IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Alter v. The University of British Columbia,* 2024 BCSC 961

Date: 20240604
Docket: S2210080
Registry: Vancouver

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

Before: The Honourable Justice Greenwood

Reasons for Judgment

Counsel for the Plaintiffs:	G. Blackett
Counsel for the Defendant, His Majesty the King in Right of British Columbia:	K. Kotliarsky E. Lapper S. Ortega
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Place and Date of Hearing:	Vancouver, B.C. May 7-8, 2024
Place and Date of Judgment:	Vancouver, B.C. June 4, 2024

[1] This is an application under Rule 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 to strike an action against the Province on the basis that the amended notice of claim discloses no reasonable cause of action. The plaintiffs' claim against the Province is based on their position that the *Canadian Charter of Rights and Freedoms* applies to the University of British Columbia.

[2] The background of the application is that in November of 2019, one of the plaintiffs, the Free Speech Club, entered into a contract with the University of British Columbia ("UBC") to rent space at Robson Square, and invited Andy Ngo to speak on the topic of "ANTIFA violence". Ultimately, for reasons that may be disputed, UBC's vice-president of students directed that the event be cancelled. The stated reason for the cancellation taken from plaintiffs' notice of civil claim was "concern about the safety and security of our campus community". UBC's chief risk officer directed staff at Robson Square to return the club's deposit and the event was cancelled.

[3] The plaintiffs have launched an action against both UBC and the Province. As against UBC, the plaintiffs seek damages for breach of contract, a declaration that the cancellation decision breached their *Charter* rights and damages as a remedy for *Charter* breaches. The claim against the Province relates solely to the alleged breaches of the *Charter* and includes damages under s. 24(1) of the *Charter*.

[4] There is no dispute on the facts that all of the decision makers involved in the decision to cancel the event were staff members of UBC. Neither the Province nor any of its employees had any direct involvement or knowledge of the events that led to the decision cancel the speech.

[5] For the reasons that follow, I would grant the application. In my view, the plaintiffs cannot succeed against the Province based on the facts or the law. The substantive claim that the *Charter* applies to the actions of UBC is not legally sustainable in light of the authorities. Even if that argument were sustainable, there are no material facts that establish a valid cause of action against the Province as a defendant. If the plaintiffs' claim were valid and enforceable against UBC, then a

proceeding against the Province for the same cause of action would also be barred by statute.

Legal Framework

[6] The test for striking out a claim is not in dispute. 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. In other words, if the claim has no reasonable prospect of success. A court's approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. Actions that yesterday were deemed hopeless may tomorrow succeed. (*Nevsun Resources v. Araya*, 2020 SCC 5 at paras. 64 and 66; and *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 17 and 21).

The Plaintiffs' position

[7] The plaintiffs agree that there was no direct involvement of the Province or staff members of the Province in the events that gave rise to cancellation of the speaking event at Robson Square. They argue however, that it is necessary to name the Province in the lawsuit to secure damages for any breach of the *Charter*.

[8] The plaintiffs' main argument is that the *Charter* applies to UBC because UBC is properly considered part of the government of the Province under s. 32 of the *Charter*. They face strong headwinds as a result of cases like *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, [1990] S.C.J. No. 123, which found that UBC was not subject to the *Charter*, and *BC Civil Liberties Association v. University of Victoria*, 2016 BCCA 162 ("*UVIC*"), which applied *Harrison*, and found that the question of whether the University of Victoria should be regarded as equivalent to government for all purposes was settled as a result of *Harrison* which remains good law (para. 21).

[9] The plaintiffs contend that both the factual and legal basis of their argument on the application of the *Charter* to UBC is different than the facts and arguments that led to the results in *Harrison* and *UVIC*.

[10] The plaintiffs further argue that it is necessary to pursue a claim against the Province because of the nature of damages as a remedy for a breach of the *Charter*. According to the plaintiff, the decision in *Vancouver (City) v. Ward*, 2010 SCC 27, requires the "state" to compensate an individual for a breach of that individual's constitutional rights. The plaintiffs' position is that the most reasonable way to interpret "the state" is simply as the Crown, and that therefore the Province is properly named as a defendant. In essence, the plaintiffs maintain that the Province is liable as a result of the actions of UBC and its officials.

Issues

[11] I would describe the issues that need to be determined as follows:

a) Is the plaintiffs' claim bound to fail as a matter of law?;

b) Do the material facts support the plaintiffs' claim that the Province breached their *Charter* rights?;

c) Does the issue of remedy alone give rise to a valid cause of action against the Province?; and

d) Does the *Crown Proceeding Act*, RSBC 1996, c. 89, bar the action against the Province?

Analysis

Is the plaintiffs' claim bound to fail as a matter of law?

[12] The first question that arises is whether the plaintiffs' claim against the Province is bound to fail as a matter of law. In this respect, it is noteworthy that the amended notice of claim against UBC includes a claim for damages for breach of contract, injunctive relief and relief based on private law, whereas the claim against the Province is solely based on *Charter* Grounds.

[13] In *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, [1990] S.C.J. No. 122, a majority of the Court held that Ontario universities were not part of

"government" for the purposes of s. 32 of the *Charter*. At issue were the universities' rules related to mandatory retirement. After recognizing earlier case law to the effect that universities, while they are incorporated by statute and subsidized by public funds, enjoy "substantial internal autonomy", LaForest J. stated at p. 269:

> …there is no question of the power of the universities to negotiate contracts and collective agreements with their employees and to include within them provisions for mandatory retirement. These actions are not taken under statutory compulsion, so a *Charter* attack cannot be sustained on that ground. There is nothing to indicate that in entering into these arrangements, the universities were in any way following the dictates of the government. They were acting purely on their own initiative. Unless, then, it can be established that they form part of government, the universities' actions here cannot fall within the ambit of the *Charter*…

[14] In *Harrison*, the Supreme Court of Canada specifically considered the *University Act*, RSBC 1996, c 468, which is the governing legislation in British Columbia, but found that the differences between the *University Act* and the legislation at issue in *McKinney* did not change the result. At p. 463-464, LaForest J. provided the following reasons for the majority:

> The facts, issues and constitutional questions being similar to those considered in *McKinney v. University of Guelph*, supra, it follows that the present appeals are governed by that case… The relatively minor factual differences in the two cases do not affect the matter. The fact that in the present case the Lieutenant Governor appoints a majority of the members of the university's Board of Governors or that the Minister of Education may require the university to submit reports or other forms of information does not lead to the conclusion that the impugned policies of mandatory retirement constitute government action. While I would acknowledge that these facts suggest a higher degree of governmental control than was present in *McKinney*, I do not think they suggest the quality of control that would justify the application of the *Charter*. I would in this respect refer to the distinction that I have drawn in the companion appeal of *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, between ultimate or extraordinary control and routine or regular control; see p. 513-14. The respondents also sought to establish government control of the university by means of the *Financial Administration Act*, S.B.C. 1981, c. 15, the *Auditor General Act*, R.S.B.C. 1979, c. 24, and 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). These Acts, no doubt, apply to the university in that they monitor and regulate the expenditure of public funds it receives. However, I agree with the Court of Appeal, at p. 152, that "the fact that the university is fiscally accountable under these statutes does not establish government control or influence upon the core functions of the university and, in particular, upon the policy and contracts in issue in this case".

[15] The *Harrison* decision therefore reflects an express finding that UBC is not in itself government in the sense required by s. 32(1). The British Columbia Court of Appeal applied *Harrison* in *Maughan v. University of British Columbia*, 2009 BCCA 447, leave ref'd, a case involving an allegation of discrimination based on the claimant's interactions with university professors. The Court found that the *Charter* had no application to the claims made by the plaintiff in the circumstances.

[16] More recently, the Court of Appeal found in *UVIC* that the *Charter* did not apply to the University of Victoria. The facts in that case are somewhat similar to the facts alleged in this case. A student group had initially arranged to secure space on the university campus for the purpose of holding an event. The student group's members were opposed to abortion and had held a number of pro-life events in the past that conflicted with the views of some members of the executive of the University of Victoria Student Society. The associate vice-president of student affairs ultimately withdrew his approval of the event and instructed the student group not to proceed. The event proceeded, but the leader of the student group and the BCCLA petitioned the court for *Charter* relief.

[17] The Chambers judge in *UVIC* held that the university was neither controlled by the government, nor performing a specific government policy or program as contemplated in *Eldrige v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86 (2015 BCSC 39 at para. 151). Among the arguments he considered and rejected were:

a) The university was performing a government function by regulating or prohibiting the use of its common spaces for expressive purposes (para 130);

b) The provision of university education was a government program in the same way as the provision of health care (para. 131); and

c) The *Charter* applied based on the analysis of Justice Paperny in *Pridgen v. University of Calgary*, 2012 ABCA 139 (paras. 136-141).

[18] The Court of Appeal upheld the chambers judge and found that neither the university nor the activity itself were amenable to *Charter* scrutiny. Willcock J.A. held that the question of whether the university should be regarded as equivalent to government for all purposes should be regarded as "settled" by the decisions of the Supreme Court of Canada in *McKinney*, *Stoffman* and in particular *Harrison* (para. 21). There were subtle distinctions in the composition of the boards of the two universities, but no material distinctions.

[19] Willcock J.A. went on to consider whether the university could be said to be implementing government policy in the actions it took. Neither the fact that the university's policy was adopted under the *University Act*, nor the fact that the university was fiscally accountable to government was sufficient. There was no routine or regular control of the power over public spaces at the university (paras. 25-26).

[20] Willcock J.A. distinguished *Eldridge* and could not find that the "specific impugned acts" of the *University of Victoria* were governmental in nature. He found that "the government neither assumed nor retained any express responsibility for the provision of a public forum for free expression on university campuses" (para. 32). The Court expressly declined to follow Paperny J. in *Pridgen*, noting that her reasons on that point were *dicta*, not adopted by the majority of her colleagues, and addressed a specific statutory framework that had no applicability in British Columbia.

[21] In my view, *UVIC* is virtually on all fours with the case at bar. Many of the legal arguments the plaintiff seeks to advance were the same or similar arguments to those made in *UVIC*, including the argument that the provision of university education is a government program analogous to health care, and the argument that the court should adopt the analysis of justice Paperny writing for herself in *Pridgen*.

[22] The plaintiff also relies on what he says are factual distinctions between the facts outlined in the amended notice of claim and the facts which led to the result in both *Harrison* and *UVIC* and novel legal arguments that were not put to the court in

those cases. The plaintiff relies on the principle that on a motion to strike, the court must allow novel but arguable claims to proceed to trial.

[23] I have carefully reviewed the statement of facts as set out in the amended notice of claim. The statement of claim includes a vast amount of detail relating to the manner in which UBC interacts with the government, the composition of its board of directors and senate, various reports that UBC is required to undertake under provincial legislation, aspects of its public accountability, its financial dependence on the provincial and federal governments, and oversight in various areas of its operations. However, I do not see anything in the additional material which would take it outside of the scope of the decisions in *Harrison* and *UVIC*.

[24] The jurisprudence establishes that UBC is autonomous in the exercise of its core function. As the Court of appeal noted in *UVIC*, the Supreme Court of Canada explicitly "recognized the significance of the relationships between universities and provincial governments in Canada, including governments' role in determining universities' powers, objects and governmental structures, and the role of governments in their funding, but noted that they manage their own affairs and allocate government funds, tuition revenues and endowment funds to meet their needs as they see fit". The complex nature of the relationship between the university and the provincial government did not alter the traditional nature of a university as a community of scholars and students enjoying substantial internal autonomy (para. 34).

[25] Even accounting for some variation in the facts, and taking a generous approach, I am bound to conclude that the plaintiffs' claim against the Province has no reasonable prospect of success.

[26] The *University Act*, grants broad powers to the board of governors and senate, but preserves its autonomy over its core functions. For example, s. 48(1)(a) of the *Act* stipulates that the minister must not interfere in the exercise of powers conferred on a university in relation to the formulation and adoption of academic policies and standards.

[27] Some of the facts plead in the amended notice of claim are more in the nature of argument than facts. For example, para. 28 of the statement of claim asserts that "UBC is government" by its nature and the extent of provincial Crown control, and by virtue of the fact that delivery of university education is a government function.

[28] Assuming that all of the assertions that are factual (or reflect legislative facts) are true, as I am bound to do, I see no basis for distinguishing *Harrison* or *UVIC*. While it is true that in *UVIC* the appellants did not press the argument that UBC was government *per se*, as the plaintiffs intend to, in my view the Court of Appeal decided that point.

[29] That leaves the plaintiffs' argument that UBC is bound by the *Charter* because it is implementing a specific government program. The plaintiffs say their argument is not that in regulating its campus property and affording students an opportunity for free speech the government is implementing government policy. Their argument is a more general argument, based on the broad proposition that the provision of university education is the relevant government policy that UBC is implementing, and as a result the *Charter* applies to all actions of UBC that fall within the implementation of that policy. In oral submissions, they argued that the provision of university education is analogous to the provision of health care.

[30] I am not persuaded by the plaintiffs' submission in that regard. First, *Eldridge* is clear that in order to attract *Charter* scrutiny an entity that is not itself government must be found to be implementing "a specific governmental policy" (para. 43). Evaluating the governmental policy as broadly as the provision of "university education," and then applying the *Charter* to a decision to cancel an event at one of the properties controlled by the university, would be virtually the same as a finding that the university was subject to the *Charter* such that all of its activities would be subject to the *Charter*. The acceptance of that argument would result in virtually all of the activities of the university being subject to *Charter* scrutiny. In addition, as noted, the same argument was made in this Court in *UVIC* and was unsuccessful.

[31] The specific factual context in the present case is also relevant. As *Eldridge* instructs, a court must scrutinize the quality of the act in issue to assess whether it is truly governmental in nature (para. 44). Here the primary act undertaken by the university was, as set out in the notice of amended claim, the decision to cancel Mr. Ngo's speech and the rental of Robson Square, and a direction that future events with a "high" risk assessment under UBC's Event Threat Assessment Group (E-TAG) process would be refused.

[32] Both the Chambers judge and the Court of Appeal found in *UVIC* that regulating or prohibiting space controlled by the University from being used for expressive purposes was not sufficient to constitute the performance of a government function (2015 BCSC 39 at paras. 149-151; 2016 BCCA 162 at para. 40).

[33] Section 27(2)(d) of the *University Act* confers on the board in consultation with the senate, the power to maintain the real property of the university, and to "make rules respecting the management, government and control of the real property, buildings and structures". Under s. 27(2)(t), the university may regulate, prohibit and impose requirements in relation to the use of real property and buildings it controls in respect of "activities and events". The activities that the plaintiff impugns thus fall within the university's autonomous authority to regulate the use of property it controls.

[34] In *Lobo v. Carleton University*, 2012 ONCA 498, a motion judge held that the appellants failed to plead the material facts necessary to establish their claim that the respondent university was implementing a specific government program when it failed to allocate space for a pro-life exhibit. As in the present case, the impugned decision in *Lobo* was alleged to have violated the appellant's expressive rights set out in s. 2 of the *Charter*. The Ontario Court of Appeal upheld the judge's decision to strike the claim in the following terms:

> …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*. <u>In carrying out</u>

> this particular activity there is, therefore, no triable issue as to whether Charter scrutiny applies to the respondent's actions. [emphasis added]

[35] *Lobo* was considered and applied by our Court of Appeal in *UVIC*, and both *UVIC* and *Lobo* address similar impugned activity on the part of a university. Applying those cases in this situation, I see no realistic scenario under which the *Charter* would apply to that activity on the basis that it was implementing a specific government policy as contemplated in *Eldridge*. Even accounting for the need to allow novel arguments to proceed, I am driven to conclude that it is plain and obvious that the plaintiffs' *Charter* claim against the Province will fail as a matter of law.

Have the plaintiffs plead material facts to support their claim that the Province breached their Charter rights?

[36] Even if the plaintiffs' substantive argument with respect to the application of the *Charter* could succeed, in my view there are no material facts that could establish a breach of the *Charter* by the Province.

[37] Before the issue of remedy arises, a breach of the *Charter* must be established, or as McLachlin C.J. put it in *Ward*, "the wrong on which the claim for damages is based". Establishment of a *Charter* breach is the "first step" (para. 23).

[38] When assessing whether the facts pleaded disclose a valid claim against the Province, it is necessary to assess whether they are capable of establishing a breach of the *Charter* on the part of the Province. In other words, did the Province participate in any "unconstitutional government acts" that would be appropriately remedied under s. 24(1) of the *Charter* (see: *R. v. Ferguson*, 2008 SCC 6 at paras. 50-51)?

[39] There are detailed allegations about UBC's board of governors, its structure and some of its activities, policies, and procedures in the amended notice of civil claim, but no evidence of participation by the Province or any of its employees in any of the acts or decisions that form the subject matter of the claim. Subject to the question of whether the remedy sought by the plaintiffs is sufficient in and of itself to

pursue a claim against the Province, the absence of any factual basis for a claim against the Province is a fatal defect.

[40] I agree with the Province that on the face of the pleading, UBC's actions were decisions taken by UBC and its officials and did not involve the Province. There are no allegations or facts in the amended notice of claim that could establish any involvement by the Province in a breach of the plaintiffs' rights under s. 2(b) and 2(c) of the *Charter*.

[41] As noted above, the thrust of the plaintiffs' submission is that UBC should be considered government under s. 32(1) of the *Charter*, and cases like *Harrison* and *UVIC* should be revisited. The pleaded facts are designed to support the argument that UBC is government, but they do not give rise to an action against the Province for breaches of the *Charter* they did not participate in or have any control over.

[42] Subject to the discussion of the remedy issue, the absence of any facts which would implicate the Province in a breach of the plaintiffs' s. 2(b) or 2(c) *Charter* rights makes it plain and obvious that their action against the Province cannot succeed. I would strike the claim on that basis irrespective of my conclusion on the legal viability of the plaintiffs' main argument.

Does the issue of remedy alone give rise to a valid cause of action against the Province?

[43] The plaintiffs argue that the *Ward* decision indicates that the "state" and only the state is liable for *Charter* damages under section 24(1). Accordingly, they say, if they are successful in establishing either that (1) UBC is government within the meaning of s. 32(1) of the *Charter*; or (2) UBC is a private entity but is implementing a specific governmental policy or program as contemplated in *Eldridge*, they would be entitled to an award of damages against the Province.

[44] The plaintiffs argue that *Ward* requires the Province to be named. Damages are payable by the Crown, they say, as a representative for "society writ large"

(*Ward* at para. 54). Their position is that s. 32(1) of the *Charter* provides the necessary nexus or "involvement" of the Province in the impugned conduct.

[45] In my view, the decision in *Ward* does not restrict damage awards under the *Charter* to the federal or provincial Crown, but contemplates such awards being granted against entities other than the Crown itself. In *Ward*, for example, the Supreme Court of Canada differentiated between government entities which are liable for *Charter* damages, and individual actors, such as police officers, who are not.

[46] In *Ward*, the trial judge awarded damages against both the Province and the City of Vancouver. The Supreme Court of Canada noted that there were "two distinct claims to consider" (para. 60). The damage award against the Province was upheld, but it was based on the conduct of corrections officers who were employed by the Province (paras. 72-73, 79).

[47] With respect to the claim against the City, the Court decided not to award damages because a declaration that the seizure of Mr. Ward's vehicle violated his rights was found to be sufficient in the circumstances (para. 78). I do not read *Ward* as standing for the proposition that damages could not have been awarded against the City in appropriate circumstances. The very fact that the Court assessed the merits of damages clearly suggests that it was open legally to impose them had they been warranted. In other words, *Ward* supports the proposition that *Charter* damages may be applied to an entity to which s. 32(1) applies.

[48] Applying *Ward* to the present case, if the plaintiffs could establish that the *Charter* applies to UBC, and that UBC infringed their rights under ss. 2(b) and 2(c) of the *Charter*, then it stands to reason that UBC would be liable, as government or as an entity carrying out a government function, for any damages that are deemed just and appropriate under s. 24(1) of the *Charter*.

[49] There are a number of cases which have awarded *Charter* damages against entities other than the federal or provincial Crown, where those entities have been

found to be subject to the *Charter*. Thus, in *Mason v. Turner* the Court upheld an award of damages for a breach of *Charter* rights against the City of Nelson for the actions of a police officer. The City of Nelson represented the "state" for the purposes of damages in accordance with the principles in *Ward* (*Mason v. Turner*, 2014 BCSC 211 at para. 124, aff'd 2016 BCCA 58). The Province was not a party.

[50] In *Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255 at para. 149, the Ontario Court of Appeal ordered the Toronto Police Services Board to pay damages for a breach of Mr. Stewart's *Charter* rights during the G20 summit in Toronto. The provincial Crown was not a party to the proceedings.

[51] *Ward*, *Mason v. Turner*, and *Stewart v. Toronto* show that where an entity is responsible for a *Charter* breach by virtue of being government for the purposes of s. 32(1) of the *Charter*, then the remedy of *Charter* damages may be awarded against that entity, but not against private individuals who may have been involved because they are not subject to the *Charter*. As Kent Roach has observed, *Charter* damages are not available against private entities and have been struck out on that basis, but they are available "against governmental entities bound by the *Charter*" (*Constitutional Remedies in Canada*, 2nd Ed (Toronto: Thompson Reuters, 2023) at 11:13).

[52] In the circumstances of this case, remedy alone under s. 24(1) of the *Charter* does not create a cause of action as against the Province. In my view, as was outlined in *Koita v. Toronto Police Services Board*, [2001] O.J. No. 3641, it is difficult to see how s. 24(1) of the *Charter* gives rise to a cause of action "against a defendant who did not participate in the infringement or deprivation of the *Charter* right or was not liable for the actions of the person who did" (paras. 12-13). As McEwen J. put it in *Whitty v. Wells*, 2014 ONSC 502 at para. 46, "…damages under s. 24 are not a cause of action, but rather a remedy".

[53] If the plaintiffs could demonstrate that the *Charter* applies to UBC, the result would be that UBC could be held liable for any damages award that this Court concludes is just and appropriate. It would be anomalous if UBC were bound by the

Charter, and at the same time immune from an award of damages for breaching an individual's *Charter* rights.

[54] It is true that under the principle in *Eldridge*, an otherwise private entity may be found to attract *Charter* scrutiny in relation to a particularly activity that is governmental in nature, but I consider *Eldridge* to be a very different case than the present case. In *Eldridge*, the issues raised went beyond a specific incident that was said to have breached the plaintiff's rights and extended to the general problem of whether health care providers across the province had to administer health care in accordance with s. 15 of the *Charter* by providing access to sign language interpretation.

[55] It is not surprising that in *Eldridge* British Columbia was the main defendant, as it was responsible for providing health care throughout the province, and it could not evade its *Charter* responsibilities by delegating the implementation of their policies and programs to private entities. The Court in *Eldridge* granted a declaration that would apply to all hospitals in the province, and it recognized that there were "myriad options" available to the provincial government to rectify the situation (para. 96).

[56] By contrast, the allegations made by the plaintiffs in this case revolve around a single and specific incident. They seek a much narrower declaration that cancellation of the speech was a breach of ss. 2(b) and 2(c) of the *Charter*, and they seek damages for compensation in relation to cancellation of the speech. In my view, the *Eldridge* decision does not require naming the province as a defendant in order to seek that relief.

[57] While the plaintiffs stress that among the remedies they are seeking is a declaration that their rights were breached, that alone would not require proceeding against the Province. If the *Charter* applied, I see no reason why the court could not fashion a declaration that UBC infringed the plaintiffs' rights if it were appropriate to do so. A declaration is designed to be a flexible remedy (*Ewert v. Canada*, 2018 SCC 30 at paras. 81-83).

[58] In short, if the plaintiff were able to establish that UBC is subject to the *Charter* either because it is a government entity, or because it was implementing a specific governmental policy or program at the time, the appropriate remedy would still be a remedy against UBC in the circumstances of this case.

[59] I do not think *Ward*, or any of the other authorities brought to my attention require or justify adding the Province as a defendant in these proceedings. Section 24(1) of the *Charter*, in and of itself, does not create an independent cause of action against the Province for the discrete alleged breaches set out in the notice of claim.

Does the Crown Proceeding Act bar the action against the Province?

[60] The *Crown Proceeding Act*, creates a general rule which allows actions against the Crown and makes the Crown subject to "all those liabilities to which it would be liable if it were a person" (s. 2(c)). There are certain limitations set out in s. 3(2) of the *Crown Proceeding Act*, including s. 3(2)(d) which provides that nothing in section 2 of the Act:

> (d) 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

[61] If a plaintiff can enforce its claim against a defendant that is a corporation or agency owned or controlled by the government, then the Crown continues to enjoy the immunity it enjoyed before the 1974 passage of the *Crown Proceeding Act* (*Skibinski v. Community Living British Columbia*, 2010 BCSC 1500 at para. 85, rev'd in part on other grounds, 2012 BCCA 17).

[62] The Province argues that s. 3(2)(d) acts as a further barrier to the plaintiffs' claim. If the plaintiffs were to succeed in arguing that the *Charter* applies to UBC's actions, the claim against the Province would be statutorily barred.

[63] The plaintiffs' argument in response to the *Crown Proceeding Act* is similar to their argument on the enforceability of damages against the Crown. They argue that s. 3(2)(d) has no application, because they can only enforce a judgment against UBC if UBC is found to be government and may be considered the "state" for the

purposes of an award of damages. In any other case, the plaintiffs say, their claim would only be "enforceable" against the Province.

[64] I have been referred to a number of examples where proceedings were found to be barred under s. 3(2)(d). In *Sellin et al v. Interior Health Authority et al*, (March 14, 2005, Kamloops No. 36652) (BCSC), Masuhara J. found that there was no independent cause of action against the Province for alleged mistreatment in care facilities run by the Interior Health Authority. The actions were all maintainable against the Health Authority or the facilities in question. Recently, in *Arhami v. British Columbia*, (December 20, 2023, New Westminster No. S249380) (BCSC), Brongers J. found that the plaintiff's claim against the Province for mistreatment at Royal Columbia Hospital was barred by s. 3(2)(d) of the *Crown Proceeding Act* because the claim was enforceable against the Fraser Health Authority.

[65] I have not been drawn to any authority which would take this case outside of the express terms in s. 3(2)(d) of the *Crown Proceeding Act*. Ultimately, this issue comes down to whether the plaintiffs' claim would be enforceable against UBC if they were to succeed in their argument that UBC should be treated as government under s. 32(1) of the *Charter*, or was subject to the *Charter* by virtue of the fact that it was implementing a specific government policy. I have already addressed that issue and will not repeat that analysis here.

[66] I agree with the Province, that if the plaintiffs were successful in establishing that the *Charter* applied to UBC, then the claim would be enforceable against UBC. In light of that conclusion, s. 3(2)(d) of the *Crown Proceeding Act* would apply with the result being that the Crown would be immune from liability for the same claim.

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.

"Greenwood J."