No. S2210080
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

REPLY SUBMISSIONS OF HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

Noah Alter, Jarryd Jaeger, Cooper Asp, and The Free Speech Club Ltd.
Glenn Blackett
Glenn Blackett Law
[redacted]

His Majesty the King in right of the Province of British Columbia
Emily Lapper, Sergio Ortega, and Karin Kotliarsky
Ministry of Attorney General
[redacted]

The University of British Columbia
Rodney Sieg and Natalia Tzemis
Harris & Company LLP
[redacted]

1. The Province raises four points in reply to the plaintiffs' written submissions.

(1) If the plaintiffs have a viable *Charter* claim, that claim is against UBC and not the Province

2. First, the plaintiffs fundamentally misconceive the thrust of the Province's application. The Province seeks to have the amended notice of civil claim struck *as against the Province.* The Province does not seek to "immunize" UBC, or any other Canadian university from *Charter* scrutiny.[1] The Province's position is simply that, if the plaintiffs have a viable *Charter* claim, then that claim is against UBC and not against the Province.

3. The Province relies on the Court of Appeal's decision in *BC Civil Liberties Association,*[2] to note that in British Columbia, it is settled law that the *Charter* does not apply to universities when they regulate the use of space on campus, however, the Province's application does not depend on that line of authority.

4. This Court could accept everything the plaintiffs have written in the first 178 paragraphs (or 55 pages) of their written submissions and *still:* (1) find that the plaintiffs have failed to plead a cause of action against the Province; and (2) grant the relief sought by the Province in this application.

5. In the amended notice of civil claim, the plaintiffs have failed to plead any material facts to support a cause of action against the Province under ss. 2(b) or (c) of the *Charter*. The plaintiffs do not seriously dispute this.[3] In fact, in their written submissions the plaintiffs admit that they are seeking a remedy against the Province for UBC's alleged infringement of their *Charter* rights.[4] With respect to the Province, the plaintiffs plead that:

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[1] Plaintiffs' written submissions at paras. 5 and 204.
[2] 2016 BCCA 162.
[3] Plaintiffs' written submissions at para. 188.
[4] Plaintiffs' written submissions at para. 195.

a. UBC is controlled by the Province;

b. the Province funds and directs UBC to deliver government programs; and

c. the Province granted UBC government-like powers and immunities.[5]

6. None of these pleaded facts give rise to a cause of action against the Province under ss. 2(b) or (c) of the *Charter*. Rather, these facts, if true, may support a finding that UBC is government under s. 32(1) of the *Charter* and may give rise to a remedy (including *Charter* damages, where just and appropriate) from UBC.

7. The plaintiffs argue that they have named the Province because they must do so to obtain damages under s. 24(1) of the *Charter*. This argument must fail for two reasons:

a. It goes against the basic legal principle that to seek damages against a defendant, a plaintiff needs to have a cause of action against that defendant.

b. If a court finds that the *Charter* applies to UBC*,* then s. 24(1) of the *Charter* applies to UBC. Nothing in *Ward* says otherwise.

(2) The Province cannot be liable for damages without a cause of action against it

8. Section 24(1) of the *Charter* does not create "a cause of action against a defendant who did not participate in the infringement"[6] because:

a. section 24(1) is a remedial provision, and a remedy is not a cause of action;[7] and

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[5] Plaintiffs' written submissions at paras. 182-183.
[6] *Koita v. Toronto Police Services Board*, 2001 CarswellOnt 3195 (Ont. Div. Crt.) at paras. 12-15.
[7] *Whitty v. Wells*, 2014 ONSC 502 at para. 46.

b. otherwise, s. 24(1) would not accord with the basic principle that a plaintiff must have a cause of action against a defendant to obtain damages from it.

9. To hold otherwise would lead to the absurd result that the Province would be held liable for damages in respect of conduct for which it had no involvement or knowledge. The plaintiffs' argument is a perverse reversal of the maxim *"ubi jus ibi remedium"* or "where there is a wrong, there is a remedy". The plaintiffs seek to have this Court uphold the opposite: where there is a remedy, there is a wrong. Such a result should not be sanctioned.

(3) Nothing in *Ward* requires or justifies naming the Province as a defendant

10. Contrary to the plaintiffs' written submissions, courts across Canada have had no trouble interpreting *Ward* to award *Charter* damages against entities other than the Provincial or Federal Crown.[8] Rather, as Kent Roach has observed, *Ward* stands for the proposition that *Charter* damages under s. 24(1) should be awarded against governmental entities bound by the *Charter* and not against private officials.[9]

11. If the *Charter* applies to an entity under s. 32(1), and there is a proper cause of action against it under the *Charter*, then a *Charter* remedy is available as against that entity.[10] Therefore, if this court finds that the *Charter* applies to UBC under s. 32(1), then s. 24(1) of the *Charter* applies to UBC, and UBC (not the Province) may be liable for *Charter* damages at trial.

12. In their written submissions, the plaintiffs assert that the Supreme Court of Canada's decision in *Ward* is "unclear". A reading of the lower court decisions in *Ward*, alongside the Supreme Court of Canada's decision, dispels any confusion

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[8] See for example: *Mason v. Turner*, 2016 BCCA 58 at paras. 9, 16; *Stewart v. Toronto (Police Services Board)*, 2020 ONCA 255 at para. 149.
[9] Kent W. Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2023) at § 11:13.
[10] See for example: *Mason v. Turner*, 2016 BCCA 58 at paras. 9, 16; *Stewart v. Toronto (Police Services*

created by the plaintiffs and reveals the plaintiffs' interpretation to be based on an erroneous reading of the case law. For example:

a. At paragraph 186 of their written submissions, the plaintiffs say that most of the compensable *Charter* violations in *Ward* arose from the conduct of the police officers, who were employed by the City of Toronto (the "City"). This is incorrect. The Supreme Court of Canada only awarded *Charter* damages for the strip search conducted by corrections officers,[11] who were employed by the Province.[12]

b. At paragraph 191 of their written submissions, the plaintiffs say that the Court considered the City to be a private actor. This is incorrect. Rather, the Court considered the City to be a governmental entity, as evidenced by the Court's analysis of whether to award damages against the City for the seizure of the plaintiff's vehicle.[13] The Court decided not to award *Charter* damages against the City, not because the City was an individual actor, but because the Court concluded that a declaration under s. 24(1) adequately served the need for vindication and deterrence.[14]

c. At paragraph 189 of their written submissions, the plaintiffs say that the Court held the Province liable for *Charter* damages despite a lack of provincial involvement. This is incorrect. The only *Charter* damages that the Court awarded in *Ward* were for strip searches conducted by corrections officers,[15] who were provincial employees.[16]

13. Applying *Ward* to the present case, if the plaintiffs succeed in demonstrating that the *Charter* applies to UBC under s. 32(1), and succeed in demonstrating a breach

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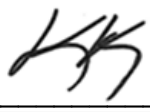
Board), 2020 ONCA 255 at para. 149.
[11] *Vancouver (City) v. Ward,* 2010 SCC 27at paras. 72-73, 79 ("*Ward*").
[12] *Ward v. British Columbia,* 2009 BCCA 23 at paras. 2, 77 ("*Ward BCCA*").
[13] *Ward* at para. 74.
[14] *Ward* at para. 78.
[15] *Ward* at paras. 72-73, 79.

of their ss. 2(b) and 2(c) *Charter* rights, then UBC, as a governmental entity, would be liable for any *Charter* damages award the court deems appropriate and just under s. 24(1). The individual actors alleged to be responsible for the impugned decisions and policies in this case (for example, UBC's Vice President Students, Ainsley Carry) would not be liable to pay *Charter* damages. Nothing in *Ward* requires or justifies the Province being added as a defendant to this proceeding.

(4) Section 3(2)(d) of the *Crown Proceeding Act* applies

14. Finally, the plaintiffs' position that s. 3(2)(d) of the *Crown Proceeding Act*[17] does not apply depends entirely on their misapprehension of *Ward*. As set out above, *Ward* does not stand for the proposition that only the Federal or Provincial Crown are liable for *Charter* damages. Therefore, the plaintiffs' cause of action under ss. 2(b) and (c) of the *Charter* is enforceable against UBC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of May 2024.



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

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[16] *Ward BCCA* at paras. 2, 77.
[17] R.S.B.C. 1996, c. 89.