



S2210080

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

NOTICE OF APPLICATION

Name of applicant: The Defendant His Majesty the King in Right of the Province of British Columbia

To: The Plaintiffs Noah Alter, Jarryd Jaeger, Cooper Asp, and the Free Speech Club Ltd.

And to: The Defendant, the University of British Columbia

TAKE NOTICE that an application will be made by the applicant to the presiding judge at the courthouse at 800 Smithe Street, Vancouver, British Columbia on 7/May/2024 at 10:00am for the orders set out in Part 1 below.

The applicant estimates that the application will take one day.

This matter is not within the jurisdiction of an associate judge.

Part 1: ORDERS SOUGHT

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.

Part 2: FACTUAL BASIS

1. The plaintiffs originally filed their notice of civil claim on December 19, 2022, and filed an amended notice of civil claim on March 13, 2024.
2. The defendants to this action are the University of British Columbia ("**UBC**") and His Majesty the King in right of the Province of British Columbia (the "**Province**").
3. The facts giving rise to claim are set out in paragraphs 38-53 of the amended notice of civil claim. In particular, the plaintiffs allege that:
 - a. In November 2019, the plaintiffs planned an event at UBC and entered into a contract with UBC to rent space to host that event at UBC's Robson Square;
 - b. In December 2019, UBC's Vice President Students, Ainsley Carry, directed UBC's Chief Risk Officer, Ron Holton, to cancel the plaintiffs' event (the "**Cancellation Decision**") and directed that all future events with a particular risk assessment would be refused (the "**Policy Amendment Decision**").
4. With respect to the Province, the plaintiffs plead that:
 - a. UBC receives funding from the Province (para. 11); and
 - b. as a result of the "Provincial Control Scheme" (as that term is defined in the amended notice of civil claim), UBC is "by its very nature part of government or, in the alternative, the [Province] functionally controls the delivery of university education at UBC, including, specifically controlling enrollment, programs and manner of delivering programs, staffing, facilities and operations" (para. 12).
5. The plaintiffs further plead and rely on numerous provincial statutes that set out various statutory obligations on the part of UBC, including the *University Act*, R.S.B.C. 1996, c. 468.

6. In Part 2 of the amended notice of civil claim, the plaintiffs seek the following relief against the Province:
 - a. A declaration that the Cancellation Decision and Policy Amendment Decision breached the plaintiffs' rights under s. 2(b) and 2(c) of the *Charter*;
 - b. *Charter* damages; and
 - c. Costs and interest.
7. In Part 3 of the amended notice of civil claim, the plaintiffs allege, in respect of the Province, that UBC is government for the purposes of s. 32 of the *Charter*; that the Cancellation Decision and Policy Amendment Decision constitute infringements of the plaintiffs' rights under ss s. 2(b) and 2(c) of the *Charter*; and that *Charter* damages under s. 24(1) of the *Charter* are a just and appropriate remedy.
8. Additional causes of action and relief are pleaded in respect of the defendant UBC, including breach of contract and deceptive acts and practices.

Part 3: LEGAL BASIS

1. The plaintiffs' claim against the Province ought to be struck in its entirety pursuant to Rule 9-5(1)(a). The amended notice of civil claim discloses no reasonable claim against the Province.
2. In the alternative, any possible claim against the Province in the amended notice of civil claim is barred by s. 3(2)(d) of the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89.

The modern approach to R. 9-5

3. Under R. 9-5(1)(a), a claim will only be struck if, assuming the facts pleaded are true, it is plain and obvious that the pleadings disclose no reasonable cause of action. To put it another way, the claim has no reasonable prospect of success.

R. v. Imperial Tobacco Canada Ltd. 2011 SCC 42 at para. 17.

4. The modern approach to R. 9-5 is robust in the sense that the Court can appropriately “resolve complex questions of law”.

Atlantic Lottery Corp. Inc. v. Babstock, 2020 SCC 19 at para. 19.

9. A plaintiff is not entitled to rely on the possibility that new facts may turn up as the action progresses. It is incumbent on the plaintiff to plead all of the facts upon which the claim is being made.

Imperial Tobacco at para. 22.

10. Speculative assertions are not assumed to be true and may be subjected to skeptical analysis.

Young v. Borzoni, 2007 BCCA 16 at paras. 30-32;
Anderson v. Double M Construction Ltd., 2021 BCSC 1473 at para. 52.

11. Conclusions of law in the pleading that are not supported by the pleaded facts will be struck.

Young at para. 20;
Canadian Bar Association v. British Columbia 2008 BCCA 92
(leave to appeal refused [2008] S.C.C.A. No. 185) at para. 51.

12. There is no special consideration given under R. 9-5 for *Charter* claims.

Canadian Bar Association, at para. 51

No cause of action against the Province on the pleadings

13. The amended notice of civil claim discloses no cause of action against the Province, nor could there be a cause of action against the Province based on the pleaded facts.

The *Charter* claims

14. The only causes of action alleged against the Province are a breach of s. 2(b) and 2(c) of the *Charter*.

15. The conduct alleged to give rise to the *Charter* breaches, namely the Cancellation Decision and Policy Amendment Decision, are, on the face of the pleading, decisions taken by UBC and/or its officials, and not the Province. There is no independent act of the Province alleged to have breached the plaintiffs' *Charter* rights.
16. Rather, the amended notice of civil claim suggests that the Province exercised control over UBC in carrying out its day to day activities, such that UBC was either part of government or functionally controlled by government. Neither assertion is supported at law.
17. In British Columbia, it is settled law that: (1) the Province does not control a university's daily or routine tasks; and (2) when universities regulate the use of space on campus they are not implementing a government policy or program.

British Columbia Civil Liberties Association, et al. v. University of Victoria, et al., 2016 BCCA 162 at paras. 20-21, 26, 32-36, leave to appeal to the SCC dismissed 2016 CanLII 82919 (SCC).

18. In *British Columbia Civil Liberties Association*, the Court of Appeal found that when universities regulate, prohibit, or impose requirements in relation to activities and events on its property, including the allocation of space to students for free expression of ideas, they do not come within the definition of "government" for the purposes of s. 32 of the *Charter*.

British Columbia Civil Liberties Association at paras. 32-36.

19. Finally, contrary to the legal assertion plead in Part 1, paragraph 5 of the amended notice of civil claim, s. 24(1) of the *Charter* does not provide an independent basis to name the Province as a defendant. Section 24(1) of the *Charter* is a remedial provision. If the *Charter* does not apply, and/or there are no material facts pleaded to support any breach of the plaintiffs' *Charter* rights by the Province, then the plaintiffs are not entitled to any relief from the Province under s. 24(1).

The Crown Proceeding Act

20. In the alternative, if the plaintiffs are correct that UBC is a corporation that is "by its very nature part of government" or "functionally control[led]" by government, which is denied, then this proceeding is statute-barred.

21. Actions against the Province for a cause of action that is enforceable against a corporation or other agency controlled by government are barred pursuant by s. 3(2)(d) of the *Crown Proceeding Act*.

Vanmackelberg v Insurance Corporation of British Columbia, 1995 CanLII 1830 (BCSC) at para 22; *Green v. Proline Management Ltd.*, 2017 BCSC 1656 at para 42.

22. To the extent the amended notice of civil claim discloses any viable causes of action, those causes of action are properly enforceable against the defendant, UBC.

Part 4: 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 Court may permit.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on the person,
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: March 22, 2024



Counsel for the Province Emily Lapper,
Sergio Ortega, and Karin Kotliarsky

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs of Part 1 of
this notice of application

☐ with the following variations and additional terms:

.....
.....
.....

Date:[dd/mmm/yyyy].....

Signature of ☐ Judge ☐ Associate Judge

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☒ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts
- ☐ none of the above

This **NOTICE OF APPLICATION** is prepared by Emily Lapper, Barrister & Solicitor, of the Ministry of Attorney General, whose place of business and address

