



Form 33 (Rule 8-1 (10))

No. 2210080

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

APPLICATION RESPONSE

Application response of: The Plaintiffs, Noah Alter, Jarryd Jaeger, Cooper Asp, and The Free Speech Club Ltd., (the “application respondents”)

THIS IS A RESPONSE TO the Notice of Application of the Defendant, His Majesty the King in Right of the Province of British Columbia, filed March 22, 2024.

The application respondents estimate that the application will take one day.

PART 1: ORDERS CONSENTED TO

The application respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms:

None

PART 2: ORDERS OPPOSED

The application respondents oppose the granting of the orders set out in paragraphs

1, 2 and 3

of Part 1 of the notice of application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondents take no position on the granting of the orders set out in paragraphs

None

of Part 1 of the notice of application.

PART 4: FACTUAL BASIS

A. Fundamental Shift in Government Control

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*, Part 1 of the Constitution Act, 1982 (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 (“**McKinney**”), para 46*

2. Since that series of decisions, 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 shifted and increased.

*Amended Notice of Civil Claim, filed March 13, 2024 (the “**NCC**”) para 13*

3. 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 its core functions;
 - b. its staff, faculty, and executive including composition (including promoting racial and gender equity), contract negotiation, compensation, policies and conduct;

- c. its 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. its relationship with indigenous peoples including faculty training;
- g. its relationship with other public sector entities; and
- h. its capital planning, investment, maintenance and dispositions.

NCC paras 7-25

4. By the Provincial Control Scheme:

- a. The Minister of Post-Secondary Education and Future Skills (the “**Minister**”) provides annual directions to UBC (by way of annual “**Mandate Letter**”, “**Budget Letter**” and other communications) to comply with designated Crown priorities, objectives and performance expectations in its delivery of programs including undergraduate university education and student safety and mental health. UBC must, upon annual Board resolution, have its Chair (the “**Chair**”) sign the Mandate Letter acknowledging such directions and must post it to UBC’s website.

NCC paras 24(c) and (f)

- b. With the participation and consent of the Minister, UBC prepares an annual “**Institutional Accountability Plan and Report**” which sets out UBC’s goals, objectives and outcomes, which must include the priorities, objectives and performance expectations set out in the Mandate Letter (including the way UBC will monitor its performance) and which reports on UBC’s performance of the priorities, objectives and performance expectations set out in the preceding Mandate Letter. It includes a letter from the Chair and UBC’s President to the Minister confirming they are accountable for same.

NCC paras 24 (d)

- c. The Minister meets regularly with the Chair and UBC’s President to review UBC’s performance and planning to ensure alignment with Provincial Crown priorities, objectives and performance expectations.

NCC para 24(e)

- d. UBC must align its assets and operations with the Crown's economic plans and environmental plans.

NCC paras 24(e)(ii) and 24(e)(vx)

- e. UBC must maintain the "honour of the Crown" in all dealings with indigenous peoples, comply with section 35 Part II of the *Constitution Act*, 1982, and satisfy the Crown's fiduciary obligations towards indigenous peoples.

NCC paras 24(e)(xiv)(8)a and b

- f. UBC must foster diversity, inclusion and equity including anti-racism and eliminating systemic discrimination in all its forms and must adopt a "Gender-Based Analysis Plus" process to analyze the gendered aspects of its policies and programs to assess the different experiences of women and minorities.

NCC paras 24(e)(xvi)

- g. UBC delivers various programs including university education and student safety and mental health, for which programs the Crown (as represented by various ministers including the Minister) retains responsibility to British Columbia residents.

NCC paras 11, 22, 23, 24 and 25

- 5. UBC operates very much like an order of government within its geographic area. While the majority of the Board is appointed by the Lieutenant Governor in Council, the balance of the Board (and UBC's Vancouver Senate, UBC's primary academic governing body for its campuses in and near Vancouver) is either appointed by the Board itself or is elected by local electors being:

- a. faculty, all of whom are appointees of the Board;
- b. students; or
- c. staff, all of whom are appointees of the Board, who work or study at UBC.

NCC 7 and 8

- 6. The Crown's annual financial information and budgets treat UBC's capital, assets, tuition fees and expenses as capital, assets, income and expenses of the Crown. In many other respects provincial legislation does not differentiate between UBC and government.

NCC 14, 16, 17, 18(a), 19 and 20

- 7. UBC has the power to penalize and fine; has powers of expropriation and is exempt from expropriation; is exempt from taxation; collects property tax; is exempt from civil liability; operates utilities; operates a system of development and building regulation; licenses businesses and transportation; promulgates and enforces traffic bylaws; and

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

NCC 7, 8, 14 and 27

B. The Plaintiffs and Relevant Events

8. UBC represents itself as a “university” offering an education characterized by freedoms of inquiry and expression (“**Educational Freedoms**”).

Amended Notice of Civil Claim, filed March 13, 2024 (the “NCC”) paras 26, 32 and 33

9. The corporate plaintiff, The Free Speech Club Ltd. (the “**Club**”), was incorporated and operated for the purpose of allowing UBC students and other Canadians to enjoy Educational Freedoms at UBC.

NCC paras 1 and 29

10. The individual plaintiffs, Noah Alter, Jarryd Jaeger, and Cooper Asp (the “**Students**”) enrolled at UBC in the belief they would enjoy Educational Freedoms there and became involved with the Club as a means of exercising such Educational Freedoms.

NCC paras 2 – 4 and 61

11. For the purpose of exercising their Education Freedoms, the Club and Students organized and planned to attend a January 29, 2020, speaking event at UBC’s Robson Square campus, involving American journalist Andy Ngo. The event was cancelled by UBC purportedly for reasons of safeguarding the emotional and psychological safety of the campus community.

NCC paras 45 – 53

12. The plaintiffs allege UBC is government and is delivering relevant government programs (including university education and student safety and mental health) such that it is “government” within the meaning of s. 32(1) of the “*Charter*”. The plaintiffs further allege that UBC’s cancellation of the event constituted a breach of their rights under sections 2(b) and 2(c) of the *Charter* for which a declaration and *Charter* damages is appropriate.

NCC paras 24, 25, 28, 66 – 72

13. The NCC includes various allegations of peripheral relevance to the within application including: breach of contract; compensable “deceptive acts or practices” under the *Business Practices & Consumer Protection Act*, SBC 2004, c. 2; and common law rights akin to judicial review.

NCC paras 56 to 82

PART 5: LEGAL BASIS

14. The applicant reasonably summarizes parts of the test under Rule 9-5(1)(a) at paras 3, 4, 9 and 10 of its notice of application (the “**NOA**”) however:

- a. Only if the action is certain to fail because it contains a radical defect should the claim be struck.

Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263 (S.C.C.), para 15

- b. The plaintiffs do not rely on the possibility of new facts arising, as suggested at paragraph 9.
- c. “Speculative assertions” means factual allegations which are either admitted to be speculation with no apparent means of obtaining their proof, facts otherwise known to be false, or facts which are inherently incapable of evidentiary proof. Courts should apply this rule with “great caution.” The applicant’s authorities are based on extraordinary fact scenarios involving, effectively, vexatious litigants. There are nothing “speculative” in the NCC pursuant to this narrow rule.

Young v. Borzoni, 2007 BCCA 16 (“Young”), paras 30 and 34

Anderson v. Double M Construction Ltd. 2021 BCSC 1473, para 53

Olenga v. British Columbia, 2015 BCSC 1050

- d. A pleading may contain a conclusion of law supported by pleaded facts. The NCC is complaint with this rule. The applicant has not applied to strike any discrete portion of the pleadings, it has only applied to strike the NCC as against the Crown, *in toto*. It provides no particulars of any discrete portions of the NCC which ought to be struck. On the basis of the NOA, the plaintiffs submit it would be improper to strike any discrete portions of the NCC. Out of an abundance of caution, the respondent is applying concurrently herewith for leave to amend the NCC in the event this Honourable Court finds the pleading contains impermissible conclusions of law and orders portions struck.

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

- e. A claim should not be struck under Rule 9-5(1)(a) because it is lengthy, complex, novel or because the defendant appears to have a strong defence – “actions that yesterday were deemed hopeless may tomorrow succeed.”

Young, para 19

Knight v. Imperial Tobacco Canada Ltd., 2011 SCC 42, para 21

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

- f. Contrary to paragraph 12 of the NOA, “there is a particular need for generous reading [of pleadings] in constitutional or *Charter* litigation.”

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

15. Contrary to paragraphs 16 and 17 of the NOA, only the *ratio decidendi* of a case binds a court through the principle of *stare decisis* - findings of fact are not binding. The applicants rely on the *ratio decidendi* of the three 1990’s SCC cases (the “**University Cases**”) which determined that UBC and the University of Guelph were not, at that time and on the evidence before the SCC, “government” entities (or, “government *per se*”). According to the principles established in the University Cases, and the existing relationship between the Crown and UBC, UBC is “government” *per se*.

Cameron v. Canadian Pacific Railway, [1918] 2 W.W.R. 1025, paras 4 and 5

Halsbury’s Laws of England, vol. 26, § 573

See: *McKinney*, para 46

Harrison v. University of British Columbia [1990] 3 S.C.R. 450 (“**Harrison**”)

Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570 (“**Douglas**”)

R v Couture, 2007 SCC 28, para 21

Carom v Bre-X Minerals Ltd, 2010 ONSC 6311, para 32

16. In the alternative, a court may depart from *stare decisis* if a new legal issue is raised or there is a significant change in circumstance or evidence that fundamentally shifts the parameters of debate. The University Cases were based on the circumstances prevailing at that time and on the evidence before the Court. As alleged in the NCC, things have significantly changed in the intervening 35 years.

Bedford v. Canada (Attorney General) 2013 SCC 72, para 44

Carter v Canada (Attorney General), 2015 SCC 5, para 44

R v Comeau, 2018 SCC 15

17. In a case more recently put to the British Columbia Court of Appeal on the topic, decided on the evidence before that Honourable Court, the applicant admitted the respondent university was not government, raised different *Charter* issues than those raised in the NCC, and provided no evidence and made no argument as to circumstances differing from those present in the University Cases as to question of whether the University of Victoria was government *per se*. The Honourable Court relied exclusively on the University Cases, even when applying more recent SCC precedent (i.e. *Eldridge v British Columbia (Attorney General)* [1997] 3 S.C.R. 624 (“**Eldridge**”).

BC Civil Liberties Assn v University of Victoria, 2016 BCCA 162 (“**UVic**”), paras 6, 21-26, 32-34, 36

18. Courts must guard against the Crown evading constitutional duties by delegating governmental activity to third parties or by claiming that government activity is “commercial” or “private.”

Eldridge, paras 40 and 42

*Godbout c Longueuil (Ville), [1997] 3 S.C.R. 844 (“**Godbout**”), para 48*

R. v. Buhay, 2003 SCC 30, para 31

19. An entity will be “government” within the meaning of s. 32(1) of the *Charter* on one of two bases. First, the entity may be found to be part of government *per se*. Courts have applied various criteria to determine whether an entity is government *per se* including:

- a. the degree to which an entity is controlled by government;

McKinney, paras 40 and 41

Harrison, para 56

Douglas, paras 37 and 49

*Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483 (“**Stoffman**”), paras 96, 102 and 105*

Eldridge, para 44

*Canadian Federation of Students v GVTA, 2009 SCC 31 (“**GVTA**”), paras 20 and 21*

*Lavigne v. O.P.S.E.U., [1991] 2 S.C.R. 211 (“**Lavigne**”), para 220*

UVic, para 26

- b. whether the entity pursues the objectives of government or merely its own objectives;

McKinney, paras 30, 31, 35, 36 and 41

Stoffman, para 104

Lavigne, para 220

Godbout, para 47

Eldridge, para 35

UVic, paras 23-26

- c. whether the entity is possessed of quintessentially governmental features including: democratic representation; community governance within a defined jurisdiction; power to promulgate laws and bylaws; powers of enforcement including penalties and fines; and taxation.

GVTA, paras 18 and 19

Godbout, para 51

20. Second, a private entity may be “government” under s. 32(1) of the *Charter* to the extent it performs an activity that can be “ascribed to government”, such as a

governmental program or policy, whether or not the entity retains discretion as to the manner of its performance.

McKinney, para 36

Harrison, para 67

Lavigne, para 221

Eldridge, paras 32, 33 and 44

Zaki v University of Manitoba 2021 MBQB 178, para 167

21. On the basis of the tests outlined in the above cases, UBC is “government” under s. 32(1) of the *Charter*.
22. Unlike private law damages, an action for public law damages under section 24(1) of the *Charter* lies against “the state” and not against “individual actors.” In the event UBC is found to be “government” under section 32(1) of the *Charter* (but not “the state”) the plaintiffs claim for public law damages lies only against the Crown and not against UBC.

Ward v Vancouver (City), [2010] 2 S.C.R. 28 (“**Ward**”), para 22

23. Section 3(2) of the *Crown Proceeding Act*, RSBC 1996, c 89 requires that an action name a corporation owned or controlled by the Crown, and not the Crown, where the cause of action is “enforceable against the corporation.” Given *Ward*, the plaintiffs’ cause of action for public law damages is not enforceable against UBC unless it is “the state” – regardless of the basis upon which UBC may be found to be “government” under section 32(1). Presumably, if UBC is found to be “government” *per se* for the purpose of section 32(1), it will also be “the state” for the purpose of *Ward*.
24. Contrary to the proposition at paragraph 19 of the NOA (for which no authority is provided), *Ward* requires that an action name the state not individual actors.
25. Contrary to the relief claimed at Part 1 paragraph 2 of the NOA, if the NCC is struck against the Crown under Rule 9-5(1)(a) there is no remaining claim against the Crown to “dismiss” under that Rule. Nor is there authority under Rule 9-5(1) to “dismiss” a claim independent of an order striking a relevant pleading.

Costs

26. Whatever the outcome of the Crown’s application, the plaintiffs do not seek costs given the public interest in the outcome of these proceedings.

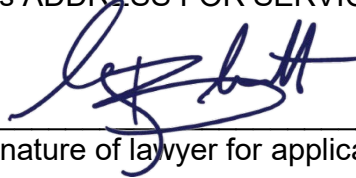
PART 6: MATERIAL TO BE RELIED ON

1. Amended Notice of Civil Claim, filed March 13, 2024
2. Such further materials as counsel may advise and this Honourable Court may permit.

☒ The application respondents have filed in this proceeding a document that contains the application respondent's address for service.

☐ The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is:

Date: 2024-04-05

A handwritten signature in blue ink, appearing to read 'Glenn Blackett', is written over a horizontal line.

Signature of lawyer for application respondents
Glenn Blackett