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Court of Appeal Decision of the Week

# Protecting Journalists Covering Protests

**Case:** *Re Brake*, 2019 NLCA 17

**Keywords:** Freedom of the press, journalists, protests, aboriginal law, injunctions, contempt

### Synopsis:

In 2016, indigenous groups protested construction at Muskrat Falls, a hydroelectric project in Newfoundland and Labrador. Journalist Justin Brake was on site covering the protest. The main contractor, Nalcor Energy, obtained an *ex parte* injunction to end a blockade that had formed. Despite the injunction, the protests continued and grew larger. Nalcor obtained another *ex parte* order directing 22 protestors to appear in court to show cause why they should not be held in contempt for failing to comply with the injunction.

Mr. Brake filed an application to vacate the *ex parte* injunction order and the contempt appearance notice as they applied to him. He argued that his status as a journalist differentiated him from the other protesters and his presence at the protest site was solely to report on the activities. Nalcor should have disclosed these facts to the court and the failure to do so disentitles them to the relief they were seeking.

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. The applications judge stated:

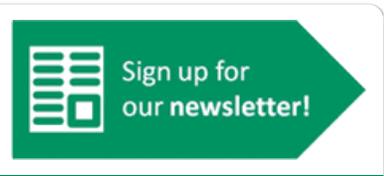
Mr. Brake did not have any special status in this case because of the fact he is a journalist. He was no more entitled to violate the Injunction Order by trespassing on the Muskrat Falls construction site than any non-journalists named in the Contempt Appearance Order who trespassed on the site. (para.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

The Court of Appeal of Newfoundland and Labrador allowed the appeal and declared that Mr. Brake is not bound by the *ex parte* injunction or the contempt appearance notice. The Court found that it was an error to find Mr. Brake’s status as a journalist not material to the outcome of the application:

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. (para. 73)

### Importance:

Towards the end of 2018, the Supreme Court of Canada released its decision in *R. v. Vice Media Canada Inc.*, 2018 SCC 53 which resulted in a reporter having to hand over his material about an accused terrorist. As much as that decision was seen as a blow for investigative journalism in Canada, the *Re Brake* decision will be seen as a positive for journalists covering protests.




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Justice Green, writing for the Court of Appeal, begins his analysis with general reflections on the problems with the use of injunctions in mass protest cases. He cautions courts granting injunctions to ensure that they are not overly broad and to exercise restraint in allowing contempt applications to go forward:

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. (para. 30)

In the present case, the overbreadth concerns became a reality: Mr. Brake was subject to a general “no trespass” prohibition which unduly and unnecessarily interfered with his function as a journalist even though he was not a participant in the ongoing protests. The intervener APTN explained the impact of the applications judge’s decision for journalism generally:

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. (para. 79)

Justice Green goes on to provide a clear list of criteria for courts to consider when determining whether the presence of a journalist in a protest is a material fact to be disclosed for the purpose of *ex parte* injunction or contempt order:

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. (para. 84)

Justice Green set out the rationale for that final point: “[A]boriginal 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.” (para. 81) With reference to the *Final Report of the Truth and Reconciliation Commission*, he further states:

[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.

Overall, this Court of Appeal’s decision in *Re Brake* provides guidance to judges grappling with injunctions that implicate the press and brings a measure of comfort to journalists embedded at protests.

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