

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**NOAH ALTER, JARRYD JAEGER,
COOPER ASP and THE FREE SPEECH CLUB LTD.**

PLAINTIFFS

AND:

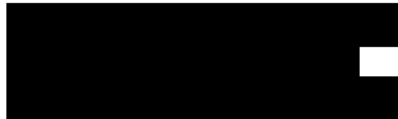
**THE UNIVERSITY OF BRITISH COLUMBIA, and
HIS MAJESTY THE KING IN RIGHT OF BRITISH COLUMBIA**

DEFENDANTS

**WRITTEN SUBMISSIONS OF HIS MAJESTY THE KING IN RIGHT OF THE
PROVINCE OF BRITISH COLUMBIA**

**Noah Alter, Jarryd Jaeger, Cooper Asp,
and The Free Speech Club Ltd.**

Glenn Blackett
Glenn Blackett Law



**His Majesty the King in right of
the Province of British Columbia**

Emily Lapper, Sergio Ortega, and
Karin Kotliarsky
Ministry of Attorney General



The University of British Columbia

Rodney Sieg and Natalia Tzemis
Harris & Company LLP



I. OVERVIEW

1. His Majesty the King in right of the Province of British Columbia (the “**Province**”) applies for an order under R. 9-5(1)(a):
 - a. striking the action against the Province, without leave to amend; and
 - b. dismissing the action against the Province on the basis that it discloses no reasonable cause of action as against the Province.
2. The factual matrix underpinning the plaintiffs’ *Charter* allegations is that:
 - a. in November 2019, one of the plaintiffs, the Free Speech Club Ltd. (the “**Club**”), entered into a contract with the University of British Columbia (“**UBC**”) to rent space to host an event at UBC’s Robson Square (the “**Event**”);
 - b. in December 2019, UBC cancelled the Event; and
 - c. UBC directed that all future events with a particular risk assessment be refused

(collectively, “**UBC’s Actions**”).
3. The plaintiffs argue that UBC is a government entity subject to the *Charter*. On that basis, the plaintiffs claim that UBC’s Actions breached their ss. 2(b) and (c) *Charter* rights to freedom of expression and freedom of peaceful assembly. The plaintiffs also claim against UBC in breach of contract and allege that UBC engaged in deceptive acts and practices.
4. The plaintiffs’ only claim against the Province is under ss. 2(b) and (c) of the *Charter* and is based on the same factual matrix outlined above, namely UBC’s Actions.
5. The plaintiffs’ claim against the Province is bound to fail.

6. First, the claim is bound to fail as a matter of law. The plaintiffs plead that through legislation and funding, the Province exercises “ultimate, extraordinary, routine, regular and highly detailed control” over UBC’s delivery of university education. However, the Supreme Court of Canada and, more recently, the BC Court of Appeal have rejected the proposition that the Province has day-to-day control of universities. The claim is therefore bound to fail as a matter of *stare decisis*.
7. However, even if this Court were to accept that UBC is government and subject to the *Charter* because it is controlled by the Province, that conclusion would not ground a claim against the Province under ss. 2(b) or (c) of the *Charter*. Rather, the appropriate defendant would be UBC. The plaintiffs do not allege that the Province was directly involved in any of the *Charter* breaches. Those alleged *Charter* breaches all rely exclusively on UBC’s Actions, which did not involve the Province. There are no material facts plead to support any cause of action against the Province.
8. Finally, if this Court were to find that UBC is a corporation controlled by government, then the plaintiffs’ claim against the Province would be statute-barred under s. 3(2)(d) of the *Crown Proceeding Act*.¹ Accordingly, assuming the plaintiffs’ own legal theory of their case is correct, the Province is not an appropriate defendant.
9. This Court should dismiss the claim against the Province and the plaintiffs may properly proceed with a claim against the defendant UBC.

II. FACTS

10. The plaintiffs are:

- a. the Club; and

¹ R.S.B.C. 1996, c. 89. (Joint Book of Authorities (“**Authorities**”), vol. 3, tab 76).

- b. three individuals who were UBC students at all material times, and executives of the Club.

11. The defendants to this action are UBC and the Province.

12. On December 19, 2022, the plaintiffs filed the notice of civil claim.

13. On March 13, 2024, the plaintiffs filed the amended notice of civil claim ("**AN OCC**").

14. The plaintiffs allege, at paragraphs 45 to 53 of the AN OCC, that:

- a. On November 25, 2019, the plaintiffs planned to host an event with Andy Ngo as the speaker. The Club entered into a contract with UBC to rent space at UBC's Robson Square.
- b. On December 19, 2019, Ainsley Carry, UBC's Vice President Students, directed UBC's Chief Risk Officer, Ron Holton, to cancel the Event and to refuse to host all future events with a high-risk assessment.
- c. On December 20, 2019, Ron Holton emailed the Club's administrator and corporate director, advising that UBC Executive had decided to cancel the Event due to safety and security concerns.

15. The plaintiffs also plead that:

- a. UBC receives funding from: (1) the Province; (2) the federal government; and (3) on occasion, municipal governments.²
- b. Through various policies and legislation, as well as through funding, UBC is by its very nature part of government, or, in the alternative, the Province functionally controls the delivery of university education at UBC.³

² Paras. 11, 21 of the AN OCC (Record, tab 7).

³ Paras. 12, 22 of the AN OCC (Record, tab 7).

16. The plaintiffs plead and rely on numerous provincial statutes that set out various statutory obligations on the part of UBC, including the *University Act*.⁴

17. In Part 2 of the ANOCC, the plaintiffs seek the following relief against the Province:

- a. a declaration that UBC's Actions breached the plaintiffs' rights under ss. 2(b) and (c) of the *Charter*;
- b. *Charter* damages; and
- c. costs and interest.

18. In Part 3 of the ANOCC, the plaintiffs allege, in respect of the Province, that:

- a. UBC is government for the purposes of s. 32 of the *Charter*;
- b. UBC's Actions constitute an infringement of the plaintiffs' rights under ss. 2(b) and (c) of the *Charter*; and
- c. *Charter* damages under s. 24(1) of the *Charter* are a just and appropriate remedy.

19. The plaintiffs also claim against UBC, but not the Province, in breach of contract and allege that UBC engaged in deceptive acts and practices.

III. SUBMISSIONS

20. The Court should strike the plaintiffs' claim against the Province pursuant to R. 9-5(1)(a) because the ANOCC discloses no reasonable claim against the Province.

21. In the alternative, any possible claim against the Province in the ANOCC is barred by s. 3(2)(d) of the *Crown Proceeding Act*.

A. The modern approach to R. 9-5

⁴ R.S.B.C. 1996, c. 46 (Authorities, vol. 3, tab 83). Paras. 14 to 20 of the ANOCC (Record, tab 7).

22. Under R. 9-5(1)(a), a claim will be struck if, assuming the facts pleaded are true, it is plain and obvious that the pleadings disclose no reasonable cause of action. In other words, if the claim has no reasonable prospect of success.⁵
23. The modern approach to R. 9-5 allows courts to resolve complex questions of law.⁶
24. The general rules pertaining to R. 9-5 apply to *Charter* claims⁷, specifically:
- a. a plaintiff is not entitled to rely on the possibility that new facts may turn up as the action progresses;⁸
 - b. the court is not to assume that speculative assertions are true;⁹ and
 - c. the court should strike conclusions of law that are not supported by the pleaded facts.¹⁰

B. No cause of action against the Province

25. The ANOCC discloses no cause of action against the Province, nor could there be a cause of action against the Province based on the pleaded facts.

It is settled law that the Province does not control UBC

26. The ANOCC suggests that, through legislation and funding, the Province exercised control over UBC in carrying out its day-to-day activities. The plaintiffs plead that this alleged control by the Province makes UBC either: (1) part of government; or (2) functionally controlled by government. However, neither assertion is supported at law.

⁵ *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17 ("**Imperial Tobacco**") (Authorities, vol. 2, tab 48).

⁶ *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 19 (Authorities, vol. 1, tab 5).

⁷ *Canadian Bar Association v. British Columbia*, 2008 BCCA 92 at para. 51 ("**Canadian Bar Association**") (Authorities, vol. 1, tab 12).

⁸ *Imperial Tobacco* at para. 22.

27. There are two ways in which the *Charter* can apply to an entity for the purposes of s. 32 of the *Charter*:

- a. if the entity is a part of government or is controlled by government; and
- b. even if the entity is not a part of government, the *Charter* will apply if the entity is implementing a specific government policy or program.¹¹

28. An entity may be considered a part of government if its activities are subject to “routine or regular control” by the government.¹² However, UBC is not subject to routine or regular control by the Province. As the Supreme Court of Canada made clear in *McKinney* and *Harrison*, insofar as the application of the *Charter* is concerned, universities (and UBC specifically) are not part of government or controlled by government.¹³

29. Further, UBC is not implementing a specific government policy or program by regulating the use of space on campus. In *BC Civil Liberties Association*, the BC Court of Appeal considered whether a university was implementing a government policy or program in “affording students a forum for free expression” by regulating the use of space on campus.¹⁴ Although the appellants in that case acknowledged the university was not “government” under the first branch of the s. 32 test, they relied on the second branch, to argue that the *Charter* should apply to the

⁹ *Young v. Borzoni*, 2007 BCCA 16 at paras. 30-32 (“**Young**”) (Authorities, vol. 3, tab 71); *Anderson v. Double M Construction Ltd.*, 2021 BCSC 1473 at para. 52 (Authorities, vol. 1, tab 3).

¹⁰ *Young* at para. 20; *Canadian Bar Association* at para. 51.

¹¹ *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at paras. 15-16 (Authorities, vol. 1, tab 23).

¹² *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 at 513-514 (“**Stoffman**”) (Authorities, vol. 3, tab 62).

¹³ *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 272-273 (“**McKinney**”) (Authorities, vol. 2, tab 35); *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 at 463-464 (“**Harrison**”) (Authorities, vol. 1, tab 25); see also *BC Civil Liberties Association v. University of Victoria*, 2016 BCCA 162 at paras. 21, 36; leave to appeal to the SCC denied 2016 CanLII 82919 (“**BC Civil Liberties Association**”) (Authorities, vol. 1, tab 6).

¹⁴ *BC Civil Liberties Association* at para. 22.

university's decision to cancel a student club's booking of outdoor space on campus for a student demonstration.¹⁵

30. The Court concluded that the university was not implementing a government policy or program in the circumstances and therefore, the *Charter* did not apply. More specifically, the Court of Appeal found that:

- a. there is no specific statutory direction in BC that governs a university's discretion to regulate, prohibit or impose requirements relating to activities and events on their property;¹⁶
- b. there is no routine or regular control of that power by the Province;¹⁷ and
- c. the Province did not assume or retain any express responsibility for the provision of a public forum for free expression on university campuses.¹⁸

31. The plaintiffs' claim against the Province is therefore bound to fail as a matter of law.

The plaintiffs fail to plead material facts to support their claim against the Province

32. However, even if this Court were not inclined to strike the claim as a matter of *stare decisis*, the claim remains bound to fail. The plaintiffs have not pleaded any material facts to ground a claim against the Province under ss. 2(b) or (c) of the *Charter*.

33. The only factual references to the Province in the ANOCC relate to the plaintiffs' argument that UBC is government because it is controlled by the Province. Even if taken to be true, the Province's control of UBC would not ground a claim against the Province under ss. 2(b) or (c) of the *Charter*.

¹⁵ *BC Civil Liberties Association* at para. 6.

¹⁶ *BC Civil Liberties Association* at para. 26.

¹⁷ *BC Civil Liberties Association* at para. 26.

¹⁸ *BC Civil Liberties Association* at paras. 32-33.

34. The plaintiffs do not allege that the Province was directly involved in the *Charter* breaches. Rather, the plaintiffs allege that their *Charter* rights were breached as a result of UBC's Actions. On the face of the pleading, UBC's Actions are decisions taken by UBC and its officials; they do not involve the Province. The plaintiffs do not plead any actions by the Province that would constitute a breach of their ss. 2(b) or (c) *Charter* rights. Therefore, the plaintiffs' claims against the Province are bound to fail.

The *Crown Proceeding Act* bars the action against the Province

35. In the alternative, if this Court accepts the plaintiffs' assertion that the *Charter* applies to UBC's Actions because UBC is part of government or functionally controlled by government, then the proceeding against the Province is barred by s. 3(2)(d) of the *Crown Proceeding Act*.

36. Section 3(2)(d) of the *Crown Proceeding Act* bars proceedings against the Province "for a cause of action that is enforceable against a corporation or other agency owned or controlled by the government". Therefore, if a plaintiff can enforce its claim against a defendant that is a corporation or agency owned or controlled by the government, then the Province continues to enjoy the common law immunity it enjoyed before the 1974 passage of the *Crown Proceeding Act*.¹⁹

37. The ANOCC does not disclose an independent claim against the Province, nor could there be an independent claim against the Province based on the pleaded facts. Therefore, even if the plaintiffs succeed in arguing that the *Charter* applies to UBC's Actions, then the plaintiffs' claim against the Province is barred by s. 3(2)(d) of the *Crown Proceeding Act*.²⁰

¹⁹ *Skibinski v. Community Living British Columbia*, 2010 BCSC 1500 at para. 85 (Authorities, vol. 3, tab 56) rev'd in part on other grounds 2012 BCCA 17 (Authorities, vol. 3, tab 57).

²⁰ *Vanmackelberg v. Insurance Corporation of British Columbia*, 1995 CanLII 1830 (BCSC) at para. 22 (Authorities, vol. 3, tab 67); *Skibinski* at para. 89; *Green v. Proline Management Ltd.*, 2017 BCSC 1656 at para. 42 (Authorities, vol. 1, tab 24); *Sellin and others v. Interior Health et al.*, (unreported, March 14,

38. To the extent that the ANOCC discloses any viable causes of action, those causes of action are properly enforceable against UBC and not against the Province.

Section 24(1) of the *Charter* does not provide a basis to name the Province

39. Contrary to the plaintiffs' assertion pleaded in Part 1, paragraph 5 of the ANOCC and repeated at paragraphs 22 to 24 of their Application Response, s. 24(1) of the *Charter* is a remedial provision, it does not provide an independent basis to name the Province as a defendant.²¹ If the *Charter* does not apply, or if there are no material facts pleaded to support any breach of the plaintiffs' *Charter* rights by the Province, then the plaintiffs are not entitled to any relief from the Province under s. 24(1).
40. The plaintiffs' reliance on *Vancouver (City) v. Ward* is misplaced.²² In *Ward*, the Court awarded *Charter* damages against the Province for conduct involving corrections officers who were provincial employees. In this case, on the face of the pleadings, the Province had no involvement in UBC's Actions giving rise to the ANOCC.
41. The Court in *Ward* held that governmental entities are liable for *Charter* damages because they are bound by the *Charter*, whereas individual actors, such as police officers, are not liable for *Charter* damages because, as individuals, they are not bound by the *Charter*. *Ward* does not stand for the proposition that *Charter* damages can only be awarded against the federal or provincial Crown. Rather, if the plaintiffs are successful in arguing that UBC is a government entity that is subject to the *Charter* under s. 32, then it would be open to the Court to award

2005, Kamloops Registry No. 36652, BCSC in Chambers) at paras. 6-11 (Authorities, vol. 2, tab 54); *Arhami v. British Columbia et al.*, (unreported, December 20, 2023, New Westminster Registry, No. S249380, BCSC in Chambers) at para. 10 (Authorities, vol. 1, tab 4).

²¹ *R. v. Ferguson*, 2008 SCC 6 at paras. 50-51 (Authorities, vol. 2, tab 47). See also *Bowen v. Canada (Minister of Employment & Immigration)*, [1984] 2 FC 507 (FCA) at 510 (Authorities, vol. 1, tab 9).

²² *Vancouver (City) v. Ward*, 2010 SCC 27 (Authorities, vol. 3, tab 66).

Charter damages against UBC. The Court would only be precluded from awarding *Charter* damages against individual actors, such as UBC employees.

42. There are various examples of courts awarding *Charter* damages against government entities other than the federal or provincial Crown. For example, in *Mason v. Turner*, the BC Court of Appeal upheld a *Charter* damages award payable by the City of Nelson for the actions of a police constable.²³ More recently, in *Stewart v. Toronto (Police Services Board)*, the Ontario Court of Appeal awarded the plaintiff *Charter* damages payable by the City of Toronto because the police conducted an illegal search of the plaintiff's belongings.²⁴ Neither the provincial Crown nor the federal Crown were parties to either action.

IV. RELIEF SOUGHT

43. The ANOCC should be struck and dismissed as against the Province under R. 9-5(1)(a), without leave to amend. Specifically, in striking the ANOCC:
- a. if the Court finds that the *Charter* does not apply to UBC's Actions, then the Court should strike the following paragraphs of the ANOCC:
 - i. Part 1: Statement of Facts – paragraphs 5, 7, 11-14, 16-25, 28, 66-73, 74(c), 82(b);
 - ii. Part 2: Relief Sought – paragraphs 4(a)(iii)-(v), 4(b), 5(a)(iv)-(vi), 5(b), 6(a)(iv)-(vi), 6(b), 7(a)(iv)-(vi), 7(b); and
 - iii. Part 3: Legal Basis – paragraphs 1(f)-(i); or
 - b. if the Court finds that either: (1) the plaintiffs did not plead material facts to support a cause of action against the Province; or (2) that s. 3(2)(d) of the

²³ *Mason v. Turner*, 2016 BCCA 58 at paras. 9, 16 (Authorities, vol. 2, tab 34).

²⁴ *Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255 at para. 149 (Authorities, vol. 3, tab 61).

Crown Proceeding Act bars a claim against the Province, then the Court should strike the following paragraphs of the ANOCC:

- i. Part 1: Statement of Facts – paragraph 5; and
- ii. Part 2: Relief Sought – paragraphs 4(b), 5(b), 6(b), 7(b).

44. In either case, His Majesty the King in right of the Province of British Columbia should be removed from the style of cause.

45. If the application is granted, the Province seeks leave to make brief written submissions on costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of April 2024.



Emily Lapper, Sergio Ortega, and
Karin Kotliarsky
Counsel for the Province