



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 defendant, University of British Columbia (“**UBC**”)

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

The application respondent estimates that the application will take 1.5 hours.

Part 1: ORDERS CONSENTED TO

The application respondent 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 application respondent opposes the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: ALL

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: NONE

Part 4: FACTUAL BASIS

A. Overview

1. UBC opposes the plaintiffs' application for a review of Justice Greenwood's order dated June 4, 2024 and as settled by Registrar Gaily on December 10, 2024 ("**Order**").
2. The plaintiffs seek to have the Order varied to include specific paragraphs of the amended notice of civil claim filed on March 13, 2024 ("**Claim**") as struck.
3. This court should dismiss the review. The Order reflects the order contained in Justice Greenwood's reasons for judgment indexed at *Alter v The University of British Columbia et al*, 2024 BCSC 961 ("**Strike Decision**") at para 67.

Strike Decision at para 67

4. The Order strikes, without leave to amend, the Claim against the defendant His Majesty the King in the Right of British Columbia ("**Province**"), without enumerating specific paragraphs in the Claim as struck. In this form, the Order is reasonably enforceable. There is no basis to vary the Order.
5. Costs of this review should be awarded as special or, alternatively, uplift costs because the plaintiffs have misrepresented UBC's position to the court.

B. Factual Background

i. Strike Application

6. On March 22, 2024, the Province filed an application to strike, without leave to amend, and to dismiss the Claim against the Province under Rule 9-5(1)(a) ("**Strike Application**").
7. On June 4, 2024, Justice Greenwood granted the Strike Application (and dismissed an amendment application brought concurrently by the plaintiffs), ordering:

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.

Costs

[68] The parties are at liberty to address the issue of costs in writing within 30 days of the release of these Reasons for Judgment, as requested at the hearing.

Strike Decision at paras 67-68

8. The parties subsequently made submissions on costs, which led to a subsequent decision of Justice Greenwood indexed at: *Alter v The University of British Columbia et al*, 2024 BCSC 1879 (“**Costs Decision**”).

ii. Registrar Hearing

9. The parties were unable to agree to the terms of the Order. The respondents were in agreement on the terms but the plaintiffs argued that specific paragraphs of the Claim were ordered by Justice Greenwood as struck.

Affidavit #1 of Vanessa Lever made January 17, 2025 (“**Lever Affidavit**”) at
Exhibit D, p 31, lines 5-12; p 33, lines 3-4

10. On December 10, 2024, the parties appeared before Registrar Gaily to settle the terms of the Order.
11. During the hearing, the plaintiffs argued, among other things, that:
 - a. Justice Greenwood struck the *Charter* claims against UBC; and
 - b. UBC took the position that Justice Greenwood struck the *Charter* claims against UBC in its submissions on costs following the Strike Decision.

Lever Affidavit at Exhibit D, p 37, lines 35-46; p 46, lines 30-37; p 47-48

12. UBC's costs submissions had merely set out that Justice Greenwood stated, *in obiter*, that the plaintiff's claim that the *Charter* applies to UBC is not legally sustainable in light of the legal precedent. As a result, UBC argued for costs payable forthwith because it doubted that the plaintiffs would pursue the action given the Strike Decision cast doubt on the plaintiffs' success against UBC on its *Charter* arguments.

Affidavit #1 of Ashley Sexton made January 2, 2025, Exhibit C, para 37-38

13. Registrar Gaily, who presided over the hearing, expressed as follows in respect of what Justice Greenwood ordered:

[...] He struck the claim against the Province so they're out. You continue against UBC.

[...]

He didn't strike the claim against UBC [...]

[...]

That doesn't say the *Charter* claim is dead, it just says he struck it against the Province.

[...]

[...] Whatever happens against UBC that is not really within the confines of settling this order.

Lever Affidavit at Exhibit D, p 47, lines 4-5, 21, and 40-41; p 48, lines 44-46

14. In its responding submissions, and given the claims made by the plaintiff before Registrar Gaily as to UBC's position, counsel for UBC put on the record:

[...] The order in the reasons for judgment are clear that the claim against the Province are struck, without specifying what particular paragraphs, and nothing was decided in respect of the claim as against UBC.

My friend for the plaintiff[s] says that UBC took the position on costs that the *Charter* claims against UBC are struck, and then took you to paragraph 32 of that cost decision. Now, of course my submission is that it is not within your jurisdiction to be looking at what submissions UBC made after this order was made on costs, but nonetheless, just to be clear on the record, UBC did not take the position that [...] the order

strikes the *Charter* claims against UBC, so I just wanted to make that clear on the record.

I could go into details about what we argued on the cost submission, and then what paragraph 32 that my friend took you to in the cost decision does speak to, but if you don't need to hear my explanation on that then those are my submissions, subject to any questions.

[Emphasis added.]

Lever Affidavit at Exhibit D, p 55, lines 30-38

15. The Province had also provided its position that “The question of what survives as against UBC, well the reasons didn’t deal with that”.

Lever Affidavit at Exhibit D, p 50, lines 21-23

16. Registrar Gaily settled the Order on the following terms:

THIS COURT ORDERS that:

1. The Province’s application is allowed. The Amended Notice of Civil Claim filed March 13, 2024 (the “**ANOC**”) is struck as against the Province, without leave to amend.
2. The plaintiffs’ application to amend the ANOC is dismissed.
3. The parties are at liberty to address the issue of costs in writing by July 4, 2024.

Order

17. On January 2, 2025, the plaintiffs filed this application to review and vary the terms of the Order under Rule 13-1(14). Justice Greenwood had declined to hear the review himself.

Lever Affidavit at Exhibit E

Part 5: LEGAL BASIS

A. The Test under Rule 13-1(14)

18. The plaintiffs bring this review under Rules 13-1 of the Supreme Court Civil Rules (“**Rules**”):

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.

Rules, rule 13-1(11) and (14)

19. The issue on this review is whether the Order was correctly settled.
20. The registrar's duty in settling an order under Rule 13-1(11) is to distill the reasons for judgment issued by the judge into a form of order. The registrar may determine the appropriate wording of an order according to the following framework:
 - a. if the reasons use a specific wording to describe a term of the order made which can be appropriately contained in the order, that wording is used;
 - b. if there is a reference in the reasons to a term of the order being made but no specific wording, the order is settled on the terms set out in the notice of motion;
 - c. if the form of the order or any of the terms of the order cannot be settled, the matter is referred to a judge.

Will Millar Associates Co v Millar, 1995 CarswellBC 1184, [1996]
BCWLD 181 ("**Millar**") at para 3

21. Occasionally, settling an order may require some interpretation of the court's reasons. In those cases, the registrar should be 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 interpretation.

Bankruptcy of P., 2000 BCSC 71 ("**Bankruptcy of P**") at para 7

B. The Order Was Correctly Settled

22. Registrar Gaily followed the framework outlined in *Millar* to settle the Order. The Strike Decision contains specific wording that Registrar Gaily correctly concluded forms the terms of the Order.
23. Registrar Gaily correctly concluded—from the specific wording—that Justice Greenwood ordered that the Claim be struck against the Province, without leave to amend. The Strike Decision did not strike specific paragraphs of the Claim.
24. Registrar Gaily was not required interpret the Strike Decision, or any other materials, as the Order is reasonably enforceable.

C. Costs

25. UBC seeks special costs or, alternatively, uplift costs of this review because the plaintiffs have misrepresented to the Court UBC's position on whether Justice Greenwood struck the *Charter* claim against it, and have made the matter needlessly complicated.
26. Special costs may be awarded for “reprehensible” conduct, which encompasses various forms of misconduct:

17 ... the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

Garcia v Crestbrook Forest Industries Ltd (1994), 119 DLR (4th) 740, 9 BCLR (3d) 242 (BCCA) at para 17

27. Uplift costs are intended to indemnify a party for unnecessary expense caused by another's misconduct, regardless of whether that conduct rises to the “reprehensible” standard necessary for an order for special costs:

[33] But where one party to an action is guilty of misconduct in the litigation, and the innocent party is required to spend time and effort

responding to such conduct, in most cases it would be unjust if the latter was not adequately indemnified for the costs associated with defending against that which should never have happened. It is in that sense that, whether reprehensible or not, the misconduct of one party is relevant when a court is considering or exercising the discretion to award increased costs to the other.

National Hockey League v Pepsi-Cola Canada Ltd, [1995] 2 BCLR (3d) 13, 37 CPC (3d) 358 (BCCA) at para 33

Supreme Court Civil Rules, Appendix B, section 2(5)

28. In this application, the plaintiffs allege that, following the Strike Decision, UBC (as well as Justice Greenwood and the Province) expressed the view that the *Charter* claims against UBC had been struck.

Notice of application filed January 2, 2025 at Part 1, para 8; Part 3, para 21

29. The plaintiffs made the same claim at the hearing before Registrar Gaily: the plaintiffs had argued that UBC's costs submissions took the position that the Strike Decision struck the *Charter* claims against UBC.

Lever Affidavit at Exhibit D, p 46, lines 30-37

30. At the hearing, counsel for UBC made it clear for the record that UBC did not, and does not, take the position that the Order strikes the *Charter* claim against UBC.
31. Yet, the plaintiffs assert before this court that UBC's position is that the *Charter* claims against it are struck.
32. Nowhere in its application do the plaintiffs acknowledge that UBC advised it did not take the position the plaintiffs say it did.
33. The plaintiffs' misconduct warrants special or, alternatively, uplift costs.

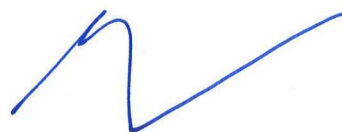
Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Vanessa Lever made January 17, 2025.
2. Affidavit #1 of Ashley Sexton made January 2, 2025.

3. Such further and other material as counsel may advise and this court permits.

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

Dated: 22 January 2025

A handwritten signature in blue ink, consisting of a stylized 'N' shape with a horizontal line extending to the right.

Signature of lawyer for
University of British Columbia
Rodney W. Sieg and Hubert Lai, K.C.