriate are evolving.
- [54] The closest analogue cited by Cooper Creek was *Houseman v. RateMDs Inc.*, 2017 SKQB 321 [Houseman]. The plaintiff in that case was a doctor, who believed that anonymous reviews about him posted on the RateMDs Inc. website were defamatory. He sought a Norwich order against RateMDs Inc. to learn the identities of the posters to be able to sue them for defamation. The court held that the plaintiff had provided evidence to raise a valid, bona fide and reasonable claim of defamation. At para. 18, the Court noted that RateMDs Inc. did not oppose the application and did not resist providing the information requested on the basis of the privacy of the persons who posted the reviews. In those circumstances, the Court held that the interests of justice favoured the plaintiff obtaining the disclosure.
- [55] A decision of Saunders, J., as she then was, cited by the court in *Houseman*, *Kenney v. Loewen*, 64 B.C.L.R. (3d) 346 [Kenney], is another example of a Norwich order being sought in aid of a defamation action, where the identity of the author of the allegedly defamatory statements was not known to the plaintiff.

- [56] The first factor to be considered is whether Cooper Creek has provided evidence sufficient to raise a bona fide. In its existing notice of civil claim, Cooper Creek pleads tortious interference. In this application, it relies on that cause of action, as well as civil conspiracy and breach of the Injunction. Its counsel states that Cooper Creek's intention, once it identifies the wrongdoers, is to either amend the notice of civil claim to include civil conspiracy or file a new claim.
- [57] The parties made submissions about whether Cooper Creek has a bona fide claim of tortious interference with economic relations, civil conspiracy or breach of the Injunction.
- [58] On this point, Mr. Perry submits that Norwich orders are only available in respect of proprietary claims, and as such are not available for the claims Cooper Creek seeks to advance. In support of this submission, he relied on Alberta Treasury, where Mason J. stated at para. 69 that:
- [69] Where a party requires assistance in tracing a proprietary claim, including a trust fund which has been misappropriated by a wrongdoer, equity has assisted by ordering third parties to provide documents and information relating to the affairs of an alleged wrongdoer and the identification of such wrongdoers.

[Citation omitted.]

- [59] Save for Kenney, all of the British Columbia cases cited by both parties involved proprietary claims. In addition to Procon and Equustek, both which I have already referred to, these included:
- a) Brito v. Terry L. Napora Law Corp., 2016 BCSC 1476 [Brito], which involved providing the names of the clients of a deceased lawyer in order to trace funds for disbursements paid to that lawyer; and
 - b) RTD Quality Services Inc. v. Dhatt, 2020 BCSC 1562, which involved the production of bank records necessary to trace funds allegedly misappropriated by an employee.
- [60] However, in none of the British Columbia cases did the court hold that a Norwich order is only available in respect of proprietary claims. That issue was not raised in any of those cases.
- [61] Houseman and Kenney were not proprietary claims; the Norwich orders in those cases were sought in relation to claims for defamation. Mr. Perry submits that a person has a proprietary interest in their reputation, and that the defamation cases were therefore effectively proprietary in nature. He submits that a defamation case was very different from the present case, in which Cooper Creek alleges that it has suffered financial loss in respect of a forest licence issued by the government. I note Abrioux J.'s comment in Equustek at para. 12 that the circumstances in which a Norwich order is available are evolving. Save for para. 69 of Alberta Treasury, I have not been directed to any other decisions which would suggest that Norwich orders are limited to proprietary claims and defamation. For the

purposes of this application, I will assume, without wishing to make a determinative finding, that a Norwich order may be ordered in the context of a non-proprietary claim.

- [62] Regarding a claim for civil conspiracy, Mr. Perry submits that this cause of action is not pleaded in Cooper Creek's notice of civil claim, nor is it mentioned in the notice of application; therefore, the claim is not properly before the court. I agree, and I will not consider whether Cooper Creek has a bona fide civil conspiracy claim against the LSWK or any other persons.
- [63] Regarding tortious interference with economic relations, Counsel for Cooper Creek refers me to 0856464 B.C. Ltd. v. TimberWest Forest Corp., 2012 BCSC 597 [TimberWest], for the elements of the tort. However, Cooper Creek did not make any submissions regarding how it proposes LSWK's alleged actions meet the elements of the tort. Thus, it is unclear whether or how Cooper Creek has a bona fide claim against LSWK for tortious interference with economic relations.
- [64] Tortious interference with economic relations requires interference by unlawful means: TimberWest at para. 30. Cooper Creek did not delineate what unlawful acts LSWK committed.
- [65] Most of LSWK's posts are not evidence of any sort of unlawful activity. It is lawful to engage in peaceful protest, to write letters to politicians about matters of social concern, to sign petitions, to hold potlucks and dances and other events to raise awareness, and to raise money to pay for legal fees, food and tents. Those activities are the lifeblood of democratic engagement, not the stuff of tortious interference, or breach of the Injunction.
- [66] The posts which arguably may be evidence of unlawful activity or breach of the Injunction, in my view, are those that refer to a blockade, and counsel the use of euphemisms, such as "holding space", instead of referring to a blockade. The Intake Document, which a number of LSWK posts link to, and which participants were required to read and agree to, is the most significant example of this.
- [67] Under the heading "Main Points", the Intake Document reads "When speaking with the public or industry workers = avoid using words like 'blocking the road' *instead =Holding space .. peaceful protestors in support of the Autonomous Sinixt." Under the heading "Camp Guidelines and Procedures", the Intake Document states:
- At least two people must be awake before work hours on all days in order to greet industry or law enforcement. They inform them that the blockade has been established to bring protection for the last remaining old-growth in BC .
 - If company officials are asking anyone * especially on camera - a sign they are preparing material to seek an injunction in court * if they will let them go to work, access logs or machinery, it is best to be vague about your intentions. Do not reveal your identity. You are not legally required to provide identification unless you are being arrested or detained by police Use positive language like: "We are here peacefully operating under Whuplakn to ensure the

ecosystems, life-forms and ecological services provided by this forest remain free of former harm*

- [68] The Intake Document suggests that LSWK was involved in a blockade of the Salisbury FSR, but that it wanted participants to avoid that language, and to instead refer to things like "holding space". That may be evidence of a breach of the Injunction or tortious interference with economic relations.
- [69] In Brito, Mr. Justice G.C. Weatherill stated at para. 21, that the plaintiff's case was very weak, but that he was not required to decide the merits of the case and could not say the claim was entirely frivolous or entirely without merit. On that basis, he found that a bona fide claim existed.
- [70] In light of that low bar, a rigorous examination of Cooper Creek's potential claims is not necessary. I accept, for the purposes of this application, that a bona fide claim for breach of the Injunction or tortious interference with economic relations exists against LSWK.
- [71] The third factor is whether the third parties are the only practical source of the information sought. Cooper Creek submits they are, because it is LSWK's intention to hide identities, with the result that it does not know who is behind these accounts.
- [72] I find that the third parties are not the only practical source of information. LSWK had an email address; Cooper Creek used that email address to send LSWK a copy of the Injunction. There is no evidence that Cooper Creek has sought any information directly from LSWK about its posts, or who is associated with LSWK.
- [73] As I discuss in detail below in addressing the individual accounts, it can readily be inferred who the individuals associated with almost all of the individual social media accounts are. Most of them were arrested by the RCMP on May 17, 2022 for allegedly breaching the Injunction. One of them is the application respondent, Mr. Perry. There is no evidence that Cooper Creek has requested any information from any of those individuals directly.
- [74] Cooper Creek could amend its notice of civil claim and name some or all of the individuals who appear to be associated with the individual social media accounts in issue in this application. If it did so, those individuals would be subject to the usual discovery processes provided under the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules], and could be required to provide documents, including any relevant social media activity.
- [75] Rather than seek information directly from LSWK or these individuals, or amend its notice of civil claim to name the individuals and use the normal discovery processes, Cooper Creek has resorted to the rare and unusual remedy of a Norwich order.
- [76] In the passage from GEA quoted by Abrioux J. in *Equustek*, the Ontario Court of Appeal held that a Norwich order may be available where "discovery is absolutely necessary".

- [77] This case is unlike the situation in *Houseman* where the plaintiff had no knowledge of the identity of the anonymous reviewers. The plaintiff in that case had no means of obtaining information about the identity of the anonymous reviewers other than by means of a Norwich order. In this case, Cooper Creek has not attempted to obtain any information directly, despite having ample evidence of the identity of most, if not all, of the individuals associated with the individual social media accounts. There is no urgency in Cooper Creek's application, and I reject any suggestion that the information it seeks will be lost if a Norwich order is not granted.
- [78] This case is similar to *Kenney*, where Saunders J. did not grant a Norwich order, because the information sought was available through a known individual that was not sued. *Kenney* concerned a defamation claim where the originator of the statement was unknown, but the plaintiff knew of a Mr. Watts who had repeated the statement. Saunders J. found that Mr. Watts could have been sued and the identity of the originator would have been found; either it was Mr. Watts, or he could have revealed his source. Thus, the plaintiff had not established that the third party was the only source of the information sought: *Kenney* at para. 36, 39.
- [79] Resorting to the equitable remedy of a Norwich order is not required in order to commence an action or continue with Cooper Creek's existing action. Nor is LSWK the only practical source of the information sought. In my view, and relying on *Kenney*, it is incumbent on a party seeking a Norwich order to obtain information of the kind sought by Cooper Creek to exhaust other available means of obtaining the information sought before asking the Court to make a Norwich order.
- [80] The fifth factor to be considered is whether the interests of justice favour disclosure.
- [81] LSWK was involved in grassroots organizing of a protest against logging activity. The great majority of its social media posts were intended to rally support for its cause and to mobilize its supporters to do things like write letters to politicians, sign petitions, engage in peaceful protest, get together at social activities, and raise funds for its activities. These are expressive and associational activities that engage the core constitutional values of freedom of expression, peaceful assembly and freedom of association, which are enshrined in s. 2 of the Canadian Charter of Rights and Freedoms. These are activities which are to be encouraged in a free and democratic society. This was recognized in the labour context in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 at para. 32, where the Supreme Court stated:

The core values which free expression promotes include self-fulfilment, participation in social and political decision-making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment.

- [82] Likewise, political protest in other social contexts is a legitimate exercise of democratic rights, as was recognized by a majority of the Supreme Court of Canada in *Morasse v. Nadeau-Dubois*, 2016 SCC 44 at para. 40, with respect to student protests.
- [83] While the Charter is not directly engaged by this application, the values which it embodies must be taken into account in considering whether the interests of justice favour disclosure of LSWK's information by the third parties. Notably, in *Olsen v. Facebook Inc.*, 2016 NSSC 155 at para. 11, Wood J. determined that in the context of a defamation case, freedom of expression must be weighed when determining whether to grant a Norwich order. Charter values can also be considered in determining whether it is in the balance of convenience to grant an injunction, another equitable remedy: *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at paras. 72, 79-82.
- [84] In my view, granting a Norwich order to require the third parties to disclose information about LSWK would have a chilling effect on LSWK and others engaging in expressive and associational activities in support of their political and social aims. Considered in light of the fact that a Norwich order is not the only practical means for Cooper Creek to obtain the information it seeks about potentially unlawful activities, it would not be in the interests of justice to grant the Norwich order sought in relation to LSWK.

Should a Norwich order be made in respect of the individual social media accounts?

- [85] Cooper Creek is seeking information from the third parties, not just about LSWK, but also about a number of other named social media accounts which it alleges have encouraged others to attend what it calls the "blockade".
- [86] Again, counsel for Cooper Creek did not make submissions on how the conduct of the persons controlling the individual social media accounts met the elements of a tort or were in breach of the Injunction. Further, Mr. Perry noted that these named social media accounts are not referred to in the legal basis of the notice of application only LSWK is. As a result, I have inadequate submissions on what misconduct is alleged regarding these accounts. On this point, as discussed below, I am skeptical that any unlawful conduct occurred in making the posts. All of these factors weigh against granting the Norwich order.
- [87] Even if Cooper Creek has a bona fide claim against the persons controlling these social media accounts, I am unwilling to grant the order since I have found that the third party media companies are not the only practical source for the information sought. I deal with each of these individual accounts below.
- [88] Cooper Creek applied for information relating to the following six Facebook accounts, which I deal with together:
- a) "Dayna Larson";
 - b) "Martin Gregory";

- c) "Naia Shine";
 - d) "Jase Aether", the full URL for the account is: <https://www.facebook.com/jason.vanrooyen.7>;
 - e) "Matt Eli", the full URL for the account is: <https://www.facebook.com/matt.perry.756>; and
 - f) "Andrea Fox", the full URL for the account is: <https://www.facebook.com/andrea.sevigny>.
- [89] The Facebook account named "Dayna Larson" made two posts. In one, dated May 7, 2022, the account updated her profile picture, and referred to herself as a "forest warrior". In the other, dated May 19, 2022, this account stated that 17 people, including herself, were "unlawfully arrested for holding space at the Argenta-Johnsons Landing Face".
- [90] On April 25, 2022 the "Martin Gregory" account posted about the camp at the base of the Salisbury FSR, asking people to "Come stand for a long fought for mountainside". The account also encouraged people to contact the local MLA and the Minister. Also, on April 25, 2022, the Martin Gregory account posted about a rally held that day, and "the amazing people who are holding space".
- [91] The "Jase Aether" account replied to Martin Gregory's April 25, 2022 post to provide the location coordinates for the gathering site, and a link to the LSWK Intake Document.
- [92] On April 26, 2022, the "Matt Eli" account reposted LSWK's post about the rally. Then on April 28, the "Naia Shine" account reposted LSWK's post about the potluck, and reposted Martin Gregory's April 25 post. Lastly, on May 25, the "Andrea Fox" account reposted LSWK's post about the rally.
- [93] The record shows that individuals named Dayna Larson, Martin Gregory Couch, Naia Shine, Jason Van Rooyen, Matthew Elijah Perry, and Andrea Sevigny were all arrested by the RCMP on May 17, 2022. Mr. Perry also responded to this application. It is reasonable to infer, if not self-evident, that the Facebook accounts listed above are controlled by the individuals arrested by the RCMP whose names correspond with the accounts. On this point, I draw attention to the names contained in the URLs listed above.
- [94] There is no evidence that Cooper Creek has sought any information directly from any of these individuals.
- [95] All of these individuals are known and could be asked for information directly, or could be added as defendants to Cooper Creek's notice of civil claim and thus be subject to discovery under the Rules. Consequently, I find that the third parties from whom discovery is sought are not the only practical sources of information available about the Facebook accounts listed above. On this basis alone, I would dismiss the Norwich order sought in relation to the Dayna Larson, Martin Gregory, Naia Shine, Jase Aether, Matt Eli, and Andrea Fox Facebook accounts.

- [96] Further, having reviewed the posts attributed to the Facebook accounts listed above, I do not see any evidence of those accounts encouraging anyone to engage in unlawful activity. For example, the Dayna Larson May 19, 2022 post describes the author's experience of being arrested, and encourages others to "get involved, sign petitions, and support this movement in any way you can." That does not constitute encouraging anyone to engage in unlawful activity. Thus, I am doubtful that Cooper Creek have a bona fide claim against the authors for anything contained in the posts.
- [97] Cooper Creek also seeks information from Facebook about an Instagram account called "the.cosmic.cardinal". It has the same profile picture as the Dayna Larson Facebook account, and it is reasonable to infer it is owned by Dayna Larson as well. In a May 7, 2022 post, the author describes their role with LSWK as being involved "as a content coordinator of sorts, or person that helps share posts and social media content". The author goes on to describe their personal motivations in being involved with LSWK.
- [98] On May 15, 2022, the.cosmic.cardinal reposted a LSWK post of that same date inviting people to the solar eclipse event. Then, on May 20, 2022, the.cosmic.cardinal published a post about being arrested. It is identical to the one posted by the Dayna Larson account on May 19, 2022.
- [99] For the same reasons I declined to make the Norwich order sought with respect to the Dayna Larson Facebook account, I decline to make the order sought with respect to the.cosmic.cardinal Instagram account.
- [100] Cooper Creek also seeks information from Facebook with respect to the Facebook account named "John Alton". The John Alton account posted on April 27, 2022, stating that "I'm heading up to Argenta for the blockade thursday morning if anyone wants a ride". The account named "Martin Gregory" replied to this post, stating "Hi John! It will be great to have you at camp. Just to clarify, there is no blockade. Civilians drove through the camp today, unimpeded. It is a peaceful protest camp." The John Alton account replied, thanking Martin Gregory for the correction.
- [101] On May 2, 2022, the John Alton account posted, stating that "our forest protectors up in Argenta could use some people support right now". On May 17, 2022, the John Alton account posted an invitation to "head on up and join the team".
- [102] There is no evidence that a John Alton was arrested, nor any evidence about whether John Alton is the name of an actual person or if it is a pseudonym. Nor is there any evidence that Cooper Creek has taken any steps to determine the identity of the owner of the John Alton Facebook account. I find that Cooper Creek has not established that the third parties are the only practical sources of information about the John Alton account. Further, the posts made by the John Alton account do not incite anyone to engage in unlawful activity. Saying you are a going to a protest site and offering a ride is not unlawful activity.
- [103] I would dismiss the Norwich order sought in respect of the John Alton account on this

basis.

[104] Finally, Cooper Creek seeks information from Facebook about an Instagram account named "damos_photography". No evidence was provided about this account. I dismiss the Norwich order sought in respect of it on that basis.

Conclusion

[105] For the reasons given, I dismiss Cooper Creek's application for Norwich orders in its entirety. Mr. Perry is entitled to his costs of this application.

"L.M. Lyster J."

LYSTER J.

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