



No. S-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:** His Majesty the King in right of British Columbia (the "Province").

THIS IS A RESPONSE TO the notice of application of the plaintiffs filed January 2, 2025.

The Province estimates that the application will take 1.5 hours.

#### **Part 1: ORDERS CONSENTED TO**

The Province consents 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 Province opposes the granting of the orders set out in ALL of the paragraphs of Part 1 of the notice of application.

#### **Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

The Province takes no position on the granting of the orders set out in NONE of the paragraphs of Part 1 of the notice of application.

## **Part 4: FACTUAL BASIS**

### ***Background***

1. The plaintiffs are a university club called the Free Speech Club Ltd. (the “**Club**”) and three individuals, who (at all material times) were students at the University of British Columbia (“**UBC**”) and executives of the Club.<sup>1</sup>
2. The allegations underlying the plaintiffs’ action are that:
  - a. In November 2019, the Club, entered into a contract with UBC to rent space on campus to host an event on the topic of “ANTIFA violence”.
  - b. In December 2019, UBC cancelled the event. The stated reason for the cancellation was UBC’s concern about the safety and security of the campus community.<sup>2</sup>
3. There is no dispute that the Province had no direct involvement in or knowledge of the events that led to UBC’s cancellation decision.<sup>3</sup> However, the plaintiffs named both UBC and the Province as defendants.
  - a. The claim against UBC seeks: (1) damages for breach of contract; (2) a declaration that UBC’s actions breached the plaintiffs’ *Charter* rights; and (3) *Charter* damages.
  - b. The claim against the Province relates solely to UBC’s alleged *Charter* breaches and seeks *Charter* damages from the Province for UBC’s actions.<sup>4</sup>

### ***The Province’s application to strike***

4. On March 22, 2024, the Province applied to strike and dismiss the action as against it without leave to amend. The Province sought the following relief in Part 1 of its notice of application:

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<sup>1</sup> Amended notice of civil claim, at paras. 1-4.

<sup>2</sup> *Alter v The University of British Columbia*, 2024 BCSC 961 at para. 2 (“**Reasons**”).

<sup>3</sup> Reasons at para. 4.

<sup>4</sup> Reasons at paras. 3-4.

1. An order pursuant to R. 9-5(1)(a) striking the amended notice of civil claim as against the defendant, His Majesty the King in Right of the Province of British Columbia, without leave to amend.
  2. An order pursuant to R. 9-5(1)(a) dismissing the action against the defendant, His Majesty the King in Right of the Province of British Columbia and removing the Province from the style of cause.
  3. Costs.<sup>5</sup>
5. On June 4, 2024, Justice Greenwood granted the Province's application. The Province argued for this relief based on four stand-alone grounds for dismissal. In the Reasons, Greenwood J. agreed with each of them as follows:
- a. The claim that the *Charter* applies to UBC's actions is doomed to fail.<sup>6</sup>
  - b. The pleadings do not contain material facts to ground a claim against the Province because the Province had no knowledge of or involvement in the facts of the claim.<sup>7</sup>
  - c. To the extent that the claim against the Province is grounded solely on the Province having to pay *Charter* damages for UBC's actions, the claim has no basis in law.<sup>8</sup>
  - d. To the extent that the *Charter* applies to UBC, s. 3(2)(d) of the *Crown Proceeding Act*<sup>9</sup> bars a claim for damages against the Province.<sup>10</sup>
6. In his Reasons, Greenwood J. described the relief granted:

### Conclusion

[67] The application to strike the pleadings against the Province under Rule 9-5(1)(a) is allowed and the claim against the Province is struck. As the defects in the pleadings go to substantive issues rather than formal defects or the manner in which the pleadings are drafted, I would grant the motion to strike without leave to amend the notice of civil claim.<sup>11</sup>

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<sup>5</sup> Province's notice of application filed on March 22, 2024, Part 1 (the "**Strike Application**").

<sup>6</sup> Reasons at paras. 23-25, 35.

<sup>7</sup> Reasons at para. 42.

<sup>8</sup> Reasons at paras. 58-59.

<sup>9</sup> RSBC 1996, c 89.

<sup>10</sup> Strike Application Reasons at para. 66.

<sup>11</sup> Reasons at para. 67.

7. On July 3, 2024, the plaintiffs appealed Greenwood J.'s order.

***Disagreement over the terms of Greenwood J.'s order***

8. In late August and early September 2024, the parties began discussing the terms of Greenwood J.'s order. The parties were unable to come to an agreement.

9. The Province's proposed order reflected the language in paragraph 67 of the Reasons and in Part 1 of the notice of application: that the plaintiffs' claim against the Province was struck and dismissed without leave to amend.<sup>12</sup>

10. The plaintiffs' proposed order instead listed various paragraphs of the amended notice of civil claim that the plaintiffs say should be struck to give effect to the Reasons. Those paragraphs were originally included in the Province's written submissions for the strike application and were orally addressed by the Province at the hearing.<sup>13</sup> The Province set out different alternative paragraphs that could be struck depending on the basis for dismissing the claim. The paragraphs in the plaintiffs' draft order were an alternative that the Province proposed if the Court held that the *Charter* did not apply to UBC's cancellation decision.

11. In the Reasons, Greenwood J. struck the claim as against the Province without referring to any specific paragraphs to be struck.<sup>14</sup>

***The registrar settles the order***

12. On December 10, 2024, Registrar Gaily heard an appointment by the plaintiffs to settle the order under R. 13-1(11).<sup>15</sup> Registrar Gaily accepted the Province's proposed order with two hand-made modifications and described the matter as "crystal clear".<sup>16</sup> That same day, the parties signed and entered the settled order. The terms of the entered order are:

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<sup>12</sup> Order made after application, June 4, 2024. The entered order is the Province's proposed order with two hand-made modifications made by Registrar Gaily.

<sup>13</sup> Lever Affidavit, Ex. "A", pp. 011-012, paras. 43-44.

<sup>14</sup> Reasons at para. 67.

<sup>15</sup> *Supreme Court Civil Rules*, B.C. Reg. 168/2009, R. 13-1(11) ("**Rules**").

<sup>16</sup> Lever Affidavit, Ex. "D", p. 037, lines 25-34.

1. The Province's application is allowed. The Amended Notice of Civil Claim filed March 13, 2024 (the "ANOCC") is struck as against the Province, without leave to amend.
  2. The plaintiffs' application to amend the ANOCC is dismissed.
  3. The parties are at liberty to address the issue of costs in writing by July 4, 2024.<sup>17</sup>
13. On December 19, 2024, the plaintiffs requested that Greenwood J. review the entered order under R. 13-1(14). The next day, Greenwood J. declined to do so.<sup>18</sup>
14. The plaintiffs then filed this application to be heard in general chambers.

## **Part 5: LEGAL BASIS**

### ***The test under rule 13-1(14)***

15. The plaintiffs bring this application under R. 13-1(14). That rule provides for a review of settled orders, including orders settled by the registrar under R. 13-1(11):<sup>19</sup>

#### **Settlement of orders**

(11) An order must be settled, when necessary, by a registrar, who may refer the draft to the judge or associate judge who made the order.

[...]

#### **Review of settlement**

(14) The court may review and vary the order as settled.

16. The Province agrees with the plaintiffs' position that in a review application under R. 13-1(14), this Court ought to apply the same legal test that the registrar applies under R. 13-1(11).<sup>20</sup> Since the terms of an order are a question of law, this court should review them without deference to the registrar's determination.<sup>21</sup>
17. The key question in this application is whether the entered order was correctly settled under R. 13-1(11). The test under R. 13-1(11) requires the registrar to distill the

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<sup>17</sup> Order made after application, June 4, 2024.

<sup>18</sup> Lever Affidavit, Ex. "E".

<sup>19</sup> *Bertolami v. Money Family Projects Ltd.*, 2020 BCSC 1351 at para. 10.

<sup>20</sup> Plaintiffs' notice of application filed January 2, 2025 at para. 15.

<sup>21</sup> *Waters v. Michie*, 2018 BCSC 1206 at paras. 5-6.

reasons for judgment "to a succinct expression that is reasonably enforceable".<sup>22</sup> The registrar does so by applying the steps set out by Registrar Wellburn in *Will Millar Associates*:

1. If the reasons use a specific wording to describe a term of the order made which can be appropriately contained in the order I have settled the order using that wording.
2. If there is a reference in the reasons to a term of the order being made but no specific wording I have settled the order on the terms set out in the notice of motion.
3. If I cannot settle the form of the order or any of the terms of the order I have referred that matter to the Chief Justice.<sup>23</sup>

18. In *Bankruptcy of P.*, Master Baker (as registrar) applied *Will Millar Associates* and addressed issues that fall outside of the scope of R. 13-1(11):

[7] Registrar Wellburn also states the registrar's duty, as:

To *distill* the reasons for judgment ...

I would paraphrase her and say that the function of the registrar under R. 41(18) is to express reasons in the form of an order. That duty may require, occasionally, some interpretation of the reasons of the court but in such cases the registrar should be very cautious in making interpretations and if reasons can be reduced to a succinct expression that is reasonably enforceable, the registrar should not enter into interpretation that might "improve" upon that expression.

[...]

[10] I am concerned that the bankrupt's draft invites the registrar to enter into unnecessary interpretation of the court's intent in its reasons. Indeed, counsel's submissions commented on what the court's intent, in its reasons, must have been. I have concluded that that interpretation is not necessary to give the proper distillation of Master Bolton's reasons. [...]

[...]

[12] Particularizing terms of an order to address future contingencies may seem advisable and the goal of reducing future applications laudable, but, unless that intent is reasonably or demonstrably expressed in the court's judgment or reasons these future events, facts, and laws are best left to future courts who can then decide the issue within a more certain factual and legal matrix.<sup>24</sup>

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<sup>22</sup> 2000 BCSC 71 at para. 7. See also *B.L.S. v D.J.S.*, 2021 BCSC 1961 at para. 6.

<sup>23</sup> *Will Millar Associates Co. v Millar*, 1995 CanLII 2176 (BC SC) at para. 3 ("*Will Millar Associates*").

<sup>24</sup> *Bankruptcy of P.*, 2000 BCSC 71 at paras. 7, 10, 12 (citations omitted) ("*Bankruptcy of P.*").

19. To summarize, under R. 13-1(11) or (14), this Court should not:

- a. enter into interpretation to improve on the reasons;<sup>25</sup>
- b. speculate as to what the judge's intent, in his reasons, must have been;<sup>26</sup> or
- c. particularize the terms of the order to address future contingencies, unless the intent to do so is clear from the reasons.<sup>27</sup>

***The order settled by Registrar Gaily is correct***

20. The entered order correctly distills the reasons for judgment to "a succinct expression that is reasonably enforceable".<sup>28</sup> The Reasons, which are consistent with the relief sought in Part 1 of the notice of application, say that:

- a. the claim against the Province is struck; and
- b. the plaintiffs do not have leave to amend.<sup>29</sup>

21. Those terms can be easily enforced:

- a. If the plaintiffs attempt to pursue the Province in this proceeding moving forward, the entered order will prevent them from doing so.
- b. If the plaintiffs seek to amend their pleading, they require leave.

22. The Reasons do not order the plaintiffs to amend any specific paragraphs in their pleading. It is for the plaintiffs to decide how to amend their pleading to give effect to the order. Justice Greenwood did not engage in that exercise.

23. The plaintiffs seek to add specific paragraphs to the order, although Greenwood J. did not refer to any paragraphs in the Reasons.<sup>30</sup> In doing so, the plaintiffs ask this Court

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<sup>25</sup> *Bankruptcy of P.* at para. 7.

<sup>26</sup> *Bankruptcy of P.* at para. 10.

<sup>27</sup> *Bankruptcy of P.* at para. 12.

<sup>28</sup> *Bankruptcy of P.* at para. 7.

<sup>29</sup> Reasons at para. 67; Strike Application, Part 1.

<sup>30</sup> Plaintiffs' notice of application filed January 2, 2025 at para. 22.



to add to or improve on the Reasons by speculating as to what Greenwood J.'s intent may have been. That is outside the scope of R. 13-1(14).<sup>31</sup>

24. The plaintiffs' remaining arguments speculate about: (1) whether the Court of Appeal will decide to address some of the constitutional issues raised in the appeal; and (2) how potential outcomes in the appeal may impact the plaintiffs' action moving forward.<sup>32</sup> The plaintiffs argue that depending on how the Court of Appeal decides their case, they may face arguments of issue estoppel when continuing to pursue their action against UBC in this Court.<sup>33</sup> As this Court held in *Bankruptcy of P*, those issues are best left to future courts:

[12] Particularizing terms of an order to address future contingencies may seem advisable and the goal of reducing future applications laudable, but, unless that intent is reasonably or demonstrably expressed in the court's judgment or reasons these future events, facts, and laws are best left to future courts who can then decide the issue within a more certain factual and legal matrix.<sup>34</sup>

25. The plaintiffs will be free to advance their arguments before future courts, if and when those issues actually arise.

***Baseless allegations of abuse of process and ulterior purpose***

26. The plaintiffs needlessly complicated this matter by accusing the Province of abuse of process.<sup>35</sup> The plaintiffs claim that the Province engaged in "artifice in drafting" and purposely drafted a vague order for ulterior purposes.<sup>36</sup> To advance these accusations the Plaintiffs mischaracterize the parties' positions. To cite just two examples:

- a. The plaintiffs say that the Province and UBC take the position that Greenwood J. struck the plaintiffs' *Charter* claim as against UBC.<sup>37</sup> However, at the hearing

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<sup>31</sup> *Bankruptcy of P*. at paras. 7, 10.

<sup>32</sup> Plaintiffs' notice of application filed January 2, 2025 at paras. 23-26.

<sup>33</sup> Plaintiffs' notice of application filed January 2, 2025 at paras. 23, 25.

<sup>34</sup> *Bankruptcy of P*. at para. 12.

<sup>35</sup> Plaintiffs' notice of application filed January 2, 2025 at paras. 23, 26-28.

<sup>36</sup> Plaintiffs' notice of application filed January 2, 2025 at paras. 23, 26-27.

<sup>37</sup> Plaintiffs' notice of application filed January 2, 2025 at paras. 20-21.



before Registrar Gaily, both defendants said that they understood the Reasons to only strike the plaintiffs' claims against the Province, not UBC.<sup>38</sup>

- b. The plaintiffs rely on the Province's statement that it would be "open to the plaintiffs to amend their claim to comply with Justice Greenwood's order",<sup>39</sup> to argue that: "the Province insists the plaintiffs must, 'amend their claim to comply with Justice Greenwood's order'".<sup>40</sup> The plaintiffs do so despite being told that the Province takes no position on how the plaintiffs give effect to the order, provided that the plaintiffs do not pursue any claims against the Province.<sup>41</sup>

27. The plaintiffs ultimately accuse the Province of purposely drafting a vague order to obtain an unfair advantage at the appeal of Greenwood J.'s order.<sup>42</sup> The accusation is baseless.

28. The Province's position is that the entered order is correct because it is a succinct and reasonably enforceable expression of the Reasons. Registrar Gaily agreed, referring to the matter as "crystal clear".<sup>43</sup>

### ***Uplift costs are appropriate***

29. The Province seeks uplift costs for this Application.<sup>44</sup>

30. Uplift costs are appropriate for misconduct that falls short of reprehensible but merits some rebuke.<sup>45</sup> Examples of unusual circumstances that merit some rebuke include: "disobedience of court processes, incivility, frivolity, actions taken in bad faith, and impertinence".<sup>46</sup>

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<sup>38</sup> Lever Affidavit, Ex. "D", p. 050, lines 18-25; p. 055, lines 26-46.

<sup>39</sup> Plaintiffs' notice of application filed January 2, 2025 at para. 21; Lever Affidavit, Ex. "B", p. 013.

<sup>40</sup> Plaintiffs' notice of application filed January 2, 2025 at para. 21.

<sup>41</sup> Lever Affidavit, Ex. "C", p. 019.

<sup>42</sup> Plaintiffs' notice of application filed January 2, 2025 at paras. 9, 23.

<sup>43</sup> Lever Affidavit, Ex. "D", p. 037, lines 25-34.

<sup>44</sup> Rules, Appendix B, s. 2 (5).

<sup>45</sup> *Shen v. West Continent Development Inc. (BC0844848)*, 2022 BCSC 462 at para. 32; *Page v Roy*, 2023 BCSC 1717 at para. 26.

<sup>46</sup> *Shen v. West Continent Development Inc. (BC0844848)*, 2022 BCSC 462 at para. 32.

31. Uplift costs are also appropriate when a party places issues before the court that needlessly complicate a matter.<sup>47</sup>

32. The plaintiffs' conduct in this application merits some rebuke. The plaintiffs have vexatiously impugned the Province's conduct by accusing the Province of abuse of process and ulterior purpose. Through those allegations, the plaintiffs introduced irrelevant considerations that needlessly complicate this application.

**Part 6: MATERIAL TO BE RELIED ON**

1. The pleadings and other materials filed in the action;
2. Affidavit #1 of Vanessa Lever affirmed January 17, 2024; and
3. Such further and other material as counsel may advise and this Honourable Court may permit.

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

Date: January 17, 2025



Signature of lawyers for the Province, Karin Kotliarsky, Emily Lapper, and Sergio Ortega

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<sup>47</sup> *Kemp v. Vancouver Coastal Health Authority Ltd. (c.o.b. Vancouver General Hospital)*, 2016 BCSC 1541 at para. 28, citing *On Call Internet Services Ltd. v. TELUS Communications Co.*, 2010 BCSC 1031.