No. S2210080

Vancouver Registry

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 ARGUMENT OF THE PLAINTIFFS / RESPONDENTS – APPLICATION TO STRIKE

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I. INTRODUCTION

1. Almost 35 years ago, La Forest J., writing for the Supreme Court of Canada (the "**SCC**"), found that universities, including The University of British Columbia ("**UBC**"), were not "government" entities within the meaning of s. 32(1) of the *Canadian Charter of Rights and Freedoms* (the "***Charter***"). The Honourable Justice continued:

> *My conclusion is not that universities cannot in any circumstances be found to be part of government for the purposes of the Charter, but rather that the appellant universities are* not part of government given the manner in which they are presently organized and governed*. [emphasis added]*
>
> *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 1990 CarswellOnt 1019 ("***McKinney***"), para 46 (Joint Book of Authorities ("**Authorities**"), vol. 2, tab 35)

2. Times have changed.

3. Since that quartet of 1990 decisions[1] which considered the *Charter's* application to*, inter alia*, universities, the manner and degree of control exercised by His Majesty the King in Right of British Columbia (the "**Crown**") over UBC, and UBC's delivery of Crown programs has fundamentally evolved and increased.

> Amended Notice of Civil Claim, filed March 13, 2024 (the "**NCC**"), para 13 (Record, tab 7)

4. UBC is now subject to routine, regular and highly detailed control by the Crown through a "**Provincial Control Scheme,**" which affects all aspects of UBC's assets and operations, including:

   a. all of UBC's core functions;

   b. UBC's staff, faculty, and executive including composition (including promoting racial and gender equity), contract negotiation and terms, compensation, policies and conduct;

[1] *McKinney*, *Harrison* v. *University of British Columbia* [1990] 3 S.C.R. 451, 1990 CarswellBC 279 ("***Harrison***"), (Authorities, vol. 1, tab 25). *Stoffman* v. *Vancouver General Hospital*, [1990] 3 S.C.R. 483, 1990 CarswellBC 277 ("***Stoffman***") (Authorities, vol. 3, tab 62) , and *Douglas/Kwantlen Faculty Assn*. v. *Douglas College* [1990] 3 S.C.R. 570, 1990 CarswellBC 278 ("***Douglas***")(Authorities, vol. 1, tab 19)*,* collectively the "**University Cases**").

c. UBC's primary governing body, the Board of Governors (the "**Board**"), including its composition (including promoting racial and gender equity), conduct and objectives;

d. curriculum design and delivery;

e. student enrollment, tuition and fees, safety, mental health and experience;

f. UBC's relationship with indigenous peoples, including faculty training;

g. UBC's relationship with other public sector entities; and

h. UBC's capital planning, investment, maintenance and dispositions.

NCC paras 7-25 (Record, tab 7)

5. The underlying premise of the Crown's present application to strike is that the University Cases immunize Canadian universities to *Charter* scrutiny for all time regardless of changing circumstances. However, s*tare decisis* binds a court to apply the legal principles from a prior decision to the facts before the court. It does not bind a court to:

   a. apply the facts from a prior decision;

   b. ignore the unique facts before it; or

   c. arrive at the same outcome as the prior decision.

6. If *stare decisis* operated as proposed by the Crown – to bind courts to the facts and outcome of prior decisions – the legal principles expressed in prior caselaw would be rendered totally inert. This would be a complete inversion of *stare decisis*.

7. Rather, consistent with the doctrine of *stare decisis*, this Honourable Court should apply the legal principles expressed in the University Cases (and other caselaw) to the state of affairs which exists today. Doing so leads, inexorably, to the conclusion that the *Charter* must apply to UBC.

8. To hold otherwise is, simply, to carve-out a vast area of government activity from *Charter* scrutiny. Worse yet, the carve-out would apply at university campuses, which are *loci*:

… of discourse, dialogue and the free exchange of ideas; all the hallmarks of a credible university and the foundation of a democratic society.

Pridgen v. University of Calgary, 2012 ABCA 139 ("***Pridgen***"), para 122

(Authorities, vol. 2, tab 42)

9. The plaintiffs were students at the University of British Columbia (the "**Students**") who formed and were active with the corporate plaintiff, The Free Speech Club Ltd. (the "**Club**"). The Club's purpose was to facilitate educational freedoms (including freedom of inquiry and freedom of expression) for students and others at UBC through various speaker events.

Amended Notice of Civil Claim, filed March 13, 2024 (the "**NCC**"), paras 1 – 4 and 29 – 31

10. The University of British Columbia (the "**UBC**") publicly represents itself as valuing and protecting educational freedoms which, it agrees, are a *sine qua non* of university education.

NCC, para 32 - 33

11. After significant coercive efforts by the political action group ANTIFA and others to suppress educational freedoms at UBC in 2019, the Club planned to host and the Students planned to attend a January 29, 2020, speaking event featuring American journalist Andy Ngo speaking on the very relevant issue of ANTIFA violence. The event was booked with UBC.

NCC para 38 – 45

12. After a group called the Vancouver and District Labour Council wrote to UBC's President vilifying Ngo as "far right" and demanding the event be cancelled <u>expressly</u> for the purpose of suppressing expression at UBC, the university cancelled the event - in contravention of its own policies and without procedural fairness. UBC's stated reasons for the cancellation included the physical and psychological safety of students. In cancelling the event, UBC gave no consideration to educational freedoms, including as secured to the students by Canada's constitution and by contract.

NCC, paras 44 - 55

13. The cancellation chilled speech on campus, effectively destroyed the Club, and denied the Students their singular life opportunity to experience a genuine university education.

NCC, paras 56 and 61 - 63

14. This is an application by the Crown to strike the plaintiffs claims seeking a remedy under section 24(1) of the *Charter.*

Notice of Application by the Crown, filed March 22, 2024 (the "**NOA**")

15. The Crown, on the one hand, relies on the facts and outcome of cases decided decades ago when universities could still be fairly described by their "traditional nature … as a community of scholars and students enjoying substantial internal autonomy." The NCC demonstrates that this view of British Columbia universities is no longer valid. The Crown is now deeply involved in the regular and routine control of all aspects of the university's operations and assets.

McKinney, para 34

16. The plaintiffs, on the other hand, rely on the principles enunciated in those cases (and others) to demonstrate that UBC, as presently organized and governed, is "government" for the purpose of section 32(1) of the *Charter* by virtue of: regular and routine control; governmental objectives; being a quintessentially governmental entity; and delivery of government programs (university education and student safety).

17. Far from "certain to fail," the plaintiffs claims are very strong. Either the *Charter* is found to apply to UBC or the Crown's extensive activity in university education will be, improperly, immunized from *Charter* scrutiny.

II. LAW

A. Application to Strike Under Rule 9-5(1)(a)

18. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action, meaning the plaintiff has no chance of success.

R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42 ("***Imperial***"), para 17

(Authorities, vol. 2, tab 48)

Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441, 1985 CarswellNat 151 ("***Dismantle***"), para 8

(Authorities, vol. 2, tab 38)

19. Neither the length and complexity of the issues, nor the novelty of the cause of action, nor the potential for the defendant to present a strong defence are grounds to strike.

Only if the action is "certain to fail" because it contains a "radical defect" should the relevant portions of a plaintiff's claim be struck. The test is a stringent one.

Young v.Borzoni, 2007 BCCA 16, para 19 (Authorities, vol. 3, tab 71)

quoting *Odhavji Estate v. Woodhouse*, 2003 SCC 69, paras 14-15 (Authorities, vol. 2, tab 36)

20. The rule is a valuable tool to ensure the efficiency and correct results but is not to be used to render the law static and unchanging:

> *Actions that yesterday were deemed hopeless may tomorrow succeed … Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.*

Imperial, para 21

21. When considering a novel claim, the court should be cognizant of the difference between responsible, incremental extensions of legal doctrine achieved through accepted pathways of legal reasoning as compared to claims "divorced from doctrine, spun from settled preconceptions, ideological visions or freestanding opinions about what is just, appropriate and right."

Paradis Honey Ltd. v. Canada (Attorney General), 2015 FCA 89, para 117

(Authorities, vol. 2, tab 39)

22. An application to strike is premised on the pleadings, not on the evidence and not on what may be pleaded in the future as new facts emerge.

Imperial, para 22

23. Pleadings should be interpreted generously in *Charter* litigation and the court should accommodate any inadequacies which are mere drafting deficiencies.

Dismantle, para 14

Canadian Bar Association. v. British Columbia, 2008 BCCA 92, para 12

(Authorities, vol. 1, tab 12)

24. The court must consider the claim as pleaded and as it could be pleaded with appropriate amendments.

25. The only exception to the rule that facts pleaded are assumed to be true is facts "manifestly incapable of being proven" – which exception should be exercised with "great caution."

Imperial, para 22

Young, para 30

26. Courts have found allegations "incapable of being proven" where:

a. by their nature they are "speculation" – in *Dismantle* the court found the allegation that cruise missile testing increased the probability of nuclear war inherently speculative.

Dismantle, para 15

b. in actions involving, effectively, vexatious litigants abusing process:

Young, paras 6, 16 and 66

Anderson v. Double M Construction Ltd., 2021 BCSC 1473 ("***Anderson***"), para 15

(Authorities, vol. 1, tab 3)

Olenga v. British Columbia, 2015 BCSC 1050 ("***Olenga***"), paras 4, 12, 20 and 27

(Authorities, vol. 2, tab 37)

i. the allegations were proven false based on documentary evidence available to the Court;

Young, para 33

ii. there was a concession by the plaintiff that the allegation was conjecture and it was obvious there was no means of ever obtaining any supporting evidence (this was also called "speculation" by the British Columbia Court of Appeal, the "**BCCA**");

Young, para 34

iii. sweeping allegations were made against multiple different defendants without distinction – i.e. the allegations were patently aimless and incoherent scattershot (also called "speculation" by the BCCA);

Young, para 31 and 32

Olenga, para 18

iv. the allegations were lengthy, prolix, and incomprehensible ramblings to which it was impossible to meaningfully respond.

Anderson, paras 46 and 55

Olenga, paras 12, 20 and 23

27. The Crown's written argument does not include any suggestion the NCC contains "speculation." Assuming that argument has been abandoned, the plaintiffs do not address the issue in this written argument.

Anderson, para 54

28. A pleading may contain conclusions of law supported by pleaded facts.

Rule 3-7(9), NOA paras 1 and 2

29. The Crown's NOA (paras 1 and 2) seeks an order both to "strike" and to "dismiss" the NCC. The Crown seems to have abandoned its request to "dismiss" in its written argument. Rule 9-5(1) contemplates "striking" the claim in part or in full and includes ancillary powers, following the striking of the pleading, to grant judgment or dismiss the proceeding (i.e. to provide a remedy on the merits). This ancillary power would, for example, permit the court to grant judgment to a plaintiff where a defendant's response to civil claim had been struck. The Rule does not contemplate the "dismissal" of the "whole or any part of a pleading, petition or other document" that is found to be hopeless, scandalous, etc.

B. Stare Decisis

30. It is trite law that only the *ratio decidendi* of a case is binding through the principle of *stare decisis* (the *ratio* being the legal principle decided by the previous court, abstracted from the facts of the case). The application of the *ratio decidendi* may lead to a different outcome where the material facts are distinguishable.

Halsbury's Laws of England, vol. 18, § 535 (Authorities, vol. 3, tab 86)

R. v. Ingram, (1981) 12 Sask. R. 242, 1981 CarswellSask 25 ("***Ingram***"), para 7 (Authorities, vol. 2, tab 49)

R. v. Sullivan, 2022 SCC 19 ("***Sullivan***"), paras 6 and 64 (Authorities, vol. 2, tab 51)

31. While the outcome of each case depends on its unique facts and the legal principles set-down in prior caselaw, prior cases are not binding as to their facts or outcome.

Cameron v. Canadian Pacific Railway (1918), [1918] 2 W.W.R. 1025, 1918 CarswellSask 106 (Sask. C.A.), paras 4 and 5 (Authorities, vol. 1, tab 10)

Ingram, paras 7 - 9

R v.Couture, 2007 SCC 28, para 21 (Authorities, vol. 2, tab 45)

Carom v.Bre-X Minerals Ltd., 2010 ONSC 6311, para 32 (Authorities, vol. 1, tab 13)

Sriskandarajah v. United States of America, 2012 SCC 70, para 18 (Authorities, vol. 3, tab 60)

Canada (Attorney General) v. Confédération des syndicats nationaux, 2014 SCC 49, para 26 (Authorities, vol. 1, tab 11)

32. The doctrine of *stare decisis* is not applicable where a previous case has not laid down a substantive rule of law but has merely decided that a particular set of facts illustrates an existing rule.

Delta Acceptance Corp. v. Redman (1966), [1966] 2 O.R. 37, 1966 CarswellOnt 92 (Ont. C.A.), paras 3 and 4 (Authorities, vol. 1, tab 17)

33. A case is an authority only for what it actually decides, it is not authority for a proposition that may seem to follow logically from it.

R. v. Deur (1944), [1944] S.C.R. 435 (S.C.C.), 1944 CarswellQue 33, para 16 (Authorities, vol. 2, tab 46)

34. The use of cases as precedents is for the propositions of law that they contain, and it is no use to compare the special facts of one case with the special facts of another for the purpose of endeavouring to ascertain what conclusion ought to be arrived at in the second case.

Sample Estate, Re, [1955] 3 D.L.R. 199, 955 CarswellSask 12, para 8 (Authorities, vol. 2, tab 53)

35. *Stare decisis* applies vertically (courts are bound to follow precedent set by higher judicial authority) and horizontally (courts are bound to follow precedent set by courts of coordinate jurisdiction within a province) but not between provinces (although they may be persuasive).

Sullivan, paras 61 - 65

36. *Stare decisis* is subject to the exceptions set-out in *Sullivan* (para 73):

    a. subsequent decisions have affected the validity of the impugned judgment;

    b. some binding authority in case law or some relevant statute was not considered (i.e. the decision is *per incuriam*); or

    c. the judgment was unconsidered, a *nisi prius* judgment, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

37. *Stare decisis* is "not a straitjacket that condemns the law to stasis." Applying a "high threshold," a court may reconsider binding precedent where:

a. a new legal issue is raised – including arguments not raised in the precedent; or

b. there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" – as opposed to merely an "alternative analysis of existing evidence."

Bedford v. Canada (Attorney General), 2013 SCC 72 ("***Bedford***"), para 44 (Authorities, vol. 1, tab 7)

Carter v. Canada (Attorney General), 2015 SCC 5, paras 42 and 44 (Authorities, vol. 1, tab 14)

R v. Comeau, 2018 SCC 15, paras 31 and 34 (Authorities, vol. 2, tab 44)

38. In *McKinney,* La Forest J. gratuitously reminded the reader of the proper scope of *stare decisis* at para 46 (quoted above) where he expressly mentioned that the outcome of the University Cases was dependent on the evidence before the court at the time. In other words, it is the legal principles in the University Cases which are binding, not the outcome of those cases.

McKinney, para 46 (quoted at para 1, above)

C. Section 32(1) – What is Government?

39. The caselaw applying the "application" clause of the *Charter* (section 32(1)) recognizes a tension between characterizing the *Charter's* application clause:

a. too widely, which "… could strangle the operation of society and … 'diminish the area of freedom within which individuals can act';" and

McKinney, para 23

b. too narrowly, which would "permit the provisions of the *Charter* to be circumvented by the simple expedient of creating a separate entity and having it perform the role."

McKinney, para 220

see also *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844 ("***Godbout***"), at para 48

40. Section 32(1) is to be interpreted in a manner that is flexible, purposive, and generous, rather than technical, narrow, or legalistic.

McKinney, para 221

Dickson v. Vuntut Gwitchin First Nation, 2024 SCC 10 ("***Dickson***"), para 45

(Authorities, vol. 1, tab 18)

41. Courts have grouped the *indicia* of what constitutes "government" for the purpose of section 32 of the *Charter* into (often-overlapping) categories. For example, in *McKinney* Madam Justice Wilson, laid out the categories *circa* 1990 as:

    i. the control test: does the legislative, executive or administrative branch of government exercise general control over the entity in question?;

    ii. the government function test: does the entity perform a government function?; and

    iii. the government entity test: is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?

McKinney, para 248

42. Following the SCC's decisions in *Eldridge* v*. British Columbia (Attorney General)* [1997] 3 S.C.R. 624 ("***Eldridge***") and *Godbout*, Madame Justice Paperny of the Alberta Court of Appeal laid out the categories *circa* 2012 as:

    iv. government actors by nature: is the entity government either by its very nature?;

    v. government actors by virtue of legislative control: is the entity subject to a sufficient degree of governmental control by government?;

    vi. bodies exercising statutory authority: does a statutory delegate exercise some form of coercive power that belongs to government alone?; and

    vii. non-governmental bodies implementing government objectives / *Eldridge*: is a non-governmental entity carrying out a specific governmental objective?

Pridgen, paras 78 – 99

43. For the purpose of this written argument, the plaintiffs focus on four categories:

    a. governmental control (categories i and v);

    b. governmental objective (category ii);

    c. government by nature (category iv); and

d. government program (category vii).

i. Governmental Control

44. The University Cases focused heavily on the degree to which the entities were controlled by government.

45. While the universities were found to be substantially funded by and regulated by government and, therefore, had their "fate … largely in the hands of government …" they were nonetheless found to be "essentially autonomous." Various *indicia* of control were noted but, perhaps, the most significant dividing line between Douglas College (which was found to be government) and the universities and the hospital (which was found not to be government) was the line between "ultimate or extraordinary control and routine or regular control."

McKinney, para 40
Harrison, para 56
Stoffman, para 102

46. In *McKinney*, the majority found:

a. the mere fact that an entity was a creature of statute given natural person powers was "in no way sufficient" to make its actions subject to the *Charter*;

b. the fact that the university served a "public service" and, as such were subject to judicial review in respect of certain decisions, did not make a university subject to the *Charter* because the prerogative writs are to enforce law and procedure, not "substantive rights;"

c. the implementation of mandatory retirement was not "taken under statutory compulsion";

d. the mere fact that the university performed a function within the legislative jurisdiction of an order of government was insufficient to attract *Charter* scrutiny; and

e. the university's financial and regulatory dependence on government did not make them subject to the *Charter* because other non-governmental organizations are in

the same position and, in any case, the "government has no legal power to control the universities" and any such attempt "would be strenuously resisted."

McKinney, paras 30, 33, 34, 35, 36, 40 - 42

47. Wilson J., in dissent, rested her opinion on many of the same *indicia* and, in addition:

    a. that government financial contributions gave government a "substantial measure of control" over universities; and

    b. that government exercised control over new programs in consideration of "academic considerations, societal need, student demand, economic constraints, and duplication of existing programs."

McKinney, paras 254, 257

48. The most significant point of divergence between the majority and Wilson J. was, according to Wilson J, differing conceptions of government as either:

    a. the "oppressor of the people" who's function is to enact coercive laws, which Wilson J. found to be "no longer valid in Canada, if indeed it ever was;" or

    b. a guarantor of socioeconomic benefits including adequate health care, access to education and a minimum level of financial security, provided through "many different instrumentalities."

McKinney, paras 189, 218, 220

49. The following year, in *Lavigne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211, 1991 CarswellBC 1038 ("***Lavigne***") (to quote Paperny J.A. in *Pridgen)*:

> *[75] … LaForest J., who had earlier authored the majority judgment in McKinney, embraced a similarly broad view and wrote:*
>
> > *In today's world it is unrealistic to think of the relationship between those who govern and those who are governed solely in terms of the traditional law maker and law subject model. We no longer expect government to simply be a law maker in the traditional sense; we expect government to stimulate and preserve the community's economic and social welfare.... To say that the Charter is only concerned with government as law maker is to interpret our Constitution in light of an understanding of government that was long outdated even before the Charter was enacted.*

see also *Lavigne*, para 226 (Authorities, vol. 1, tab 29)

50. In *Harrison*, the majority provided very little section 32(1) analysis, citing "relatively minor factual differences" with *McKinney*. While the majority acknowledged a "higher degree of governmental control" at UBC in *Harrison* than at the University of Guelph in *McKinney* based on facts including that "the Lieutenant Governor appoints a majority of the members of the university's board of governors [and] that the Minister of Education may require the university to submit reports or other forms of information," the court found such control was merely "ultimate and extraordinary" rather than routine or regular. Commenting on legislation imposing "fiscal accountability" on UBC (pursuant to the *Financial Administration Act*, S.B.C. 1981, c. 15, and *Compensation Stabilization Act*, S.B.C. 1982, c. 32 which, Wilson J. noted, treated UBC as a government body) the court found "fiscally accountable under these statutes does not establish government control or influence upon the core functions of the university."

Harrison, paras 14 and 56.

51. Only in Wilson J.'s dissent is there a thorough itemization of the "higher degree of governmental control" present in *Harrison* including:

    a. the Lieutenant Governor in Council (which will be referred to simply as the Crown herein) was a "Visitor" with concomitant powers;

    b. the majority of the board was appointed by the Crown, and the entire board served at the Crown's pleasure;

    c. the Board was given special government like powers including expropriation and exemption from expropriation and taxation;

    d. asset dispositions were subject to Crown approval;

    e. statutory duties to, *inter alia*, carry on the work of a university;

    f. 80% of UBC's operating costs were borne by the Crown;

    g. the Crown had control over UBC's foundation; and

    h. the Crown had control of financial dealings through the *Financial Administration Act*, S.B.C. 1981, c. 15, and *Compensation Stabilization Act*.

McKinney, paras 5 - 17

52. In *Stoffman*, reflecting on sections of the *Hospital Act*, R.S.B.C. 1979, c. 176 which, *inter alia*, required the hospital to:

a. make room for Crown representation on its board;

b. have a board and by-laws thought necessary by the minister;

c. obtain approval of a constitution and its by-laws and rules; and

d. comply with the conditions prescribed by the Crown, "a provision which leaves it open for the [Crown] to set virtually any requirement deemed appropriate",

La Forest J. stated:

> *[102] …While it is indisputable that the fate of the Vancouver General is ultimately in the hands of the Government of British Columbia, I do not think it can be said that the Hospital Act makes the daily or routine aspects of the hospital's operation, such as the adoption of policy with respect to the renewal of the admitting privileges of medical staff, subject to government control. On the contrary, it implies that the responsibility for such matters will, barring some extraordinary development, rest with the Vancouver General's board of trustees.*
>
> *…*
>
> *[104] The same can be said with respect to the minister's power to order a revision of a hospital's by-laws, at least until such revision has actually been ordered. [emphasis added]*

53. In *Douglas,* the SCC found "direct and substantial" governmental control, notwithstanding the college's board retaining a "measure of discretion," by virtue of:

a. the college being created for the purpose of conducting post-secondary education and training in British Columbia;

b. the college being, for all purposes, an agent of the Crown;

c. the College's board being, appointed by and removable at the pleasure of the Crown; and

d. The Crown being able "by law [to] direct its operation" including:

i. in consultation with the college, setting policies and directives for post-secondary education and training in the province;

ii. approval of board bylaws; and

iii. providing 83% of its operating funds.

Douglas, paras 36, 37 and 49

54. Wilson J., in her concurring opinion in *Douglas*, noted that, not only was the minister empowered to "mold college policy", the minister had done so on at least two occasions prior to 1990: in 1980 the minister divided the college into two separate institutions (with no evidence the board participated in that decision); and in 1985 the minister informed the college by letter of his intention to transfer a nursing program to the college from another post-secondary institution in the province.

Douglas, para 11

55. In Lavigne, a sufficient degree of governmental control was found to render the Council of Regents government under section 32. While in Douglas the college's constituent act expressly described it as an "agent" of the Crown, in Lavigne the act simply gave the minister power to conduct and govern the colleges "assisted" by the Council:

> *… But the reality is the same. The government, through the Minister, has the same power of 'routine or regular control' …*

Lavigne, para 20

56. The more recent case of *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 ("***Greater Vancouver***") focused on two transit authorities: TransLink, which operated in the Greater Vancouver Regional District (the "**GVRD**"); and BC Transit, which operated outside the GVRD. The trial court found BC Transit a government entity under section 32 of the *Charter*, which finding was not appealed to the SCC:

> *It is clearly a government entity. It is a statutory body designated by legislation as an "agent of the government", with a board of directors whose members are all appointed by the Lieutenant Governor in Council [who] has the power to manage BC Transit's affairs and operations by means of regulations … Thus, BC Transit cannot be said to be operating autonomously from the provincial government, since the latter has the power to exercise substantial control over its day-to-day activities.*

Greater Vancouver, para 17 (Authorities, vol. 1, tab 23)

57. The SCC agreed with the lower courts that TransLink was, likewise, government because, *inter alia*:

    a. the GVRD (found to be a government) could[2] exercise "substantial control over the day-to-day operations of TransLink;"

    b. the GVRD had power to appoint the vast majority (12 of 15) of the members of TransLink's board;

    c. to the extent the GVRD did not have complete control over TransLink, control was shared by another order of government: the Province;

    d. it could not be viewed to be operating "independently or autonomously";

    e. TransLink's strategic transportation plan had to be ratified by the GVRD and TransLink was required to "prepare all its capital and service plans and policies and carry out all its activities and services in a manner that is consistent with its strategic transportation plan;" and

    f. the GVRD ratified bylaws relating to a variety of taxes and levies.

Greater Vancouver, paras 17 – 21

58. It should be noted from the above cases that:

    a. no one *indicium* of control was conclusive and any particular indicium may be found to have either no, or low or high probative value depending on the remaining factual matrix - for example:

        i. while in *Douglas,* the proportion of government funding (83%) was highly probative, in *McKinney,* the same proportion (78.9%) was not;

McKinney, para 39

Douglas, para 37

        ii. while in *Douglas* the fact of the college being designated an "agent" under the legislation was key, while in *Lavigne* there was no such designation but the court nonetheless concluded "the reality is the same;"

[2] Note the court does not find the GVRD does <u>in fact</u> exercise such control.

Douglas, paras 34 and 36

Lavigne, para 20

iii. while in *Stoffman,* the court found a statutory assignment of management and control to the board "meaningless" unless control was understood to be ultimate and extraordinary rather than routine or regular, in *Douglas*, the court found "direct and substantial" governmental control notwithstanding that "the affairs of the college [were] managed and directed by a board of seven members;"

Stoffman, para 102

Douglas, para 37

iv. while in *Douglas,* the board being removable by the Crown was central, in *Harrison* that same power was not even expressly referenced by the majority; and

Douglas, para 49

v. while in the University Cases, the <u>mere</u> existence of a means of control was characterized as "extraordinary and ultimate control" ("… at least until such revision has actually been ordered.") and therefore insufficient to establish government control, in *Greater Vancouver* the court characterized the mere existence of such control mechanism as a decisive "…power to exercise substantial control over [BC Transit's] day-to-day activities," and as "… substantial control over the day-to-day operations of TransLink."

Stoffman, paras 102 - 104

Harrison, para 56

Greater Vancouver, paras 17 - 21

b. in *Harrison* (and to some extent *McKinney*) the court was particularly interested in whether the government had "control or influence upon the <u>core functions</u> of the university" [emphasis added];

Harrison, para 56

McKinney, para 436

c. the Crown merely <u>having</u> a power is often differentiated from the government <u>actually exercising</u> that power (however, see subparagraph 58(a)(v), above). In fact, in performing the section 32 analyses the above cases made very little

reference to how the entities and government actually interacted. [3] Rather, the cases were largely decided on the basis of the powers granted under the applicable regulatory frameworks not whether and to what extent those powers were actually deployed.[4] It is obvious from the cases, that to the extent power is in fact exercised by the Crown, the application of the *Charter* was more likely.

see especially *Stoffman*, para 104

59. The control test is, therefore, a highly contextual analysis to determine, ultimately, whether the government exercises a sufficient degree of control so as to alter the "essentially autonomous" nature of the entity.

Douglas, para 49

ii. Governmental Objective

60. A central feature in the various section 32 tests (and especially Wilson J.'s government entity test) and a through-line in the above cases is a characterization of the objectives of the entity and, in particular, whether the entity pursues merely its own objectives or the objectives of the Crown.

61. In *McKinney,* the majority's analysis depended heavily on a finding that universities pursue their own objectives and not governmental objectives. For example:

    i. the majority's rejection of the university being considered government because it was a creature of statute with natural person powers was premised on the observation that such an entity "may be established to facilitate the performance of tasks that those seeking incorporation wish to undertake and to control, not to facilitate the performance of tasks assigned to government;"

    McKinney, para 30

    ii. the majority dismissed the applicability of Professor Hogg's concern, echoed in *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038, that government might "authorize action by others that would be in breach of the

[3] See narrow exceptions at: a. *McKinney*, para 39 (funding levels and program approval) and Wilson J.'s dissent at paras 252 (funding), 253 (funding) and 257 (student loans); b. *Douglas*, para 37 (funding) and Wilson J's concurring opinion at para 11 (see para 26 above) and 13 (funding); c. *Harrison*, only Wilson J.'s dissenting opinion at para 11 (funding); and d. *Stoffman*, para 93 and 94 ("instigator" of retirement policies) and Wilson J.'s dissenting opinion at para 13 (funding) and 14 (physician fee structure).
[4] See above at paras 46(e), 50, 52, 57, and 58(a)(v).

Charter" on the grounds that such concern applies only where an entity is performing a governmental objective not, "private individuals [doing] things of their own choosing without engaging governmental responsibility;"

McKinney, para 31

iii. the majority indicated that, had the university's actions been "taken under statutory compulsion" or "following the dictates of government" rather than "acting purely on their own initiative," the *Charter* may have applied; and

McKinney, para 35

iv. while the university's "fate [was] largely in the hands of government" they were not organs of government because their governing board's "duty is not to act at the direction of the government but in the interests of the university."

McKinney, para 40

62. Similarly, in *Stoffman:*

a. the fact the board could be required by the minister to adopt specific by-laws did not "undermine its responsibility for by-laws or rules … which it adopts on its own initiative and pursuant to its own sense of what is in the best interests of the Vancouver General;" and

b. the ministerial power of approval of board bylaws was dismissed as:

… nothing more than a mechanism to ensure that the hospital's actions do not run counter to the powers conferred on the government … to prescribe standards in respect of hospital administration . It is a mere supervisory power to that end. It does not displace the ongoing responsibility of its board to manage the affairs of the hospital for the benefit of the community.

Stoffman, paras 96 and 104

63. In *Douglas,* the college was found to be government, in large measure, due to its pursuit of governmental objectives: "… the college is a Crown agency established by the government to implement government policy."

Douglas, paras 9, 18, 37 and 49

64. Likewise, in *Greater Vancouver,* TransLink was government because, *inter alia*, "it has no independent agenda." Commenting on this aspect, the Alberta Court of Appeal's Justice M. Crighton later stated:

> *… [Greater Vancouver] rests on the ability to identify an area of government policy and objectives that the University can be said to be implementing for the state more broadly and not just for internal University objectives.*

UAlberta Pro-Life v. Governors of the University of Alberta, 2020 ABCA 1 ("***UAlberta***"), para 139 (Authorities, vol. 3, tab 65)

See also *Greater Vancouver*, para 20 and 21

65. As to the scope of what might be described as a "governmental objective," Wilson J. in *McKinney*, informed by a broader view of government than simply "the maker and enforcer of laws," found, *inter alia*, the university to be subject to the *Charter* because it performed a government function (education) which, "… has been a traditional function of governments in Canada." Wilson J. rejected the argument that the *Charter* ought only apply in this respect to "inherently" governmental functions:

> *A function becomes governmental because a government has decided that it should perform that function, not because the function is inherently a government function. [emphasis added]*

McKinney, para 238

66. While the *McKinney* majority ultimately disagreed on the disposition, it agreed with this particular principle:

> *… the Charter is not limited to entities which discharge functions that are inherently governmental in nature. As to what other entities may be subject to the Charter by virtue of the functions they perform, I would think that more would have to be shown than that they engaged in activities or the provision of services that are subject to the legislative jurisdiction of either the federal or provincial governments. [emphasis added]*

McKinney, para 36

iii. Government by Nature

67. In *Eldridge,* La Forest J. noted two bases upon which an entity may be found to be government for the purpose of the *Charter*: "either by its very nature or in virtue of the degree of governmental control exercised over it."

Eldridge, para 44 (Authorities, vol. 1, tab 20)

68. A finding that an entity is government "by its very nature" is best typified by *Godbout* in which the SCC determined that a municipality was subject to the *Charter*. According to La Forest J. (and the two concurring justices) the:

> *… ambit of s. 32 is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the federal or provincial governments.*

Godbout, para 47

69. La Forest J. based his opinion on the following *indicia*:

    a. Municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to legislatures: *"[t]o my mind, this itself is a highly significant (although perhaps not a decisive)* indicium *of 'government' …"* (It should be clarified that municipal councils are, in fact, elected by the members of the public who reside within the municipality's jurisdiction.)

    b. Municipalities possess a general taxing power. (Again, it should be clarified that while Parliament has an unrestricted right of taxation under the *Constitution Act*, 1867, section 91(3), the Provinces enjoy more restricted authority under sections 92(2) and 92(9), and municipalities enjoy only such powers of taxation as are granted to them by a provincial legislature – such as sections 280 and 396 of the *Vancouver Charter*, S.B.C.1953, c 55 (the "***Vancouver Charter***")).

    c. Municipalities are empowered to make laws, to administer them and to enforce them within a defined territorial jurisdiction – to enact coercive laws binding on the public generally, for which offenders may be punished.

    d. Municipalities derive their existence and law-making authority from the provinces.

Godbout, paras 51 - 55

70. With respect to this last point, the court found this *indicium* most significant, although it noted that municipalities "have distinct political mandates" and are not, therefore, "agents" of the province. Compare this to the argument in *McKinney* that universities were also creatures of statute with such powers as granted by the legislature. As shown above, La Forest J. rejected this argument on the basis that universities were doing "things of their own choosing without engaging governmental responsibility." This

apparent contradiction between *McKinney* and *Godbout* (i.e. the pursuit of its "own objectives" being an *indicia* against or for a finding of *Charter* applicability) can be reconciled on the basis that what a municipality chooses to do is its "political mandate" – i.e. it pursues the objectives of the democratic electors within its jurisdiction. In other words, contrary to the general rule (that an entity pursuing its "own objectives" is less likely to be a government entity under section 32(1) of the *Charter),* an entity pursuing its "own objectives" is evidence the entity is government if such objectives are the objectives of a democratically elected body.

McKinney, para 31

Godbout, para 52

71. The "government nature" test was further fleshed-out in *Greater Vancouver*. There the GVRD was determined to be government because:

    a. the *Local Government Act*, R.S.B.C. 1996, c. 323 (the "***LGA***") defined "local government" to include "the council of a municipality" and "the board of a regional district" including electoral area directors;

    b. the *LGA* described regional districts as "independent, responsible and accountable order[s] of government within their jurisdiction" intended to provide "good government for its community"; and

    c. the LGA's designation of regional districts as "government" was consistent with the powers granted to the GVRD by statute:

        i. to operate any service the board considered necessary or desirable for its geographic area;

        ii. to recover the costs of its services; and

        iii. to make bylaws which are enforceable by fine or by imprisonment.

Greater Vancouver, paras 18 and 19

72. To these *indicia* of "government nature" should be added the "special government-like powers" noted by Wilson J.: the power of expropriation; exemption from expropriation; and exemption from taxation.

Harrison, para 6

Douglas, para 6

73. Finally, the majority in *Douglas* found that the college's designation as a Crown agent (or "agency") made "immediately evident" that "the college is simply a delegate through which the government operates a system of post-secondary education in the province."

Douglas, para 37

iv. Government Program

74. At least as early as the University Cases, the SCC has recognized the possibility of *Charter* application to non-government entities in respect of "some functions." The impetus for such recognition is, again, the risk that government might circumvent the *Charter* by the simple expedient of "creating a separate entity and having it perform the role."

Harrison, para 67

McKinney, paras 42, 45 and 220

75. The principle was established and applied in *Eldridge,* where La Forest J. found that a non-governmental entity's delivery of "health services" (as generally defined by the *Canada Health Act,* R.S.C. 1985, c. C-6, the "***CHA***") attracted *Charter* scrutiny. La Forest J. stated:

> *… an entity may be found to attract Charter scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity … but rather into the nature of the activity itself … If the act is truly "governmental" in nature - for example, the implementation of a specific statutory scheme or a government program - the entity performing it will be subject to review under the Charter only in respect of that act, and not its other, private activities. [emphasis added]*

Eldridge, para 44

76. The court also observed that,

> *… The factors that might serve to ground a finding that an activity engaged in by a private entity is "governmental" in nature do not readily admit of any* a priori *elucidation*. McKinney *makes it clear, however, that the* Charter *applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it … [emphasis added]*

Eldridge, para 42

77. As stated in *McKinney*, the mere performance of a "public function" is insufficient to attract *Charter* scrutiny (see para 46(b), above). Rather, "it must be found to be implementing a specific governmental policy or program." This condition ought not be too formalistically applied. In *Eldridge* at para 44 (cited at para 75 above) La Forest J. described a "specific statutory scheme or a government program" as just an "example" of an activity that might "be ascribed to government."

Eldridge, paras 43 and 44

78. While the applicable legislation in *Eldridge* generally defined the "health services" at issue (including those "normally available" and "historically provided" at hospitals):

    a. a nine-member panel (the "**Commission**") composed of representatives from the government, the British Columbia Medical Association and healthcare consumers had complete discretion (subject to the general requirements of the *CHA*) to determine what non-hospital services would or would not be provided; and

    b. individual hospitals had complete discretion to determine the hospital services they would and would not provide, the manner of providing such services, and how they would allocate annual grants received for hospital services provided the previous year.

Eldridge, paras 24 - 34, 49 and 50

79. The *Charter* breach in *Eldridge* was alleged to have arisen from the failure of the Commission and hospitals to provide sign-language interpreters to patients with hearing impairment seeking health services. None of the applicable legislation was found to either require or prohibit the provision of interpreters (i.e. sign language interpretation was not the relevant government program). Nevertheless, the SCC found the failure to provide interpretation a breach of section 15(1) of the *Charter*. The court accepted the appellants' assertion that:

> *… sign language interpretation, where it is necessary for effective communication, is integrally related to the provision of general medical services. [emphasis added]*

Eldridge, paras 29, 34 and 69

80. The court found that "health services" qualified as a program ascribed to government because:

a. although hospitals had:

> *… existed long before the statute, and have historically provided a full range of medical services. In recent decades, however, health care, including that generally provided by hospitals, has become a keystone tenet of governmental policy;*

b. as to hospital services, the government remained responsible to determine the service to be delivered (at government expense) and the persons entitled to receive it (subject to the broad discretion referred to at para 78 above); and

c. as to non-hospital services, the Commission was implementing a government policy ("ensur[ing] all residents receive medically required services without charge") when it determined what services would qualify for funding.

Eldridge, paras 50 - 52

81. As set-out by the test:

> *While it is a private actor that actually implements the program, it is government that retain[ed] responsibility for it.*

Eldridge, para 42

82. Distinguishing *Stoffman*, which determined that a mandatory retirement policy at the hospital was not conduct attracting *Charter* scrutiny, La Forest J. stated:

> *Unlike* Stoffman*, then, in the present case there is a "direct and ... precisely-defined connection" between a specific government policy and the hospital's impugned conduct. The alleged discrimination - the failure to provide sign language interpretation - is intimately connected to the medical service delivery system instituted by the legislation. The provision of these services is not simply a matter of internal hospital management; it is an expression of government policy [emphasis added].*

Eldridge, para 51

83. Interpreting these reasons, Justice P. R. Jeffrey of the Alberta Court of Queen's Bench stated:

> *Central to that determination is whether "there is a 'direct and ... precisely-defined connection' between a specific government policy and the [institution]'s impugned conduct" … The Court looks at whether the impugned activity is closer to the institution's public functions — its core raison d'être, as was the case in Eldridge,*

or to its private 'mission-neutral' activities, as was the case in McKinney. [emphasis added]

R. v. Whatcott, 2012 ABQB 231 ("***Whatcott***"), para 21 (Authorities, vol. 2, tab 52)

84. The underlined portion of Jeffrey J.'s interpretation of *Eldridge* is likely incorrect. As seen above, that government control relates to an entity's core functions is an *indicium* of control for the purpose of finding an entity government *per se* under section 32(1) (see para 58(b)). Where, however, La Forest J. discussed the "direct and ... precisely-defined connection" he was discussing the "government program" test and, in particular, the connection between the "government policy" and the impugned conduct (see *Eldridge*, paras 47 and 51). In other words, once a government policy (or "program") is identified, in order for the *Charter* to apply to the impugned conduct, the conduct must be related to the program. *Eldridge* identified such a connection between the program (hospital services) and the impugned conduct (sign language interpretation): communication is necessary to receive medical services (see quote at para 79, above). That an entity may be delivering a government program close to its core function is irrelevant to *Eldridge* but would be a relevant *indicium* of government control and government objective.

85. *Eldridge* demonstrates that:

a. a government funded program to deliver a service through or with the involvement of a private entity;

b. notwithstanding broad discretion on the part of the entity to define the service, to provide some services and not others, and as to the manner of delivery; and

c. notwithstanding that the service was historically provided by that entity without government involvement,

constitutes an activity "ascribed to government" attracting *Charter* scrutiny provided there is also a "direct and precisely-defined connection" between the government activity (eg health services) and the impugned conduct (eg. refusing to provide sign language interpretation).

86. It is also noteworthy, for the purpose of the present action, that the program ascribed to government in *Eldridge* was health services. Health services were found to inherently include communication, including sign language interpretation where necessary. It was the failure to provide sign language interpretation which constituted the section 15(1) violation. That failure was in no way at the government's direction.

87. *Eldridge* has been considered in the university context in a number of Canadian cases.

88. In *Lobo* v. *Carleton University* 2012 ONCA 498 ("***Lobo CA***") (an appeal of *Lobo* v. *Carleton University*, 2011 ONSC 4680 ("***Lobo 2***"), following an earlier decision in *Lobo* v. *Carleton University* 2012 ONSC 254 ("***Lobo 1***") the court considered *Eldridge* and concluded that:

> *As explained by the motion judge, when the University books space for non-academic extra-curricular use, it is not implementing a specific government policy or program as contemplated in Eldridge.*
>
> *Lobo CA*, para 4 (Authorities, vol. 2, tab 31)

89. *Lobo* should be understood in its context. First, it was conceded by the applicant that the university was not government. Second, the decision appealed from (*Lobo 2*) was a decision striking a claim for failing to disclose a reasonable cause of action. Contrary to the above statement from the Ontario Court of Appeal, the lower court had <u>not</u> determined that the university was not implementing a government program. Rather the court had merely determined that:

> *The amended pleading … fails to plead the material facts to establish that [the university] is implementing a specific government program or policy …*
>
> *Lobo 2*, para 9 (Authorities, vol. 2, tab 30)

90. The lower court had earlier struck the pleading saying:

> *At a minimum, the Plaintiffs are required to plead the necessary facts establishing a clear nexus between the university and government, if it is alleged that the university acted as agent of government.*
>
> *Lobo 1*, para 31 (Authorities, vol. 2, tab 32)

91. In *Whatcott* an accused had been issued a trespass notice under the *Trespass to Premises Act*, R.S.A. 2000, c. T-7 for circulating pro-life flyers on campus. He was later

found delivering more flyers on campus and was arrested and charged with an offence under the act. At trial, the Provincial Court judge determined his *Charter* rights had been violated and stayed the proceedings. The trial judgment, affirmed on appeal, followed *Pridgen* v. *University of Calgary*, 2010 ABQB 644 (the lower court decision under appeal in *Pridgen*) and held that the university was delivering a government program of post-secondary education.

92. The judgment in *Whatcott* found the use of provincial trespass legislation to respond to an individual's complaint concerning the content of Mr. Whatcott's flyer was "integrally connected" to that program – a direct connection between the governmental mandate and the impugned activity – which attracted *Charter* scrutiny. Jeffrey J. added that, *inter alia*:

    i. utilizing provincial trespass legislation to curtail Mr. Whatcott triggered *Charter* rights;

    ii. the University had itself expounded on its mandate, confirming it included providing a platform for the exchange of ideas; and

    iii. the University was publicly funded, "a factor that could not be easily discounted in assessing the applicability of the *Charter.*"

Whatcott, para 29 to 35

93. In *Pridgen,* University of Calgary students were sanctioned for online criticism of a professor. The lower court quashed the decision of a review committee for violation of the *Charter*. On appeal, only one of the three-judge panel, Justice M. Paperny, rested her decision on *Charter* grounds.

94. The lower court judge had determined the *Charter* applied on the basis of *Eldridge* with respect to "the provision of post-secondary education." The lower court judge stated:

> *The structure of the [Post Secondary Learning] Act reveals that in providing post-secondary education, universities in Alberta carry out a specific government objective. Universities may be autonomous in their day-to-day operations, as both universities and hospitals were found to be when dealing with employment issues involving mandatory retirement, however, they act as the agent for the government in facilitating access to those post-secondary education services contemplated in the PSL Act, just as the hospitals in Eldridge were found to be acting as the agent*

for the government in providing medical services under the Hospital Insurance Act, RSBC 1979, c 180 (now RSBC 1996, c 204).

quoted at *Pridgen*, para 102

95. Paperny J.A., commenting on the lower court decision, stated:

> *[104] That education at all levels, including post-secondary education as provided by universities, is an important public function cannot be seriously disputed. The rather more fine distinction the University seeks to draw here is that it is not a "specific governmental objective", which it says Eldridge requires. I find this distinction to be without merit. Eldridge does not require that a particular activity have a name or program identified, but rather that the objective be clear. The objectives set out in the PSL Act, while couched in broad terms, are tangible and clear.*
>
> *[105] Applying the Eldridge analysis to the facts of this case is one possible approach. However, I find that the nature of the activity … fits more comfortably within the analytical framework of statutory compulsion …*

Pridgen, paras 104 and 105

96. In *BC Civil Liberties Association* v. *University of Victoria*, 2016 BCCA 162 ("***UVic***"), the applicants argued that the university's power to regulate the use of its property granted to it under the *University Act*, R.S.B.C. 1996, c. 468 (the *"**Act**"*) constituted a government program which was subject to the C*harter*. The Court dismissed the petition, citing *McKinney*:

> *… [T]he mere fact that an entity is a creature of statute and has been given the legal attributes of a natural person is in no way sufficient to make its actions subject to the Charter. Such an entity may be established to facilitate the performance of tasks that those seeking incorporation wish to undertake and to control, not to facilitate the performance of tasks assigned to government.*

UVic, para 24 (Authorities, vol. 1, tab 6)

97. The applicants also advanced the argument that university activities in the "public interest" should be subject to the *Charter,* which argument was likely dismissed pursuant to *Stoffman*.

UVic, para 27

98. It should be noted that, in *UVic*:

a. the applicants conceded the university was not “an organ of the state”;

UVic, para 6

b. except as set-out above and notwithstanding a specific invitation to do so from the BCCA, the applicants advanced no arguments or evidence to distinguish the University Cases; in particular, the case includes no reference to the contemporary relationship between the Crown and universities described in the NCC;

UVic, para 21

c. the applicants advanced no evidence of a government program;

UVic, para 33

d. because the applicants had failed to distinguish the University Cases with contemporary evidence, the BCCA almost entirely relied on those early cases, even when applying *Eldridge;* and

UVic, paras 33 and 36

e. the court even relied on the University Cases as to the facts that universities are autonomous and do not perform their core functions as part of the apparatus of government – which facts do not constitute binding authority.

UVic, para 22, 34 and 36

99. In *UAlberta,* the applicant students had sought judicial review of a university decision to impose a significant cost order as a condition for a pro-life campus event. The court unanimously held that the *Charter* applied, *per Eldridge*, to the university’s “regulation of freedom of expression by students on University grounds.” This was considered a form of governmental action because, *inter alia*:

> *… the education of students largely by means of free expression is the core purpose of the University dating from its beginnings and into the future. It is a responsibility given to the university by government for over a century under both statute and the Constitution Act, 1867. It is largely funded by government and by private sector donors who likewise support and adhere to the core purpose of the University. Education of students is a goal for society as a whole and the University is a means to that end, not a goal in itself.*

UAlberta, para 148

100. Earlier in Creighton J.A.’s reasons, she stated:

> *… from its very inception, the University was committed by government policy with deep Constitutional roots to a broad scope of education with surveillance by the Crown (at an increasingly greater distance over the decades). [emphasis added]*

UAlberta, para 109

101. In *Zaki* v. *University of Manitoba*, 2021 MBQB 178 (”***Zaki***”), a university expelled a student for posting pro-life and pro-gun positions online, pursuant to a bylaw and procedure which referenced a sexual violence policy. The sexual violence policy was one adopted pursuant to a statutory obligation. The court found that in developing its sexual violence policy and in applying the bylaw and procedure which referenced it, the university “… was engaged in developing and implementing government policy …” On this basis, the university was subject to the *Charter* in connection with such government policy.

Zaki, paras 155 - 169

D. Charter Damages

102. The SCC in *Vancouver (City)* v. *Ward*, 2010 SCC 27 (“***Ward***”) determined that damages were an available remedy under section 24(1) of the *Charter*.

103. McLachlin C.J.C. laid-out the test for *Charter* damages: that damages must further the general objects of the *Charter* through compensation, vindication and deterrence.

Ward, para 25

104. The court then emphasized the distinction between private law damages and public law damages under the *Charter* as a consequence of section 32(1):

> *… [A]n action for public law damages “is not a private law action in the nature of a tort claim for which the state is vicariously liable, but [a distinct] public law action directly against the state for which the state is primarily liable” … The nature of the remedy is to require the state (or society writ large) to compensate an individual for breaches of the individual’s constitutional rights. An action for public law damages — including constitutional damages — lies against the state and not against individual actors. [emphasis added]*

Ward, para 22

105. This begs the question, not clearly answered in *Ward*: Does “the state” (against whom a claim in *Charter* damages must be made) include anything except the Crown?

106. The plaintiff, *Ward*, had claimed against the Crown (Provincial and Federal) as well as the City of Vancouver, the Royal Canadian Mounted Police, a number of police officers and unnamed jail staff. In distinguishing between "the state" and "individual actors" the court necessarily excluded from "the state" the natural persons who were police officers notwithstanding that the *Charter* applies to police officers. This demonstrates, at least, that "the state" is not simply "entities subject to the *Charter*."

> *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15 ("***Acadiens***") (Authorities, vol. 3, tab 59)

107. Where the *Charter* applies to a private entity delivering a government program *per Eldridge*, *Ward* indicates very clearly that no *Charter* damages claim lies against it – the Crown must be added to the claim.

108. However, even in the case of an entity firmly determined to be "government" under section 32(1) (for example, Douglas College) it does not necessarily follow that the entity is "the state." Douglas College was the agent of the Crown. It was not itself the Crown.

109. The plaintiffs submit that the most reasonable way to interpret "the state" in *Ward* is as, simply, "the Crown." The plaintiffs address the Crown's argument on this point below at section III.E – *Charter* Damages.

E. Crown Proceedings Act

110. Section 3(2)(d) of the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89 the ("***CPA***") states:

> *Nothing in section 2 does any of the following: … authorizes proceedings against the government for a cause of action that is enforceable against a corporation or other agency owned or controlled by the government. [emphasis added]*

111. For the purpose of this application, the plaintiffs do not dispute para 21 of the Crown's NOA, but the rule has no application in this action. An action for public law damages lies only against "the state" and is not, therefore, "enforceable" against any entity except "the state."[5]

112. Only if UBC is found to be both:

[5] *see para 102 to 109, above.*

a. "government" under section 32(1) (because it is controlled by the Crown – as seemingly conceded by the Crown at paras 21 and 22 of the NOA – or on some other basis); and

b. "the state" answerable for *Charter* damages under section 24,

will the plaintiffs have pleaded a claim for *Charter* damages "enforceable" against a Crown agency *per* section 3(2)(d) of the *CPA*. In any other case, the plaintiffs claim for *Charter* damages is only enforceable against the Crown.

113. As to the request for a remedial declaration, a declaration is not "enforceable" against anyone.

III. FACTS AND ARGUMENT

A. Routine and Regular Crown Control of UBC

114. As set-out in the NCC at paras 7 to 25, the UBC is subject to regular, routine and highly detailed control by the Crown over every aspect of UBC's assets and operations, including its core function of university education.

115. On the evidence and argument presented to the SCC in 1990, the court recognized that UBC was likely subject to a "higher degree of governmental control than was present in *McKinney*" but not the "quality of control that would justify the application of the *Charter*." This written argument will not focus on the section 32(1) *indicia* which the court in the University Cases addressed, for example, that the majority of UBC's governing body is appointed by the Crown or that the university's "fate is largely in the hands of government" due in large part to its "dependence on government funds."

Harrison, para 56

McKinney, para 40

116. Rather, this written argument starts from *Harrison* and largely focuses on unaddressed *indicia* as well as contemporary features of the relationship between the Crown and UBC which demonstrate a significant shift in the quality of control that amply justifies the application of the *Charter*.

i. University Act

117. In *Harrison*, only Wilson J. in dissent referenced UBC's "statutory duty to perform certain functions" under section 46(f) of the *University Act*, R.S.B.C. 1979, c. 419 (the "***1976 Act***") (now section 47(2)(f) of the *Act*, "***Act***"). The *Act* now reads:

> *Functions and duties of university named in section 3*
>
> *…*
>
> *(2) A university must[6], so far as and to the full extent that its resources from time to time permit, do all of the following:*
>
> > *(a) establish and maintain colleges, schools, institutes, faculties, departments, chairs and courses of instruction;*
> >
> > *(b) provide instruction in all branches of knowledge;*
> >
> > *(c) establish facilities for the pursuit of original research in all branches of knowledge;*
> >
> > *(d) establish fellowships, scholarships, exhibitions, bursaries, prizes, rewards and pecuniary and other aids to facilitate or encourage proficiency in the subjects taught in the university and original research in all branches of knowledge;*
> >
> > *(e) provide a program of continuing education in all academic and cultural fields throughout British Columbia;*
> >
> > *(f) generally, promote and carry on the work of a university in all its branches, through the cooperative effort of the board, senate and other constituent parts of the university. [emphasis added]*
>
> *Act*, section 47(2) (Authorities, vol. 3, tab 83)

118. This demonstrates that, even in its constating legislation, UBC is not free to pursue its own objectives – its objectives are those assigned to it by the Crown.

119. While the Crown retains the power of appointment over the majority[7] of UBC's Board which manages, administers and controls the property, revenue, business and affairs

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[6] In the *1976 Act* the provision read, "… A university shall …" Substituting the word "must" for "shall" seems to modernize and cure grammatical uncertainty as to whether "shall" was used as an imperative (as the *Interpretation Act*, R.S.B.C 1996, c 238, section 29 indicates "shall" is interpreted), a directive or as a future auxiliary.

[7] As to the minority of the Board elected by other means, see section III.C - Government by Nature below.

of UBC, all of which Crown appointees serve at the pleasure of the Crown, in the current *Act*:

a. the Board Chair must be selected from one of the Crown's appointees; and

b. the Crown has the additional power to remove elected members of the Board upon resolution of 2/3 of the Board.

Act, sections 19(2), 19.2(2) and 35.1(2)

120. UBC's senate remains subordinate to the Board in various matters within the senate's putative jurisdiction.

Harrison, para 10

Act, sections 37(1)(f), (i), (o), (q) and (r) and 38(2)

121. The *Act* has also retained UBC's duty to provide annual financial reports to the minister (currently the Ministry of Post-Secondary Education and Future Skills, the "**Minister**") and to provide other reports upon the Minister's request. While in *Harrison,* this statutory power (without more) was considered demonstrative only of ultimate or extraordinary control, as shall be seen below (see paras 127 to 131) this statutory power has been leveraged by the Crown to dramatically increase Crown control over UBC since *Harrison*.

Harrison, para 56

Act, sections 32 and 49

122. The *Act* prohibits all borrowing except certain "current year" operating loans and, subject to Crown approval, capital loans. Similar provisions existed in 1990 but this was not referenced in *Harrison*.

Act, sections 29, 31 and 58

123. The *Act* now imposes a statutory obligation, in the event of a labour strike or lock-out, to return to the Crown a portion of the annual Crown grant equal to the net savings of wage and other benefits arising from such labour disruption.

Act, section 30

124. The Minister retains power to approve new degree programs which, as shall be seen below (see paras 129(i), 131(c)(i), and 131(d)(i),(v) and (viii) below) has since been leverage by the Crown to increase Crown control over UBC;

Act, section 48(2)

125. The Minister now has power to restrict UBC's tax exemption for property used for designated purposes.

Act, section 54(4)

ii. Provincial Control Scheme

126. The *Act* (the Crown's significant power of the purse, and other legislation (see below) provide the Crown with "ultimate" power over UBC.

Harrison, para 56

NCC, paras 12 - 24

127. For UBC to be subject to the *Charter* due to government control, however, it must likely be demonstrated that the Crown, in fact, uses these powers on a routine and regular basis (see above at para 58(c)).

128. The NCC describes a "**Provincial Control Scheme**" (called the "Accountability Framework" by the Crown) by which the Crown has "routine, regular and highly detailed control" over every aspect of UBC's assets and operations including its core function: the delivery of university education. The Provincial Control Scheme almost entirely post-dates *Harrison*.

NCC, para 12 to 24

129. Some key features of the Provincial Control Scheme are:

    a. A "**Mandate Letter**" is issued annually by the Minister to UBC which directs UBC to comply with Crown priorities, objectives, and performance expectations. The Mandate Letter is signed by the Board Chair (upon Board resolution) acknowledging the mandate from the Crown which is then posted to UBC's website.

    NCC, para 24(c)

    b. The Mandate Letter reflects the Minister's annual "Service Plan," which sets-out the Crown's priorities, objectives and performance expectations for the British Columbia university sector broadly. The Minister retains responsibility for the services delivered by universities.

    NCC, para 23 and 24(b)

c. Following receipt of the Mandate Letter and with the participation and consent of the Minister, universities, including UBC, prepare an annual "**Institutional Accountability Plan and Report**" which includes:

   i. the university's mission, vision and values, as well as specific institutional strategic priorities;

   ii. a report to the Minister on institutional performance of the priorities, objectives and performance expectations set out in the preceding Mandate Letter; and

   iii. institutional goals, objectives and outcomes, which must include the priorities, objectives and performance expectations set out in the current Mandate Letter, including the way the institution will monitor performance.

d. The Institutional Accountability Plan and Report includes a letter from the university's Board Chair and president confirming they are accountable for it.

NCC, para 24(d)

e. The Institutional Accountability Plan and Report requirements are very similar to, both:

   i. the government's control over Douglas College by involvement in "setting policies and directives;"[8] and

   ii. the GVRD's control over TransLink by ratification of its strategic plan.[9]

   Further, unlike *Stoffman,* where such ratification was "nothing more than a mechanism to ensure that the hospital's actions do not run counter to the powers conferred on the government"[10] the Institutional Accountability Plan and Report must include the Crown's priorities, objectives and performance expectations and, as to UBC's mission, values, priorities, etc., even these are subject to Crown consent.

f. The Minister meets with the university's chair and president three times annually to review institutional performance and planning to ensure alignment with Crown priorities, objectives and performance expectations.

[8] See para 53 (d)(i), above
[9] See para 57(e), above
[10] See para 62(b), above

NCC, para 24(e)

g. An annual “Budget Letter” is delivered by the Minister to UBC setting-out UBC’s annual operating grant and various obligations of UBC to the Crown, including student enrollment targets in the program of university education.

NCC, para 24(f)

h. While *Harrison* makes passing reference to the fact that the Crown has some “supervisory jurisdiction” over UBC through the approval of degree programs under the Provincial Control Scheme that power is exercised so as to advance Crown priorities and objectives, including workforce considerations and student interests.

NCC, para 24(g)

i. UBC’s ability to host international students and charge them fees for use of publicly funded assets and operations, a major source of UBC funding, is controlled through an “Educational Quality Assurance” certification program which requires UBC to comply with the requirements set-out in the Minister’s “Guidelines Respecting International Students at British Columbia Post Secondary Institutions” including student enrollment criteria.

NCC, para 24(h)

j. UBC’s capital assets are tightly controlled through a “Capital Asset Management Framework,” including annual Ministerial participation and approval of 5-year capital plans.

NCC, para 24(i)

k. UBC’s Board is subject to the Crown’s “Orientation for B.C. Public Post-Secondary Institution Board Members” which sets-out Crown requirements and expectations on members of the Board to ensure transparent stewardship of public resources and accountability to the Crown.

NCC, para 24(j)

130. The broad purposes of the Provincial Control Scheme include ensuring universities like UBC are accountable to the Crown to:

a. deliver programs for which the Crown retains responsibility, including quality and relevant university education and student safety; and

b. ensure the Minister remains accountable to the public for the delivery of university education through an integrated and coherent university system that meets the priorities and objectives of the Crown.

NCC, paras 21 and 23

131. In addition to those set-out above, through the Provincial Control Scheme the Crown has imposed specific duties on UBC, including:

a. inherently governmental duties, including maintaining in UBC's relationship with Indigenous Canadians the "honour of the Crown", complying with section 35 of Part II of the *Constitution Act*, 1982 and satisfying Crown fiduciary obligations towards indigenous Canadians;

NCC, para 24(e)(xvi)(8)(a) and (b)

b. financial duties (as opposed to the mere "fiscal accountability" referenced in *Harrison*[11]), such as:

i. ensuring tuition is affordable, compliant with tuition caps, and (even) that tuition is waived in the case of adult learners and former youth in care;

NCC, paras 24(e)(i),(vi),(viii) and (vix)

ii. meeting or exceeding financial targets; and

NCC, para 24(e)(xxi)

iii. controlling (and even freezing) executive compensation through compliance with the Crown's executive compensation guidelines;

NCC, para 24(e)(vii)

c. duties to integrate and align UBC's assets and operations with Crown's broader governmental plans, including:

i. an integrated and coherent provincial university system which provides quality education that meets Crown objectives such as labour market, economic and indigenous needs, including closing the educational and employment gap between indigenous and non-indigenous Canadians ;

*NCC, paras 23, 24(e)(i), (ii), (iii), (viii), (x), (*xi) and (xiv)(2)

ii. the "Provincial Crown's B.C. Economic Plan";

[11] See para 50, above

NCC, para 24(e)(ii)

iii. the Crown's implementation of the *United Nations Declaration of the Rights of Indigenous Peoples* and the Truth and Reconciliation Commission's Calls to Action; and

NCC, para 24(e)(xiv)(1)

iv. the Crown's climate action plan, "2018 CleanBC";

NCC, para 24(e)(xv)

d. duties affecting the programs offered by UBC, the manner of their delivery, the substantive content of *curriculum* and student evaluation including:

i. programs consistent with the Crown objectives set out in para 131(c) above;

ii. recommencing on-campus learning services;

NCC, para 24(e)(xxii)

iii. developing and recognizing "flexible learning pathways" including dual credits and open learning resources;

NCC, para 24(e)(iv)

iv. expanding co-op learning opportunities;

NCC, para 24(e)(xii)

v. providing free adult basic education and English;

NCC, para 24(e)(vii)

vi. aligning institutional processes with K – 12 *curriculum* changes;

NCC, para 24(e)(x)

vii. improving educational access, participation and success for former youth in care, indigenous Canadians and vulnerable and underrepresented students;

NCC, paras 24(e)(ix), (xiv)(3) and (xx)

viii. developing "culturally appropriate" *curricula* for indigenous students, including indigenous language and the integration of indigenous knowledge and teaching methods into the classroom;

NCC, paras 24(xiv)(4), (5) and (7)

e. duties affecting the composition, training and conduct of the Board, executive, faculty and staff;

NCC 24(e)(xiv)(7) and (xvi)

f. duties to collaborate with other governmental and non-governmental entities for prescribed purposes; and

NCC 24(e)(iv), (v), (xiv)(1), (xiv)(6), (xiv)(8)(d) and (xix)

g. duties that, by their nature, apply to every aspect of UBC operations and assets.

NCC 24(e)(xiv), (xvi), (xviii)

iii. Other Legislation

132. In *Harrison,* the court references:

a. the *Financial Administration Act*, S.B.C. 1981, c. 15 (now R.S.B.C. 1996, c. 138), which treats UBC as a "government body";

b. the *Auditor General Act*, R.S.B.C. 1979, c. 24 (now S.B.C. 2003, c. 2); and

c. the *Compensation Stabilization Act*, S.B.C. 1982, c. 32 (repealed by s. 69 of the *Industrial Relations Reform Act*, S.B.C. 1987, c. 24),

133. Under the *Financial Administration Act*, R.S.B.C. 1996, c. 138 (the "***FAA***"), UBC is defined as a "government body" and "government organization." The Treasury Board is empowered to make regulations or issue directives respecting the planning, management, and reporting of capital expenditures of government bodies[12]. UBC must comply with any policy, procedure or directive from the Comptroller General, who also has the power of subpoena over UBC.

FAA, sections 1, 4.1(1), 9.1(1), 9.1(3) and 8.1(1) (Authorities, vol. 3, tab 77)

134. Wilson J. also referenced the *University Foundations Act*, R.S.B.C. 1979, c. 420.5 (now R.S.B.C. 1996, c. 471, the "***Foundation Act***") which makes The University of British Columbia Foundation a wholly owned Crown asset and Crown agent and which defines the purposes of The University of British Columbia Foundation to include, "to develop, foster and encourage public knowledge and awareness of the relevant university and the benefits to the people of British Columbia in connection with that university." Like UBC itself, The University of British Columbia Foundation enjoys certain legal

[12] See para 129(k) above.

immunities and exemptions from taxation and is subject to Crown audit under the *Auditor General Act*.

Foundation Act, paras 2(1)(a), 3, 4, 5(1)(a), 9, 13 and 14 (Authorities, vol. 3, tab 84)

135. *Harrison* does not reference:

a. The *Public Sector Employers Act*, R.S.B.C. 1996, c. 384 (the "***PSEA***"), which:

i. Defines a university as a "public sector employer."

PSEA, section 1 (Authorities, vol. 3, tab 80)

ii. Grants the Minister of Finance significant powers over UBC in how it negotiates employment contracts with its employees, including collective bargaining. PSEA requires each sector to establish an employers' association which must "make provision for the representation of the government on the board of directors of the association." Members of an employers' association to represent government interests.

PSEA, sections 6 and 7(1)(a)

iii. Allows the Minister of Finance to designate a ministerially-approved employers' association as the bargaining agent for its sector.

PSEA, section 12

iv. Grants the Minister of Finance authority to direct a public sector employer to prepare a compensation plan in accordance with the Minister of Finance's direction and for the Minister of Finance's approval. Upon issuing a direction to prepare a compensation plan, any wage increases are disallowed unless they were already agreed upon prior to the Minister of Finance's direction.

PSEA, sections 14.3(4), 14.3(4) and 14.3(6)(a)-(d)

v. Grants the Crown authority to make regulations for public sector employers in relation to standards for termination of employment.

PSEA, section 14.4

vi. Requires a public service employer to provide the Public Sector Employers' Council with terms and conditions for senior employees' compensation.

PSEA, section 14.6

b. Pursuant to these PSEA powers the Crown may direct and coordinate labour negotiations across the public sector, including labour negotiations with UBC's unionized faculty and staff (nearly all UBC faculty and staff are unionized) for the purpose of pursuing Crown objectives in such negotiations and the Crown may impose terms of employment on UBC's faculty and staff, including compensation limits and public reporting requirements with respect to senior employee compensation.

NCC, para 16

c. The *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165 ("***FOIPPA***"), which designates UBC a "local public body" and by which UBC is (subject to narrow exceptions) accountable to disclose information to the public upon request and to protect personal privacy.

FOIPPA, sections 3(3)(h)-(i) and Schedule 1 (Authorities, vol. 3, tab 78)

d. The purpose of *FOIPPA* is to "make public bodies more accountable to the public and protect personal privacy." The BCCA has held that FOIPP has two main purposes:

   i. to make public bodies more accountable by providing public access to its records; and

   ii. protecting personal privacy by preventing unauthorised collection, use or disclosure of personal information.

e. Both of these goals have been endorsed by the SCC as vital to a free and democratic society.

FOIPPA, s 2

R v.Skakun, 2014 BCCA 223, paras 8-9 (Authorities, vol. 2, tab 50)

f. The *Budget Transparency and Accountability Act*, S.B.C 2000, c. 23, (the "***BTAA***"), which designates UBC as an "education and health sector organization", "government organization," and a "government reporting entity." It requires regular government financial reports which are used to prepare consolidated provincial financial information and budgets which treat UBC capital, assets, tuition fees and expenses as capital, assets, income and expenses of the Provincial Crown.

BTAA, sections 9 and 10 (Authorities, vol. 3, tab 73)

NCC, para 19(a)

g. The *Sexual Violence and Misconduct Policy Act,* S.B.C. 2016, c. 23 (the "***Sexual Violence Act***"), by which UBC is required to establish and implement a sexual misconduct policy including substantive content dictated by the Crown (including the Minister's "Preventing and Responding to Sexual Violence and Misconduct at British Columbia Post-Secondary Institutions; A Guide For Developing Policies and Actions") and UBC must monitor the efficacy of such policy including participation in reviews of such policy by the Minister and conducting surveys in accordance with directions from the Minister.

Sexual Violence Act, sections 2, 2(1)(c), 3(1)(b) and 5 (Authorities, vol. 3, tab 81)

NCC, para 20

iv. Conclusion - Control

136. In 1990 the SCC found UBC's legislative framework and funding suggestive of a "higher degree of governmental control than was present in *McKinney*," but not "the quality of control that would justify the application of the *Charter*." This finding was due in large measure to an absence of routine and regular control.

Harrison, para 56

137. Consistent with the evolution of government noted in *McKinney* and *Lavigne*, the NCC describes a fundamental shift in Crown involvement in university education – a public service for which the Crown now clearly retains responsibility.

138. The Crown now exercises regular and routine control in every area of UBC's assets and operations, including over its core functions[13]. To the extent UBC's Board pursues its "own objectives," those objectives are:

i. highly constrained and, largely if not entirely, the dictates of government;[14]

ii. pursued by a Board subject to significant Crown control;[15]

iii. subject to government oversight by the Provincial Control Scheme; and

iv. pursued by a Board which, to the extent it is not appointed by the Crown, is democratically elected by UBC's constituents.[16] This is much like TransLink,

[13] See, especially, paras 131(b)(i), 131(c)(i), 131(d), 131(e), 131(g), above
[14] See paras 117, 118, and 129, above
[15] See paras 119 and 129(l) above
[16] See para 70, above

which, to the extent not controlled by GVRD, was controlled by another order of government.[17]

139. The University Cases are, therefore, clearly distinguishable. The principle of *stare decisis* requires, however, application of the legal principles (regarding section 32 control) these (and other cases referenced above) establish.

140. While UBC retains some discretion in the manner in which it operates (as do all government entities) it is impossible, based on the way UBC is "presently organized and governed", to describe UBC as "essentially autonomous."

McKinney, para 46

Douglas, para 49

141. The present degree of Crown control clearly renders UBC "government" for the purpose of section 32(1) of the *Charter*.

142. The Crown's written argument (paras 6 and 28) posits that the University Cases and *UVic* are binding as to the fact that the Province does not have requisite control of universities. This is a misapplication of *stare decisis*. The principle applies to bind courts to legal principles (the *ratio decidendi)* not to findings of fact (to which the legal principles are applied) and not to outcomes. Further, the principle does not apply to a decision which merely applies a previously developed legal principle.[18] *UVic* applied the legal principles in the University Cases and *Eldridge*. It did not create new, binding, legal principles.

143. The nature and degree of control exercised by the Crown over UBC is a question of fact which, on this application, is determined solely with reference to the pleading. Whether or not the degree of Crown control alleged in the pleading is sufficient to attract *Charter* scrutiny requires the application of binding legal precedents (including the University Cases) to the pleaded facts. The legal principles set-out in authorities, when applied to the Provincial Control Scheme alleged in the NCC, lead to the conclusion that the Crown's significant control over UBC render UBC government for the purpose of section 32(1) of the *Charter.*

[17] See para 57(c), above
[18] Section II.B - Stare Decisis.

144. In the alternative, there has been, since the 1990s, a change in the circumstances that "fundamentally shifts the parameters of the debate," leaving it open to reconsider the University Cases.

B. UBC's Governmental Objectives

145. The above section also demonstrates that, in no real sense:

a. can the *Act* be described as merely [facilitate[ing] the performance of tasks that those seeking incorporation wish to undertake;" or

b. can UBC any longer be described as "private individuals [doing] things of their own choosing without engaging governmental responsibility" or "acting purely on their own initiative."

McKinney, paras 30, 31 and 35

Stoffman, paras 96 and 104

146. In fact, not only is:

a. UBC required to do things chosen for UBC by and on the initiative of the Crown, which touch on every aspect of UBC's assets and operations; and

b. UBC assigned a statutory mandate to operate a university,

but, as to UBC's apparent residual jurisdiction to determine its "own" mission, vision, values, strategic priorities, goals, objectives, and outcomes, even here the Crown exercises routine and regular control through, *inter alia*, Board appointees including the Board Chair and through the annual review and approval of UBC's Institutional Accountability Plan and Report. To the extent there remains some vestigial ability to pursue its "own objectives", those objectives are, in fact, the objectives of a democratically elected board (an inherently governmental creature).

147. By application of the test set-out in section II.C.ii - Governmental Objective, given UBC is pursuing objectives of the Crown, it must be held to be "government" under section 32(1) of the *Charter*. Otherwise the mischief warned of in, *inter alia*, *Godbout* will be plainly manifest:

> *… the provincial legislatur[e] … could simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions*

> *and, thereby, avoid the constraints imposed upon their activities through the operation of the Charter. Clearly, this course of action would indirectly narrow the ambit of protection afforded by the Charter in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. Indeed, in view of their fundamental importance, Charter rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender.*
>
> *Godbout*, para 48

148. Again, in analysing UBC's objectives, the University Cases (and others) are clearly distinguishable. The overwhelming presence of Crown objectives renders UBC "government" for the purpose of section 32(1) of the *Charter*.[19]

149. In the alternative, there is a change in the circumstances that "fundamentally shifts the parameters of the debate," leaving it open to reconsider the University Cases.[20]

C. Government by Nature

150. In addition to the fact that UBC is:

    a. significantly controlled by the government either directly through the Provincial Control Scheme or indirectly by Crown appointees, including the Board Chair; and

    b. pursuing, primarily or exclusively, Crown objectives,

    UBC is possessed of so many "quintessential" features of government so as to render it, practically, a special purpose municipality.

151. The minority of UBC's Board not appointed by the Crown, and the members of UBC's senate not appointed by the Board are elected by various UBC constituencies who work or study at UBC – just as city councils are elected by residents in city wards.

NCC, paras 7 and 8

Act, sections 19(1), 35.1 and Part 9

152. Like a municipality, UBC is exempt from taxation and collects property tax[21].

[19] Section II.C.ii -Governmental Objective
[20] Section II.B.- Stare Decisis
[21] Actually called a "services levy."

Act, sections 27(2)(w) and 54

NCC, para 27(f)

153. Like a municipality, UBC is empowered to make bylaws, to administer them and to enforce them within its territorial jurisdiction, including by "statutory compulsion" of penalty and fine. UBC is even empowered to constitute quasi-judicial tribunals for the hearing and determination of disputes.

Act, sections 27(2)(d), (t) – (t.4), (x.1) and (x.2)

154. Of course, UBC derives its existence and law making authority from the Province under the *Act*.

155. In addition, like a municipality:

a. UBC owns and operates energy, water, sanitation, sewer, and waste management utilities

NCC 27(a)

b. UBC is exempt from expropriation and the rule against perpetuities and empowered by the legislature to expropriate;

Act, section 51 - 53

c. various UBC entities enjoy immunity from civil liability;[22]

Act, section 68 and 69

d. controls development and building on campus through land use rules, development & building regulations, a development handbook, codes, development and building permits, building and trade permits, and through building inspections and enforcement;

NCC 27(b)

e. controls private business operations on campus through permits, business licenses, and UBC's business license regulations;

NCC 27(c)

f. controls private transportation operations on campus through transportation permits, the enforcement of UBC's "Transportation Network Services Permit Standard Terms and Conditions" and traffic bylaws; and

[22] Compare to the immunities granted to municipal entities under the *Vancouver Charter*, section 294

NCC 27(d)

g. owns and operates various public amenities including public thoroughfares, parks, libraries, museums, galleries and recreation facilities.

NCC 27(e)

156. Given the foregoing, UBC acts in its territorial jurisdiction (its campuses) and towards its constituents (students, staff and faculty) in a manner practically indistinguishable from a municipal government.

157. Apart from the foregoing governmental characteristics, UBC is otherwise treated by the Crown as an "apparatus of government" (*Douglas*, see para 14):

a. UBC is part of an integrated and coherent university system with respect to which the Crown publishes annual, consolidated performance metrics;

NCC, para 23(b) and 24(a) and (g)

b. UBC's Crown mandated objectives include objectives which are inherently governmental;

see para 131(a), above

c. the Crown's consolidated provincial financial information and budgets treat UBC capital, assets, tuition fees and expenses as capital, assets, income and expenses of the Crown;

NCC, para 18(a) and 19(a)

d. UBC is designated a "public sector employer" under the *PSEA*, pursuant to which the Crown may direct and coordinate public sector labour negotiations for the purpose of pursuing Crown objectives;[23]

e. *FOIPP* designates UBC a "local public body" subject to governmental protection and disclose obligations;[24]

f. the BTAA designates UBC an "education and health sector organization" for the purpose of preparing consolidated provincial financial information.[25]

[23] see para 135(a), above.
[24] see para 135(c) and (d), above.
[25] See para 135(f), above.

158. Given the foregoing and the test for government "by nature" set-out in *Godbout* and *Greater Vancouver*, UBC is a form of "government" for the purpose of section 32(1) of the *Charter*. UBC:

a. is controlled by government;

b. implements government objectives;

c. is structured and empowered by the provincial legislature like a special purpose municipality, complete with elected representatives, bylaws, quasi-judicial tribunals, statutory powers of compulsion, and special government-like powers and immunities; and

d. operates in a manner nearly indistinguishable from municipalities except as to its special purposes, including the delivery of university education.

D. UBC's Government Programs

159. The application of *Eldridge* to the Provincial Control Scheme described in the NCC leads inevitably to the conclusion that UBC is delivering government programs including university education.

160. While the relevant *indicia* did not "readily admit of any *a priori* elucidation," the ultimate question asked in *Eldridge* was whether the activity could be "ascribed to government."

161. Starting, first, with that general proposition, the Provincial Control Scheme demonstrates deep Crown involvement in UBC's operations, including regular Crown directions as to UBC's core functions including what university education to deliver (including instructions regarding programming[26], *curriculum*[27], instructors[28] and mode of instruction[29]), where to deliver it (on campus and in person[30]) and to whom (including requirements to enroll students in high-demand fields[31], restrictions on international

[26] See paras 124, 131(c)(i), 131(d)(v), 131(d)(vii), 131(g), above.
[27] See paras 131(c)(i), 131(d)(i), 131(d)(iii) to (vi), 131(d)(viii), and 131(g), above.
[28] See paras 131(e), 131(g), and 135(b) above.
[29] See paras 130(a), 131(c)(i), 131(d)(vii), 131(g), above.
[30] See para 131(d)(ii), above
[31] See para 131(c)(i), above

students[32], requirements to provide adult learning[33], and to assist in closing the educational and employment gaps of Indigenous students[34]).

162. Whether or not that degree of control is sufficient to render UBC a government entity *per se*, the Crown's deep involvement amply demonstrates that UBC's delivery of university education is an activity properly "ascribed to government:" UBC's annual grants are paid for the enrollment of students in university education; UBC is part of an "integrated and coherent university system that meets the priorities and objectives of the Crown;" an entire "accountability framework" exists to ensure UBC remains accountable to the Crown in its delivery of university education; and UBC is subject to routine and regular control in its activities, including in its core activities.

163. To find the *Charter* inapplicable to such a broad area of government activity and spending is, simply put, to grant the Crown immunity from its constitutional duties.

164. Looking more closely at the details of *Eldridge*, the present action is nearly "on all fours" with the facts of that case.

165. As in *Eldridge*, the Crown funds the provision of a particular service. In *Eldridge,* the service was "hospital services" (see paras 78 to 80, above), here it is "university education" and "student safety"[35]. The present case is also stronger than *Eldridge* in this respect – UBC has a clear statutory duty, reinforced annually by the Crown's Budget Letter and approval of the Institutional Accountability Plan and Report, to provide university education. The hospital in *Eldridge* had no such duty. Rather, it was only able to access government funding to the extent it provided funded services.

166. As in *Eldridge*,[36] UBC has discretion as to services provided and the manner in which those services are provided. Again, the present case is stronger than *Eldridge's* in that even UBC's discretion is significantly narrowed and controlled through the Provincial Control Scheme.

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[32] See para 129(j), above, and NCC paras 124(e)(v)
[33] See para 131(d)(v), above
[34] See para 131(d)(vii), above and NCC para 24(e)(xiv)(2).
[35] See NCC paras 21 and 24(e)(xiii)
[36] See para 78, above.

167. As in *Eldridge,* universities, like hospitals, historically provided services on their own accord but, to borrow a line from *Elridge*, "in recent decades … [university education], including that generally provided by [universities], has become a keystone tenet of governmental policy."

168. And, as in *Eldridge,* there is a "direct and precisely-defined connection" between the government program (university education) and the impugned conduct (the suppression of free inquiry and expression) given that free inquiry and expression are an "integral part" of university education, as repeatedly acknowledged by UBC itself (see NCC paras 32 and 33).

169. The strong parallels between hospitals and universities were the basis upon which Madam Justice J. Strekaf (of the lower court in *Pridgen*) premised her conclusion that the University of Calgary was subject to the *Charter*, a finding with which Paperny J.A. of the Alberta Court of Appeal agreed.

see paras 94 and 95, above and *Pridgen*, paras 105 and 135

170. The NCC does not allege, as suggested in the Crown's written argument (paras 29 and 30), a program of "regulating the use of space on campus" or "affording students a forum for free expression." The NCC does not, for example, allege anything like:

> *… a provision of the sort adopted in the United Kingdom … which imposes an obligation on universities and colleges to ... take such steps as are reasonably practicable to ensure that freedom of speech …*

UVic, para 32

171. Indeed, had the Crown seen fit, through its vast controls and activities, to enforce the *Charter's* fundamental freedoms at UBC, this claim would never have arisen. But this – the Crown's <u>failure to safeguard the *Charter*</u> where the Crown is present – is the very mischief *Elridge* seeks to avoid.

172. Rather, the NCC alleges a government program of "university education" with which there is a "direct and precisely-defined connection" with free expression. In UBC's own words:

> *The members of the University enjoy certain <u>rights and privileges essential to the fulfilment of its primary functions</u>: instruction and the pursuit of knowledge. Central among these rights is the freedom, within the law, to pursue what seems to them*

> *as fruitful avenues of inquiry, to … learn unhindered by external or non-academic constraints, and to engage in full and unrestricted consideration of any opinion.*
>
> *… Suppression of this freedom, whether by institutions of the state, the officers of the University, or the actions of private individuals, would prevent the University from carrying out its primary functions. [emphasis added]*

NCC, para 32(d)(i)

173. The NCC also alleges a government program of student mental health and safety incorporated by the Crown into UBC's Mandate Letter and Institutional Accountability Plan and Report. The NCC further alleges the "direct and precisely-defined connection" between mental health and safety and the impugned conduct: UBC's stated reasons for the cancellation included the physical and psychological safety of students.[37]

174. The NCC, in this respect, is quite similar to *Zaki* where the government had directed the University of Manitoba to implement a sexual violence policy, which policy was referenced in the policies and procedures under which Mr. Zaki was expelled.

175. On the basis of the foregoing, whether or not UBC is government *per se* under the *Charter*, UBC is quite obviously delivering government programs for the Crown which program must, according to *Eldridge*, be delivered in a *Charter* compliant manner.

176. The Crown's written argument (paras 29 and 30) posits that *UVic* determined that "UBC is not implementing a specific government policy or program by regulating the use of space on campus." That is not correct. The BCCA answered the very narrow question: "Can it be said that when the University of Victoria exercises its particular statutory power, pursuant to s. 27 of the *University Act*, to regulate, prohibit or impose requirements in relation to activities and events on its property, it is acting in furtherance of a specific government policy or program?" The BCCA answered that question as follows:

> *There is no basis upon which it can be said on the evidence that when the University regulated the use of space on the campus it was implementing a government policy or program.*

UVic, paras 25 and 33

[37] See para 12, above.

177. The plaintiffs do not advance the argument dismissed in *UVic*, that the implementation of section 27(2)(t) of the *Act* itself constitutes a government program which attracts *Charter* scrutiny. Instead, the plaintiffs allege that UBC delivers a program of university education for the Crown. The regulation of free space on campus is connected with that program but is not the program itself. Like in *Eldridge*, free speech "is quite obviously an integral part of the provision of" university education.

178. The Crown's argument invites a perverse outcome. The Crown argues, effectively, that the Crown's failure to safeguard *Charter* rights in the delivery of its programs are grounds for *Charter* immunity. This is the exact mischief the SCC warns against:

> *Charter rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender.*
>
> *Godbout*, para 48

E. Charter Damages

179. The plaintiffs have not alleged any cause of action against the Crown except under the *Charter*. In *Ward,* the SCC indicated that the "state," and only the state, is liable for *Charter* damages under section 24. Further, *Ward* demonstrates that an entity being bound by the *Charter* under section 32(1) (police officers and prison staff) does not necessarily render that entity "the state."

180. Should UBC be found, in this action, to be a private entity subject to the *Charter* in its delivery of a government program (*per Eldridge*), *Ward* indicates that, to obtain a judgment in *Charter* damages, the Crown must be named.

181. The only arguable ambiguity remaining in *Ward* is whether, if UBC is found to be a governmental entity under section 32(1), it is *ipso facto* also "the state" answerable for *Charter* damages. Again, the plaintiffs submit that the most reasonable way to interpret "the state (or society *writ* large)" in *Ward* is as "the Crown."

182. The Crown's written argument (para 33) claims that:

> *The only factual referenced to the [Crown] in the [NCC] relate to the plaintiffs' argument that UBC is government because it is controlled by the [Crown].*

183. That is not correct. The NCC also alleges the Crown funds and directs UBC to deliver government programs (NCC, paras 11, 20, 23(a), 24(f), and 25) and alleges the Crown

granted UBC government like powers and immunities (NCC, paras 14(a), (d), (n), (o), (p) and (s)).

184. The Crown's written argument (para 40) claims that:

> *In Ward, the Court awarded Charter damages against the Province for conduct involving corrections officers who were provincial employees.*

185. There are three problems with this proposition. First, while the SCC awarded damages against "the state," it is frankly not clear from the decision (or from the decision under appeal) which defendants (other than the natural persons) were not considered to be part of "the state." Mr. Ward had also named:

    a. the City of Vancouver, which order of government jointly operated the jail where Ward was held and established the Vancouver Police Department, which employs police officers, including the "officer in charge" at the jail;

    Ward v. Vancouver (City), 2007 BCSC 3, para 24 (Authorities, vol. 3, tab 70)

    Police Act, R.S.B.C. 1996, c 367 (the "***Police Act***"), section 3(2)(a) (Authorities, vol. 3, tab 79)

    b. Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Attorney General and Ministry of Public Safety and Solicitor General, which established the City of Vancouver and which employs the corrections officers at the jail; and

    c. the Federal Crown, Attorney General and the RCMP.

186. Most of the compensable *Charter* violations arose from the conduct, not of prison, but of police officers:

    a. who were not Provincial employees but were employed by a police department established by and paid (directly or indirectly) by the City of Vancouver; and

    b. in respect of whom the Province, as the Crown says, "had no involvement."

    Police Act, section 15(1)

187. Second, the Crown's statement comes very close to suggesting the Crown was liable on a theory of vicarious liability, whereas *Ward* expressly negates that proposition – "the state" is primarily and solely liable.[38]

188. Third, the Crown suggests here and elsewhere (for example, at paras 7, 34 and 39) that direct Crown participation (or "involvement") in the impugned conduct is necessary to ground a claim against it in *Charter* damages. Neither does *Ward* impose such a requirement, nor does the SCC's rationale support the imposition of such a requirement. Damages are payable by the Crown as representative for "society writ large:"

> *… it is society as a whole that is asked to compensate the claimant.*
>
> *Ward*, para 54

189. Assuming the Crown is correct (at para 40 of its written argument) that where the SCC used the term "the state" it referred solely to the (Provincial) Crown, *Ward* in fact demonstrates Crown liability for *Charter* damages notwithstanding a lack of Crown "involvement" – the Crown in *Ward* had no direct "involvement" with the police officers whose conduct attracted most of the *Charter* liability.[39]

190. The Crown's written argument (at para 41) claims:

> *… 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 …*

191. There are three problems with this statement. First, the Crown seems to equate the term "individual actors" with "natural persons," but that is not consistent with *Ward*. The court drew a line between "the state" and "individual actors," not between "corporate entities" and "natural persons." The court also says: "actions against individual actors should be pursued in accordance with existing causes of action," only a few paragraphs after mentioning that the trial judge had "… found that the City … committed the tort of wrongful imprisonment …" This suggests the SCC considered the city an "individual actor."

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[38] See para 104, above.
[39] See continuation of discussion on "involvement" at para 196, below.

Ward, para 10

192. Second, natural persons are, in fact, "bound by the *Charter*" to the extent their activities are caught under section 32(1).

For example police, see *Acadiens*

193. Third, the statement suggests that the reason for the SCC determining that only "the state" is liable for *Charter* damages was that individual actors are not bound by the *Charter*. The SCC actually said:

> *The nature of the remedy is to require the state (or society writ large) to compensate an individual for breaches of the individual's constitutional rights.*

Ward, para 22

194. Given the foregoing, the *Crown Proceedings Act* has no application unless this Honourable Court determines that UBC is "the state." Unless that happens, there is no claim in damages against the Crown which is "enforceable" against any other entity.

195. The Crown's written argument (at para 39) indicates that section 24 of the *Charter* is remedial and provides no independent basis to name the Crown. The cases cited by the Crown do not stand for that proposition. The relevant *ratio* (actually, *obiter dicta*) from the cited cases is that a section 24 remedy is a "personal remedy" available only to a plaintiff whose *Charter* rights have been violated, whereas (citing *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295) a section 52 declaration is available to anyone with standing. Here, however, the plaintiffs seek a remedy for UBC's infringement of the plaintiffs' own *Charter* rights.

R v. Ferguson, 2008 SCC 6 ("***Ferguson***"), paras 59 – 60 (Authorities, vol. 2, tab 47)

Bowen v. Canada, [1984] 2 F.C. 507, 1984 CarswellNat 70, para 5 (Authorities, vol. 1, tab 9)

196. In connection with the Crown's "involvement" argument, however, *Ferguson* is instructive in its restatement of some trite law:

> *60 Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional: see Eldridge … The acts of government agents acting under such regimes are not the necessary result or "effect" of the law, but of the government agent's applying a discretion conferred by the law in an unconstitutional manner. Section 52(1) is thus not applicable. The appropriate remedy lies under s. 24(1).*

197. Of course, to be entitled to a remedy under section 24 in cases involving government action as opposed to legislation, a claimant must establish "government acts committed under the authority of legal regimes" by "government agent[s] applying discretion." This is established under section 32(1). It is the section 32(1) analysis which establishes the necessary nexus (or "involvement") of the Crown in the impugned conduct which entitles a party to a remedy. *Ward* simply establishes that one remedy arising from *Charter* violations (which, by operation of section 32(1), must have sufficient Crown "involvement") is damages and, in particular, damages only against "the state."

198. Nor are the cases cited by the Crown (at paras 42) binding authority for the proposition that UBC is "the state" answerable for *Charter* damages. While the trial judge in *Mason* v. *Turner*, 2014 BCSC 211, treated the City of Nelson as "the state," that was not an issue in dispute decided by the court and is not, therefore, a *ratio decidendi.* Additionally, that issue was not appealed to the BCCA in *Mason* v. *Turner*, 2016 BCCA 58. The Ontario Court of Appeal in *Stewart* v. *Toronto (Police Services Board)*, 2020 ONCA 255, likewise awarded *Charter* damages against the Toronto Police Services Board without the "state" question being raised. In any event, there may be reasons for holding that the City of Nelson or the Toronto Police Services Board are "the state" (as contemplated by *Ward*), which reasons may not hold for UBC; for example, if UBC is only subject to the *Charter* as a private actor.

IV. CONCLUSION

199. The NCC demonstrates that, three decades after *Harrison*, UBC is an institution with which the Crown is now deeply enmeshed. UBC is no longer "essentially autonomous." UBC is controlled by a combination of Crown Board appointees, the Crown's Provincial Control Scheme, and by democratically elected Board members. There is no aspect of UBC's assets or operations (core or peripheral) over which the Crown does not exercise control.

200. UBC does not pursue "its own" objectives. It pursues only the objectives it is directed to pursue by the Crown, by its Crown appointed Board members or by its democratically elected Board members.

201. UBC was established by the Crown, which granted UBC government like powers, and structured it as, effectively, a special purpose municipality. UBC is treated by the Crown as government. UBC's assets, income and expenses are all treated as Crown assets, income and expenses. In its interactions with indigenous Canadians, UBC is expected to represent the Honour of the Crown, to comply with the *Constitution*, and to satisfy Crown fiduciary obligations.

202. UBC is paid by the Crown to deliver university education to Canadian students.

203. UBC's "traditional nature … as a community of scholars and students enjoying substantial internal autonomy," is but a pleasant memory. Times have changed and, with them, the largely "hands-off" nature of the relationship between the Crown and UBC.

McKinney, para 34

204. The Crown is now very "hands-on" UBC but insists, by this application, that its activity ought to be immune to *Charter* scrutiny. This application represents the very mischief the SCC's interpretation of section 32(1) seeks to avoid:

> *Were the Charter to apply only to those bodies that are institutionally part of government but not to those that are — as a simple matter of fact — governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their Charter obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies. In other words, Parliament, the provincial legislatures and the federal and provincial executives could simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions and, thereby, avoid the constraints imposed upon their activities through the operation of the Charter. Clearly, this course of action would indirectly narrow the ambit of protection afforded by the Charter in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. Indeed, in view of their fundamental importance, Charter rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender.*

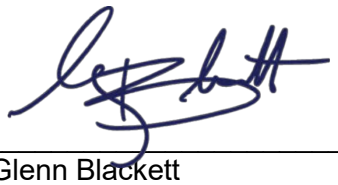
Godbout, para 48

205. It is, therefore, not plain and obvious the NCC discloses "no reasonable cause of action", is "certain to fail" because it contains a "radical defect". Quite the opposite.

206. As such, the plaintiffs submit that this Honourable Court ought to dismiss the application.

207. The plaintiffs agree with the Crown's proposal that written costs submissions be provided in due course.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of April 2024.



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