COURT OF APPEAL

ON APPEAL FROM the Order of The Honourable Justice Groves of the Supreme Court B.C. pronounced on January 31, 2025.

BETWEEN:

Noah Alter, Jarryd Jaeger, Cooper Asp, and The Free Speech Club Ltd.

APPELLANTS
(Plaintiffs)

AND:

The University of British Columbia and His Majesty the King In Right of British Columbia

RESPONDENTS
(Defendants)

Publication Ban or Anonymity Order (if any) : NIL

Sealing Order (if any): NIL

APPELLANTS' FACTUM

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CHRONOLOGY

Date	Event	Reference
13-Mar-24	Plaintiffs / appellants file an Amended Notice of Civil Claim in the Supreme Court of British Columbia (the NCC).	Amended Notice of Civil Claim, filed March 13, 2024
22-Mar-24	Defendant, His Majesty the King in Right of British Columbia (the Province) files an application pursuant to Rule 9-5(1)(a) to strike the NCC, in part, without leave to amend, and to dismiss.	Notice of Application (British Columbia), filed March 22, 2024
05-Apr-24	Plaintiffs file an application to amend the NCC pursuant to Rule 6-1(1) in the event the Court strikes portions of the NCC for defects in form as opposed to substance.	Notice of Application (Plaintiffs), filed April 5, 2024
12-Apr-24	In written argument, and later in oral argument, Province requests a form of order particularizing the paragraphs to be struck from the NCC. UBC consents.	Written Submissions of the Province, filed April 12, 2024.
04-Jun-24	Honourable Justice Greenwood grants the strike application and refuses the amendment application on the basis defects “go to substantive issues.”	Reasons for Judgment, dated June 4, 2024 (the “Reasons”)
03-Jul-24	Plaintiffs file a notice of appeal to this Honourable Court.	Notice of Appeal, filed July 3, 2024
28-Aug-24	Plaintiffs propose the form of striking order requested by the Province.	Affidavit of Vanessa Lever, filed July 5, 2024, (“Lever Affidavit”) Exhibit "B"
9-Sept-24	Defendants object to the form of order originally proposed by Province.	Lever Affidavit, Exhibits "B" and “C”
10-Oct-24	Greenwood J. issues supplemental reasons as to costs, following written submissions of the parties.	Reasons for Judgment - Costs, dated October 10, 2024 (the “Costs Reasons”)
16-Oct-24	Plaintiffs file an amended notice of appeal.	Amended Notice of Appeal, filed October 16, 2024

10-Dec-24	Plaintiffs' application to settle order pursuant to Rule 13-1(12) heard before Registrar Gaily, who settles the order as a modified version of the defendants' form.	Lever Affidavit, Exhibit "D" and Order Made After Application (Greenwood), entered December 10, 2024
30-Jan-25	Plaintiffs' application to review and vary the order as settled heard before the Honourable Justice Groves who confirms the order as settled by Registrar Gaily.	Oral Reasons for Judgment of Justice Groves dated January 30, 2025 and Order Made After Application (Groves), entered January 30, 2025
25-Feb-25	Plaintiffs file a notice of appeal of Justice Groves' decision to this Honourable Court.	Notice of Appeal, filed February 25, 2025

OPENING STATEMENT

1. This is an appeal from an order reviewing the settlement of an order under *Rule*[1] 13-1(14). The order arises from a March 22, 2024, application by the Province to strike the plaintiffs' pleadings, without leave to amend, and to dismiss the action under *Rule* 9-5(1)(a). The strike application was brought on the grounds that*, inter alia*, the allegations that the *Charter* applied to UBC (the Section 32 Issue) disclosed no reasonable claim. The Province requested, with UBC's consent, an order striking from the civil claim all *Charter* allegations and requested remedies.

2. On June 4, 2024, the Honourable Justice Greenwood agreed with the Province in every respect and granted the application. In Greenwood J.'s view: 1) because the *Charter* did not apply to UBC "as a matter of law," leave to amend was inappropriate – no amendment could remedy "substantive" defects; and 2) the plaintiffs' *Charter* claims against UBC did not survive the strike application. The plaintiffs appealed, which is pending.

3. The plaintiffs proposed the form of order the Province had requested. The defendants now object to that form of order. The defendants insist that the order <u>not</u> expressly strike any allegations whatsoever. Rather, they seem to insist that the order effectively dismiss the claim against the Province and, for the time being, leave all of the substantively defective *Charter* allegations intact with an obligation on the plaintiffs to seek leave to make appropriate amendments. Citing the rule that appeals are from orders and not reasons, the Province has advised this Honourable Court of its intention, should the order remain settled in the defendants' preferred form, to urge the dismissal of the Main Appeal without reconsidering the Section 32 Issue. In other words, the defendants now-preferred form of order risks "appeal proofing" the Section 32 Issue to the plaintiffs' prejudice.

4. The order should be settled in the form proposed by the plaintiffs. It is consistent with Greenwood J.'s reasons and the *Rules* and would not effect an unjust appeal proofing of the Section 32 Issue.

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[1] All terms defined below.

PART 1 – STATEMENT OF FACTS

I. Notice of Civil Claim and Strike and Dismissal Application

5. On March 13, 2024, the plaintiffs and appellants, Noah Alter, Jarryd Jaeger, Cooper Asp, and The Free Speech Club Ltd., filed an amended notice of civil claim ("**NCC**") against His Majesty the King in Right of British Columbia (the "**Province**") and the University of British Columbia ("**UBC**"). The NCC made:

   a. common allegations against, both, the Province and UBC that:

      i. the *Canadian Charter of Rights and Freedoms* (the "***Charter***") applies to UBC as government and as an entity delivering a government program;[2] and

      ii. certain UBC conduct infringed the plaintiffs' *Charter* rights for which *Charter* damages would be appropriate;[3]

      (the "**Common *Charter* Allegations**")

   b. requests for *Charter* relief against the Province[4] (the "**Province *Charter* Remedies**") and against UBC[5] (the "**UBC *Charter* Remedies**"); and

   c. allegations unique to UBC in contract, under the *Business Practices & Consumer Protection Act*, SBC 2004, c. 2, in unjust enrichment, and at common law[6] (the "**Other UBC Allegations**"); and a request for other relief against UBC[7] (the "**Other UBC Remedies**")

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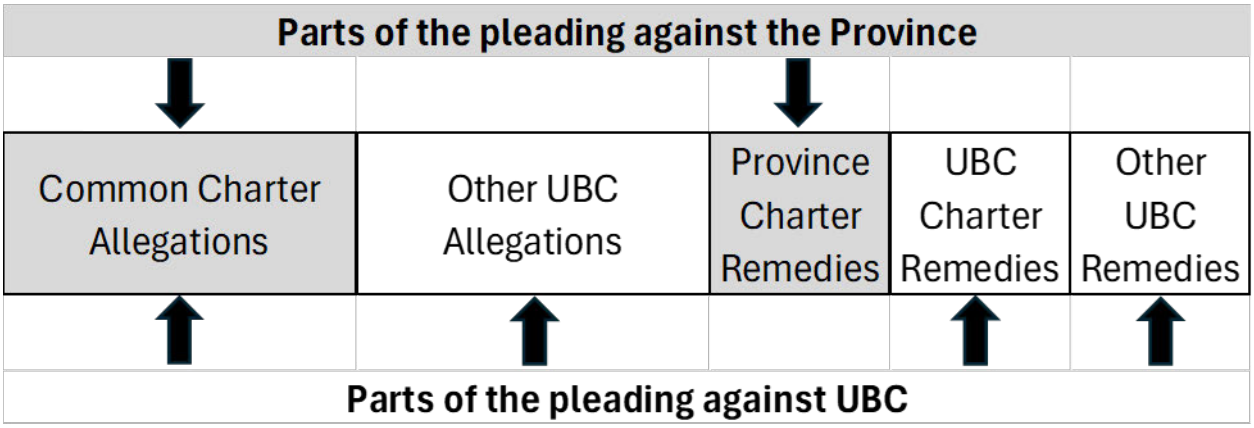
[2] NCC at Part 1, paras. 5, 7, 11-14, 16-25, 28, and 66 and NCC at Part 3, para. 1(f) (Amended Appeal Record "**AAR**", Tab A, pp. 5-16, 26 and 34).
[3] NCC at Part 1, paras. 67-73, 74(c), and 82(b) and NCC at Part 3, para. 1(g) (AAR, Tab A, pp. 27, 29, and 35).
[4] NCC at Part 2, paras. 4(b), 5(b), 6(b), and 7(b) and NCC at Part 3, para. 1(h) and (i) (AAR, Tab A, pp. 30-33 and 35).
[5] NCC at Part 2, paras. 4(a)(iii)-(v), 5(a)(iv)-(vi), 6(a)(iv)-(vi), and 7(a)(iv)-(vi) and NCC at Part 3, para. 1(h) and (i) (AAR, Tab A, pp. 30-33 and 35).
[6] All paragraphs of the NCC not detailed above.
[7] NCC at Part 2, paras. 4(b), 5(b), 6(b), and 7(b) and NCC at Part 3, para. 1(h) and (i) (AAR, Tab A, pp. 30-33 and 35).

6. The "whole of … [the] pleading"[8] against the Province was, therefore, the Common Charter Allegations and the Province Charter Remedies. Graphically the NCC can be represented as follows:



7. On March 22, 2024, the Province applied under the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the "***Rules***") *Rule* 9-5(1)(a) to: a) "strik[e] the [NCC] as against the [Province], without leave to amend"; and b) "dismis[s] the action against the [Province] and remov[e] the Province from the style of cause" (the "**Strike and Dismissal Application**").[9] The Province argued: a) the *Charter* did not apply to UBC; b) the Province was not involved in the impugned decisions of UBC; and c) the claim was barred under the *Crown Proceedings Act*, RSBC 1996, c. 89.[10] UBC consented to the application.[11]

8. On April 5, 2024, the plaintiffs filed an application to amend the NCC, "… in the event this Honourable Court finds the pleading contains impermissible conclusions of law."[12] At the hearing on the Strike and Dismissal Application the plaintiffs advised that an amendment would not be pursued if the court struck allegations on the basis they were substantively defective, but would be pursued if allegations were struck for being technically defective.[13] On April 12, 2024, in response, the Province

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[8] *Rule* 9-5(1).
[9] AAR, Tab "C", p. 44.
[10] Strike and Dismissal Application, paras. 15-22 (AAR, Tab "C", pp. 48-49).
[11] Affidavit #1 of Ashley Sexton, filed January 2, 2025 ("**Sexton Affidavit**") at Exhibit "C", p. 25, para. 7 (Appeal Book "**AB**" at p. 65).
[12] AAR, Tab "D", p. 53.
[13] Sexton Affidavit, Exhibit "A", p. 8, lines 34-47 and p. 9, lines 1-11 (AB pp. 48-49).

replied, *inter alia*, that the "Province's application to strike only impacts the plaintiffs' *Charter* claim."[14]

9. On April 12, 2024, the Province provided written argument. It argued, first, that the *Charter* does not apply to UBC. It also: confirmed that the Common *Charter* Allegations were allegations against both the Province and UBC; requested that the NCC be "struck and dismissed as against the Province"; particularized the parts of the NCC which ought to be struck "… if the Court finds that the *Charter* does not apply to UBC's Actions …" (being the Common *Charter* Allegations, the Province *Charter* Remedies and the UBC *Charter* Remedies, the "**Impugned Allegations**"); and requested the Province be removed from the style of cause.[15] The Province reiterated its request to strike the Impugned Allegations in oral argument.[16]

10. It is important to reemphasize that the allegations against the Province include the Common *Charter* Allegations which allegations perform "double duty." The Common *Charter* Allegations form part of the claim against both the Province and UBC. Therefore, if the Common *Charter* Allegations are struck out of the pleading, that benefits both the Province and UBC.

11. On June 4, 2024, Greenwood J. rendered partial judgment on the Strike and Dismissal Application (the "***Charter* Reasons**")[17] which:

    a. at paragraph 1 confirmed that the plaintiffs' pleadings against the Province included the allegations that the *Charter* applied to UBC (which allegations are part of the Common *Charter* Allegations);

    b. at paragraph 23 referenced allegations which provided "… 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

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[14] AAR, Tab "F", p. 69.
[15] Sexton Affidavit, Exhibit "B", paras. 4, 6, 7, and 43 (AB pp. 53-54 and 62-63).
[16] Affidavit #1 of Vanessa Lever filed January 17, 2025 ("**Lever Affidavit**"), Exhibit "D", p. 53, lines 35-41 (AB p. 191).
[17] *Alter v The University of British Columbia*, 2024 BCSC 961.

governments, and oversight in various areas of its operations…" (which allegations are part of the Common *Charter* Allegations);

c. at paragraphs 1 to 35[18], found that the *Charter* did not apply to UBC's actions because, *inter alia*, the "substantive claim that the *Charter* applies to the action of UBC is not legally sustainable in light of the authorities";

d. at paragraphs 36 to 66, found that, even if the *Charter* did apply to UBC's actions, there was no *Charter* claim enforceable against the Province – *Charter* claims would only be enforceable against UBC;

e. nowhere said the claim against the Province was "dismissed"[19]; and

f. at paragraph 67, granted the Province's Strike and Dismissal Application as follows:

> *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.*[20]

12. The parties then made costs submissions to Greenwood J, including UBC's submissions[21] and reply submissions[22] (collectively, "**UBC's Costs Submissions**") in which UBC sought costs against the plaintiffs payable forthwith on the basis the plaintiffs' *Charter* claims against UBC had not "survive[d]" the Strike and Dismissal Application.[23]

13. Referencing the Other UBC Allegations and Other UBC Remedies, Greenwood J. rejected this submission stating, *inter alia*:

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[18] See especially paras. 5, 23 and 35.
[19] Although the combined substantive effect of striking all allegations against a defendant and refusing leave to amend is a dismissal.
[20] All emphasis and edits herein are added.
[21] Sexton Affidavit at Exhibit "C" (AB p. 64).
[22] Sexton Affidavit, Exhibit "D" (AB pp. 123).
[23] Sexton Affidavit, Exhibit "C", pp. 31-32, paras. 37-38 (AB pp. 71-72) and Exhibit "D", p. 91, para. 36 (AB p. 131).

> *… I would not draw the conclusion that the matter is unlikely to go to trial. There is a separate action for breach of contract that is unaffected by the court's ruling on the strike application …* [24]

14. UBC later claimed that, in fact, it had not argued the *Charter* claims against UBC had not survived the Strike and Dismissal Application. Rather UBC later claimed it had "… merely set out that Justice Greenwood stated, *in obiter*, that the plaintiffs' claim that the *Charter* applies to UBC is not legally sustainable … UBC argued for costs payable forthwith because it doubted that the plaintiffs would pursue the action given the [Reasons] cast doubt on the plaintiffs' … *Charter* arguments."[25]

15. The plaintiffs proposed to the defendants a form of order which, consistent with the Province's request, struck the Impugned Allegations and removed the Province from the style of cause (the "**Plaintiffs' Draft Order**").[26]

16. The defendants objected to the Plaintiffs' Draft Order on the basis that, *inter alia*: Greenwood J. had struck nothing specifically from the NCC but, instead, ordered in "general terms" that "… the claim against the Province is struck". According to the Province, because Greenwood J. had not "… indicate[d] which paragraphs or portions of the pleading he believes should be struck …" the plaintiffs were obliged to bring an application to amend the NCC "… to comply with Justice Greenwood's order … " (i.e. to remove the "defects in the pleadings [which] go to substantive issues"[27]).[28]

17. In argument before the Registrar who initially settled the order (see below) the Province argued:

> *The question of what specific paragraphs from the amended claim the plaintiffs may wish to amend to reflect Justice Greenwood's reasons moving forward … is … up to the plaintiffs … Justice Greenwood … chose not to engage in the exercise of identifying specific paragraphs*

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[24] *Alter v The University of British Columbia*, 2024 BCSC 1879 (the "**Costs Reasons**") at para. 32.
[25] Application Response (UBC), filed January 23, 2025, para. 12 (AAR, Tab "L", p. 128).
[26] AOS, Exhibit "B" (AB p. 35).
[27] *Charter* Reasons at para. 67.
[28] Affidavit of Ordinary Service of Ashley Sexton ("**AOS**"), filed November 5, 2024, Exhibit "C" (AB p. 37).

> *… The reasons do not speak to which paragraphs are struck. The question of what survives as against UBC, well the reasons didn't deal with that, and again that is for either the parties to agree on or for future courts to determine to the extent that that issue actually arises in the future.*[29]

18. The Province later argued, "[i]t is for the plaintiffs to decide how to amend their pleading to give effect to the order."[30]

19. UBC likewise argued before the Registrar that Greenwood J. had struck " … the claim against the Province … without specifying what particular paragraphs, and nothing was decided in respect of the claim as against UBC."[31]

20. It seems to be the position of the defendants, therefore, that the effect of Greenwood J's order "striking" pleadings is to: 1) strike all allegations "against the Province" (in "general terms"); and 2) require that the plaintiffs apply for leave to amend the NCC so as to specifically delete those allegations. As will be seen, this view of the effect of Greenwood's order seems to have been shared by Registrar Gaily and Groves J. Nowhere in Greenwood J's reasons does he indicate that the plaintiffs have any obligation to "specifically" strike out the pleadings which the Court had struck out "generally." To the contrary, Greenwood J. struck pleadings without leave to amend.

21. The defendants proposed a different form of order which struck the NCC "… as against the Province, without leave to amend …" and ordered the action as against the Province be "dismissed." (the "**Defendants' Draft Order**").[32]

22. The Province claims no interest in, "what specific paragraphs from the amended claim the plaintiffs may wish to amend to reflect Justice Greenwood's reasons…"[33] and takes "… no position on how your clients effect the order of Justice Greenwood…"[34] In other words, the Province has "no interest" in whether Greenwood J.'s order is effected by the deletion of the Impugned Allegations (as

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[29] Lever Affidavit, Exhibit "D", p. 50, lines 10-25 (AB p. 188).
[30] Application Response (BC), filed January 17, 2025, para. 22 (AAR, Tab "K", p. 121).
[31] Lever Affidavit, Exhibit "D", p. 55, lines 30-34 (AB p. 193).
[32] Defendants' Draft Order, AOS at Exhibit "A", pp. 11-12 (AB pp. 15-16).
[33] Lever Affidavit, Exhibit "D", p. 50, lines 10-12 (AB p. 188).
[34] Lever Affidavit, Exhibit "C", p. 19 (AB p. 157).

suggested by the plaintiffs in their Plaintiffs' Draft Order). It would seem, therefore, that the Province should have no objection to the Plaintiffs' Draft Order.

23. In UBC's view: the plaintiffs' *Charter* claims are their "primary" claim[35]; Greenwood J's decision on the Section 32 Issue is *obiter dicta*[36]; and the plaintiffs are so unlikely to proceed with the action in light of Greenwood J.'s *obiter* statements that the entire action against UBC is, practically, dead.[37] It would seem, therefore, that UBC should likewise have no objection to the order "striking the claim against the Province" by expressly deleting the Common *Charter* Allegations and, thereby, the "primary" claim against UBC.

24. The Plaintiffs' Draft Order will likely save the parties and the Courts significant resources. If the plaintiffs Common *Charter* Allegations are struck out of the pleading (without leave to amend) the action against UBC is significantly narrowed (the plaintiffs' "primary" claim is dead, subject to appeal).

25. If the plaintiffs Common *Charter* Allegations are not struck out of the pleading, the action against UBC is not clearly narrowed. Significant party and court resources will be spent: a) determining appropriate amendments to give effect to Greenwood J's order; and b) exploring the vast and complicated regulatory relationship between UBC and the Province.

26. Notwithstanding the benefits to all parties and the Court of the Plaintiffs' Draft Order, both defendants explain their opposition to it on the basis that the *Charter* Reasons were worded generally, so the order should be too.[38]

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[35] Sexton Affidavit, Exhibit "C", p. 32, para. 38 (AB p. 72).
[36] Application Response (UBC), filed January 23, 2025, para. 12 (AAR, Tab "L", p. 128).
[37] Sexton Affidavit, Exhibit "D", p. 91, para. 36 (AB p. 131).
[38] AOS, Exhibit "C", pp. 33-35 (AB pp. 37-39) and Lever Affidavit, Exhibit "D", p. 53, line 35 to p. 54, line 13, and p. 55, lines 30-34 (AB pp. 191-193).

II. Appeal of Greenwood J.'s Order

27. On July 3, 2024, the plaintiffs appealed Greenwood J's decision[39], which notice of appeal was amended on October 16, 2024[40] and on November 26, 2024 (the "**Main Appeal**").

28. Greenwood J's *Charter* Reasons rest on two primary conclusions: 1) that, "as a matter of law" it was hopeless to claim the *Charter* applied to UBC[41] (the "**Section 32 Issue**"); and 2) that, even if it was not hopeless to claim the *Charter* applied to UBC, there was still no hope of proving a cause of action against the Province[42] (the "**Cause of Action Issue**").

29. If Greenwood J's order is settled on the basis of:

    a. the Plaintiffs' Draft Order (i.e. if the *Charter* claims are struck out of the NCC) then the Main Appeal can not be disposed of without reviewing Greenwood J's conclusion on the Section 32 Issue; or

    b. the Defendants' Draft Order (i.e. striking nothing out of the NCC, specifically) then it may be argued that the Main Appeal can and should be disposed of on the basis of the Cause of Action Issue without reviewing the Section 32 Issue, rendering the Honourable Justice's conclusion on the Section 32 Issue appeal proof (the "**Appeal Proofing Issue**").

30. The Province has already telegraphed its intention to take advantage of the Appeal Proofing Issue. In a November 18, 2024, procedural hearing before this Honourable Court, the Province communicated its intention (should the Defendants' Draft Order prevail) to argue that the Main Appeal should be dismissed without reconsidering the Section 32 Issue - citing the rule that appeals are from orders and not reasons.[43]

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[39] Greenwood Notice of Appeal, filed July 3, 2024.
[40] Greenwood Amended Notice of Appeal, filed October 16, 2024.
[41] *Charter* Reasons, paras. 1-35.
[42] Charter Reasons, paras. 36-66.
[43] *Alter v British Columbia*, 2024 BCCA 396, para. 37.

III. Applications to Settle the Order

31. The plaintiffs filed an appointment to settle the order, which was heard before Registrar Gaily on December 10, 2024. The order, as settled by the Registrar, was the Defendants' Draft Order minus (*inter alia*) the words, "and the action as against the Province is dismissed" (the "**Impugned Order"**).[44] Registrar Gaily settled the order using Greenwood J's "exact language."[45]

32. Copying from paragraph 67 of the *Charter* Reasons, the Impugned Order states the NCC "… is struck as against the Province, without leave to amend …" The Impugned Order does not, therefore, particularize any "part of [the] pleading" which is "struck out" in accordance with *Rule* 9-5(1).

33. Registrar Gaily disagreed that the Defendants' Draft Order created an Appeal Proofing Issue[46], seemingly agreeing with the Province's submission that, "the plaintiffs will be able to advance their concerns and submissions on those points before future courts …"[47] Of course, if and when the Province urges this Honourable Court to appeal proof the Section 32 Issue (see above at paragraph 30), the order will already have been settled – it will be too late for the plaintiffs to argue that the order should have been worded correctly in accordance Greenwood J's reasons (which correct form of order clearly eliminates the Appeal Proofing Issue).

34. On December 20, 2024, Greenwood J. declined to hear a review and variation of the Impugned Order under *Rule* 13-1(14).[48]

35. On January 30, 2025, the plaintiffs' application for a review and variation of the Impugned Order under *Rule* 13-1(14) was heard before the Honourable Justice Groves. Groves J. dismissed the application, leaving the Impugned Order in the form settled by Registrar Gaily[49] (the "**Groves Reasons**" and the "**Groves Order**").

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[44] Order Made After Application (Greenwood, entered December 10, 2024) (AAR, Tab "I", p. 102).
[45] Lever Affidavit, Exhibit "D", p. 60, line 24 (AB p. 198).
[46] Lever Affidavit, Exhibit "D", p. 29, line 11 to p. 30, line 4 (AB pp. 167-168).
[47] Lever Affidavit, Exhibit "D", p. 55, lines 9-11 (AB pp. 193).
[48] Sexton Affidavit, Exhibit "E" (AB p. 133).
[49] Groves Reasons (AAR, Tab "N").

Groves J treated the application as a sort of appeal and concluded that Registrar Gaily did not err.[50]

36. Groves J. also disagreed that the Defendants' Draft Order created an Appeal Proofing Issue.[51]

37. Given the foregoing:

    a. the Impugned Order strikes all pleadings in the NCC as against the Province;

    b. the Impugned Order does so in "general terms" – it does not expressly particularize which allegations are struck from the NCC;

    c. the Impugned Order does not technically "dismiss" the NCC as against the Province (although it has that same effect);

    d. the plaintiffs did not request[52] but were denied leave to reframe the *Charter* Allegations because they are "defects in the pleadings [which] go to substantive issues"; and

    e. according to the defendants, in order to comply with the Impugned Order, the plaintiffs must now bring a new application to amend the NCC,[53] although the defendants refuse to specify how the NCC must be amended apart from their earlier view that the part of the pleading against the Province was the Impugned Allegations.

PART 2 – ERRORS IN JUDGMENT

38. Groves J. erred by:

    a. misconstruing the test for settling orders by refusing to clarify what was to happen next (Error #1);

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[50] Groves Reasons, paras. 13 and 17 (AAR, Tab "N").
[51] Groves Reasons, para. 16 (AAR, Tab "N").
[52] The plaintiffs' amendment application was expressly not in respect of substantive defects (see para. 8, above).
[53] Although the defendants (now) refuse to specify how the NCC must be amended to comply with the Impugned Order.

b. misconstruing Greenwood J's jurisdiction under *Rule* 9-5(1) by confusing "striking out" with "dismissal" (Error #2);

c. misconstruing the test for settling orders by settling an order that improperly exceeds Greenwood J's jurisdiction (Error #3);

d. misconstruing the test for settling orders by refusing to refer to relevant sources (Error #4); and

e. misapplying the *Rules* by settling the order in a manner which unnecessarily and improperly risks an injustice (Error #5).

PART 3 – ARGUMENT

I. Standard of Review – Correctness

39. Settling an order is a question of pure law. It is an exercise in interpreting reasons and applicable caselaw. There is no discretion and no findings of fact. As such, the standard of review is correctness.[54]

II. Appeal Proofing

40. According to Greenwood J., the plaintiffs *Charter* claims against UBC did not survive the Strike and Dismissal Application.[55] This seems to be correct for a number of reasons:

a. Greenwood J. determined that the plaintiffs *Charter* claims against UBC were hopeless and, according to the plaintiffs interpretation of the reasons, struck the *Charter* allegations (including, primarily, the Common Charter Allegations) from the NCC directly and expressly (with the words, "… the application to strike the pleadings against the Province … is allowed …"[56]);

b. As seems to the position of the defendants, even if Greenwood J. did not strike the *Charter* claims against UBC from the NCC directly and expressly, that is the

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[54] *Housen v Nikolaisen*, 2002 SCC 33 at paras. 8-37.
[55] Costs Reasons at para. 32.
[56] *Charter* Reasons at para. 67.

effect of his order (for example, "[i]t is for the plaintiffs to decide how to amend their pleadings to give effect to the order."[57]);

c. The Impugned Order otherwise effects the termination of the plaintiffs' *Charter* claims against UBC because the Court has now determined, in the same action, that those claims are hopeless. This binds the plaintiffs as a matter of, *inter alia*:

   i. *Res judicata*: an issue has been decided which is fundamental to the decision arrived at[58]; the decision is final; and the parties to the decision are the same[59];

   ii. *Stare decisis*: the Court is bound to apply the legal principles of Greenwood J's reasons by the principle of horizontal *stare decisis* to facts which are identical (the NCC's allegations are unchanged) and will, therefore, lead inevitably to the same conclusion;[60] and

   iii. Abuse of process: it is an abuse of process to relitigate an issue even where the strict requirements of *res judicata* are not fulfilled or do not apply. The doctrine exists to conserve judicial resources, to protect the integrity of the court's processes, to ensure consistency and finality in decision-making, and to prevent the credibility of the justice system from falling into disrepute.[61]

41. Appeals are generally from orders not reasons.[62] Provided the Impugned Order can be sustained for any reason (including the Cause of Action Issue) the appeal could be dismissed.[63] If the Impugned Order is interpreted as having no direct or indirect effect on the plaintiffs' *Charter* claims against UBC, it would be open to the defendants to argue (as the Province indicates it may) that the Main Appeal should

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[57] Application Response (BC), filed January 17, 2025, para. 22 (AAR, Tab "K", p.121).
[58] UBC's current position that Greenwood J's decision on the Section 32 Issue is *obiter dicta* is plainly wrong.
[59] *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 SCR 460 at paras. 25 and 25.
[60] *R. v Sullivan*, 2022 SCC 19 at paras. 61 to 65.
[61] *Toronto (City) v CUPE Local 79*, 2003 SCC 63, at paras. 42 and 51.
[62] *C.(K.K.) v. C.(A.P.)*, 2003 BCCA 295 ("***CKK***"), at paras. 19 and 20; *Henderson v Mawji*, 2020 BCCA 43, at para. 10
[63] *CKK* at paras. 19 to 20.

be dismissed without considering whether Greenwood J. was correct on the Section 32 Issue. In this case, the Section 32 Issue would be, effectively, immune from appeal, while prejudicially binding the plaintiffs.

42. This would work an injustice contrary to the *Rules*. *Rule* 1-3(1) provides that "the object of these [*Rules*] is to secure the just, speedy and inexpensive determination of every proceeding on its merits". This rule applies to all proceedings and is supposed to be the principal lens through which all the other rules are interpreted.[64] The *Rules* should not, therefore, act as obstacles to a just and expeditious resolution of a case.[65]

43. The order should be settled, therefore, on a correct and just basis: it should expressly say exactly what is to happen (i.e. how the NCC is to be amended) so the Section 32 Issue is unambiguously not appeal proofed.

III. Error #1: Misconstruing the Test for Settling Orders: Clarity

44. The Strike and Dismissal Application was brought under *Rule* 9-5(1)(a) which states:

> *At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, … on the ground that*
>
> *it discloses no reasonable claim …*
>
> *…*
>
> *and the court may pronounce judgment or order the proceeding to be stayed or dismissed …*

45. The rule, therefore, contemplates two possible remedies: first, the court may strike out or amend the pleading in whole or in part (meaning to delete words, to change words, and to add words[66]); and, second, the court may thereafter dismiss the

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[64] *LBEL Inc v Ten Veen*, 2018 BCSC 1991, at para. 64; *Buna v Paulson*, 2019 BCSC 185, at para. 14; *City of Surrey v Johal*, 2024 BCSC 1806, at para. 21; see also *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), at para. 21, for the object of legislation as a key interpretive element.

[65] *Nelles v Ontario*, [1989] 2 SCR 170, at p. 177.

[66] See, for example: *The Public Guardian and Trustee of British Columbia v Johnston*, 2017 BCSC 1255 at para. 17; *Fraser v Central Ready-Mix Ltd*, 1999 CanLII 2066 (BCSC) at paras. 20, 22, 23, 25; *Berscheid v HMTQ*, 2000 BCSC 884 at para. 20; *Briglio v Roi Recreation Outfitters Incorporated et al*, 2004 BCSC 1617 at para. 27;

proceeding.[67] As stated in *Brown*: "The effect of R. 9-5 is that … a court may order that the whole or any part of a pleading can be struck out or amended to pronounce judgment or order that the proceeding be stayed or dismissed."[68]

46. There was an application before Greenwood J. to "strike out … the whole of [the] pleading" against the Province, to dismiss the claim against the Province, and to remove the Province's name from the style of cause.[69] The application was granted. Using "general terms" Greenwood J. struck out all of the "pleadings against the Province."[70]. Greenwood J. did not list the paragraph numbers which comprised the "pleadings against the Province" he was striking out, however:

    a. he identified the Common *Charter* Claims by referring, for example, to the allegations that the *Charter* applied to UBC including "a vast amount of detail relating to …" various matters which he summarized; and[71]

    b. he refused leave to amend the NCC (by which the plaintiffs might have amended to insert some variation of the Common *Charter* Claims which Greenwood J. had struck) because they were "defects in the pleadings [which] go to substantive issues" because, *inter alia*, the "… substantive claim that the *Charter* applies to the action of UBC is not legally sustainable in light of the authorities."[72]

47. It requires no strained interpretation, guesswork, or speculation to determine which parts of the pleading Greenwood J. struck out. He struck out the Common *Charter* Claims and the Province *Charter* Remedies. It is not necessary to locate within the reasons a list of paragraph numbers to determine which allegations Greenwood J. had identified as "substantive" defects.

Powell v Powell, 1987 CanLII 2544 (BCSC) at para. 38; and *Bhangu v Honda Canada Inc*, 2021 BCSC 2381 at para. 48.

[67] See, for example, *Brown v Canada (AG)*, 2015 BCSC 1910 ("***Brown***") at para. 53.

[68] *Brown* at para. 10.

[69] Strike and Dismissal Application (AAR, Tab "C", p. 44); Sexton Affidavit, Exhibit "B", pp. 22-23, at para. 43 (AB pp.62-63); *Rule* 9-5(1).

[70] *Charter* Reasons at para. 67.

[71] *Charter* Reasons at para. 1 and 23.

[72] *Charter* Reasons at paras. 5, 23 and 35.

48. Both Registrar Gaily and Groves J. misconstrued the test for settling an order. Registrar Gaily repeatedly referenced a duty to settle the order using only words found in the *Charter* Reasons.[73] In the Honourable Justice's view, the words used in an order are necessarily limited to the "actual words of the judge … in their reasons" without "interpret[ation]" or "… converting a detailed analysis of a judge's reasons into words in an order."[74]

49. This is incorrect. The Court, in settling an order under *Rule* 13-1, is to interpret the reasons so as to distill them into an enforceable order.[75] The Court is not limited to searching reasons for "actual words" that can be copied into an order. On the contrary, it is a mistake to "merely pluck" vague and uncertain words from the reasons.[76] Settling an order is not a mechanical process of copying and pasting from reasons.

50. The purpose of an order, as opposed to reasons, is to give complete and enforceable directions which are obvious on their face, without resort to extrinsic sources like reasons, to those who must comply with them. The order should be expressed in plain and simple language so that "anyone picking it up and reading it would understand exactly what was to happen."[77]

51. Both Registrar Gaily and Groves J. erred in the view that an order may not "clarify the reasons for judgment …".[78] On the contrary, an order should clarify the judgment where such clarification may be discerned from interpretation (not "improvement") of the judgment.[79] An order may be settled to "particularize" terms where "reasonably or demonstrably expressed" in the reasons.[80]

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[73] See especially, Lever Affidavit, Exhibit "D", p. 59, lines 17-20, p. 39, lines 20-24, p. 40, lines 27-28, p. 42, lines 3-5 and p. 58, lines 1-27 (AB pp. 197, 177, 178, 180, 196).
[74] Lever Affidavit, Exhibit "D", p. 51, lines 16-24 (AB p. 189); Groves Reasons at para. 2 (AAR, Tab "N").
[75] *Bankruptcy of P.*, 2000 BCSC 71 ("***Re P***"), at para. 7.
[76] *Halvorson v British Columbia (Medical Services Commissions)*, 2010 BCCA 267 ("***Halvorson***") at para 19.
[77] *Halvorson* at para. 18, *Starink v Tidy*, 2007 BCSC 567, at para. 7 ("***Starink***").
[78] Groves Reasons at para. 2 (AAR, Tab "N").
[79] *Re P* at para. 7.
[80] *Re P* at para. 12.

52. As stated by this Honourable Court:

> *Reasons for judgment will not, of course, always be given in terms which avoid every possibility of uncertainty or ambiguity, and where doubt or difference exists among counsel as to the meaning of reasons for judgment, whether oral or written, this will be resolved in the settlement of the formal order of the court, which is the definitive expression of its decision*[81]

53. The lower Court misconstrued *Halverson* as standing only for the specific *ratio* that an order should not contain the words, "in accordance with the Reasons for Judgment of this Court."[82] *Halverson* stands for the broader proposition that litigation efficiency is enhanced when orders are settled correctly, by providing clear, complete, and intelligible instructions without resort to extrinsic sources, "… such as … reasons."[83]

54. The Impugned Order says the NCC is "struck as against the Province." Had there been only one defendant named in the NCC this order would have been 100% clear: the whole of the NCC would have been struck out so that it contained no allegations whatsoever. However, because there are two defendants and because there are some allegations doing double duty (and others doing single duty) the order is not clear.

55. The defendants (and, apparently, Registrar Gaily and Groves J., see below) claim the "effect of the order" is to impose a requirement on the plaintiffs to seek leave to amend the pleading to (presumably) remove the "pleadings against the Province"[84] (see above at paragraphs 16 to 20).

56. However, by "picking up and reading the order" the plaintiffs do not "understand exactly what [is] to happen." Specifically, exactly which allegations constitute the "pleadings against the Province" if not those specified in the Plaintiffs' Draft Order?

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[81] *Streifel v First Heritage Savings Credit Union*, [1995] B.C.J. No. 607 (BCCA) at para. 10, quoted in *Halverson* at para. 19.
[82] Lever Affidavit, Exhibit "D", p. 51, lines 16-24 (AB p. 189); *Halverson* at para. 17.
[83] *Halverson* at para. 18.
[84] *Charter* Reasons at para. 67.

57. Like the order in *Halverson*, the Impugned Order is capable of multiple inconsistent interpretations, setting the stage for wasteful and inefficient litigation (and putting the plaintiffs at risk of the Appeal Proofing Issue). It may be construed as:

    a. effecting only something like a dismissal of the action against the Province by striking out the NCC as if:

        i. there were two NCC's filed, one against the Province and one against UBC; and

        ii. the Impugned Order were granted following an application for summary judgement and made pursuant to *Rule* 9-6(5)(a);

    b. ordering the striking out of all allegations within the NCC against the Province (which either include or do not include the Common *Charter* Allegations) by an (implied) obligation on the plaintiffs to bring an application to amend the NCC to specifically remove what has been ordered to be struck in general terms (the defendants' and lower Court's apparent view of the Greenwood reasons); or

    c. directly striking out all allegations within the NCC against the Province without specific reference to paragraph numbers, but those paragraphs are sufficiently identified as "pleading against the Province" (which either includes or does not include the Common Charter Allegations).

58. Given Greenwood J's conclusion that the *Charter* claims against UBC were hopeless, it would be nonsensical to strike them out only as they relate to the Province. There was an application before the Court to strike out the *Charter* claims entirely, and this was the application he "allowed." Where reasons may be interpreted to yield either a sensical or nonsensical order, the sensical order should be preferred.[85]

59. In the plaintiffs' submission, the part of the NCC which Greenwood J. struck out (being the whole of the NCC against the Province) is obvious from the *Charter* Reasons where Greenwood J. identifies the NCC's "substantive" defects: the Common Charter Allegations and the Province *Charter* Remedies. Things become

[85] *Starink* at para. 9(3).

even more clear when one considers the defendants' submission that the "pleadings against the Province" were the Impugned Allegations (see above at paragraph 9) and clearer still when one considers Greenwood J.s opinion that the *Charter* claims against UBC did not survive the Strike and Dismissal Application.

60. Groves J. erred by merely reading and plucking general wording from Greenwood J's reasons rather than interpreting those reasons (with the assistance of other sources) and settling an order which clearly and completely gave enforceable directions as to which allegations Greenwood J. struck out where he referenced the "pleadings against the Province."

IV. Error #2: Confusing "Striking Out" with "Dismissal"

61. As set out above at paragraphs 44 to 46, the Province's application was brought under *Rule* 9-5(1)(a) under which Greenwood J. has jurisdiction to strike out the whole or any part of a pleading and then, possibly, to dismiss the action.

62. The *Rule* distinguishes between:

    a. "striking out" parts or the whole of a pleading; and

    b. "dismissing" the proceeding,

    because, of course, they are distinct concepts. The Court should not interpret those words to mean the same thing.

63. Under the *Rule*, "strike out" means to delete words from the pleading (including, possibly, deleting every word in the pleading) while "dismiss" means to declare the action terminated (or, as stated by Groves J., it means to "end the claim"[86]). When an action is "dismissed" words in the pleading are not deleted. Rather, the plaintiff's claims for relief in connection with all pleaded causes of action are terminated.

64. Put simply, under *Rule* 9-5(1)(a), words in pleadings are "struck" while actions are "dismissed."

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[86] Groves Reasons at para. 6 (AAR, Tab "N").

65. The Province applied to Greenwood J. for both forms of order: “striking the amended notice of civil claim as against the defendant” and “dismissing the action as against the defendant.”[87]

66. The *Charter* Reasons only contemplate “striking out” – the word “dismiss” nowhere appears in Greenwood J’s reasons.[88] Greenwood J. therefore struck out (deleted) the “pleadings against the Province” and the “claim against the Province”[89] but did not order the action “dismissed.”

67. Nonetheless, both Registrar Gaily and Groves J. seem to have read Greenwood J’s order (“[t]he application to strike the pleadings against the Province under *Rule* 9-5(1)(a) is allowed and the claim against the Province is struck”) to effect only a dismissal of the action and to not effect any striking (deleting) of words in the pleading.

68. For example, the following exchange with Registrar Gaily:

> *THE COURT: He struck the whole thing against the Province. He struck the --*
>
> *CNSL G. BLACKETT: Right.*
>
> *THE COURT : -- whole -- he struck -- the claim against the Province is struck . I don't know how else --*
>
> *CNSL G. BLACKETT: Right.*
>
> *THE COURT: -- to say it other than the claim against the Province is struck. I don' t –*
>
> *CNSL G. BLACKETT : Which I take -- which I - - which I think I understand you to mean is dismissed?*
>
> *THE COURT : Yeah , the claim - -*
>
> *CNSL G. BLACKETT : Okay, so there was no --*

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[87] Strike and Dismissal Application at paras. 1 and 2 (AAR, Tab ”C”, pp. 44-45).
[88] In the plaintiffs’ view, Greenwood J. having, both, struck out all allegations contained in the NCC against the Province and having refused leave to amend the NCC, a dismissal order would have been redundant – the action was already, effectively, terminated as against the Province.
[89] *Charter* Reasons at para. 67.

> *THE COURT : -- against the Province …*[90]

69. Likewise, Groves J., who agreed with Registrar Gaily's order, stated:

> *[Greenwood J.] articulated reasons which are 68 paragraphs in total. In those reasons, he did not specifically talk about striking certain sections of the claim, but took a more holistic approach to the litigation and the claim against the Province and determined that he agreed with the position advanced by the Province in paragraph 1 of their notice of application. …*[91]

70. Later in his reasons Groves J. summarized Greenwood J's order as having struck "the claim"[92] against the Province. In other words, in Groves J's view, Greenwood J. had "struck" the entire claim (i.e. he had dismissed the action) without striking out (deleting) any part of the pleading.

71. In fairness, Groves J. did go on to observe that Greenwood J. had not technically "dismissed" the action[93] and, therefore, agreed with Registrar Gaily's decision to strike out from the Defendants' Draft Order the words "and the action against the Province is dismissed".[94] However, like Registrar Gaily, Groves J. did, in fact, interpret the phrase "strike the pleadings against the Province" as a dismissal of the action, not as a striking out of words from the pleadings.

72. This nuance may seem pedantic. In the ordinary course such confusion would not matter. Whether a) every word is deleted from a pleading and leave to amend is denied or b) nothing is deleted from the pleading but the action is dismissed, the action is just as surely dead.

73. However, in the context of the plaintiffs' Main Appeal, the nuance is critical. If the claim is dismissed but the Common *Charter* Allegations are not struck from the NCC, Greenwood J's decision (that it is hopeless to allege the Charter applies to UBC) may be rendered "appeal proof" to the plaintiffs prejudice (see above at paragraphs 40 to 43).

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[90] Lever Affidavit, Exhibit "D", p. 39, line 40 to p. 40, line 5 (AB pp. 177-178).
[91] Groves Reasons at para. 5 (AAR, Tab "N").
[92] Groves Reasons at para. 12 (AAR, Tab "N").
[93] Groves Reasons at para. 6 (AAR, Tab "N").
[94] Groves Reasons at para. 9 (AAR, Tab "N").

74. Groves J. erred by failing to properly distinguish the concepts of "striking out" pleadings and "dismissing" actions under *Rule* 9-5(1)(a).

75. Had Groves fully distinguished those concepts he would necessarily have interpreted Greenwood J's striking out of the "pleadings against the Province" as effecting a deletion of all of the words in the NCC by which the plaintiffs advanced claims against the Province. Groves J. would then have determined which words were deleted and would have included that in the order: "an order ought to be so clear that anyone picking it up and reading it would understand exactly what was to happen."[95] which told the parties and this Honourable Court in clear and complete terms exactly what was to happen.

V. Error #3: Settling an Order That Exceeds Greenwood J's Jurisdiction

76. As explained above at paragraphs 44 to 46, *Rule* 9-5(1) granted Greenwood J. jurisdiction to strike out (i.e. delete) or amend (i.e. change) the whole or part of the NCC and, then, to dismiss the action. The *Rule* does not grant jurisdiction to simply dismiss a defendant from the lawsuit whether by (purportedly) "striking" or "dismissing" the action against the defendant. The Court must have, first, "struck out or amended the whole or any part of the pleading."

77. It is not clear from the Impugned Order that any part of the pleading (i.e. the NCC, as opposed to the action commenced against, *inter alia,* the Province by the NCC) is struck out. It is, therefore, not clear that Greenwood J. had authority to grant the Impugned Order as settled.

78. This jurisdictional failure is resolved if the order is settled, instead, on the basis of the Plaintiffs' Draft Order because the Plaintiffs' Draft Order does strike out parts of the pleading.

79. An order should be settled with due consideration to what, legally, can be ordered.[96]

80. The defendants provide a strained interpretation that the Impugned Order strikes out the pleading indirectly by requiring the plaintiffs to seek leave to amend the NCC

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[95] *Starink* at para. 7.
[96] *Inter-Coastal BKR Development Group v Cadillac Care Inc.*, 1995 CanLII 1295 (BC SC) ("***Inter-Coastal***") at para. 18, *Haight-Smith v Neden*, 2002 BCCA 329 at para. 5.

to "give effect" to the order (see above at paragraphs 16 to 20). Both Registrar Gaily[97] and Groves J.[98] seem to have accepted this interpretation.

81. Greenwood J. had no jurisdiction under *Rule* 9-5(1) to strike out part of the pleading indirectly by requiring that the plaintiffs later apply for amendments to effect the striking out. It is the Court under *Rule* 9-5(1) which strikes out or amends the pleading – not the parties. This should not be confused with an order striking out pleadings with leave to amend. In that case the party has leave to amend, not an obligation, and the party attempts a remedial amendment, not the Court.

82. Groves J. erred by failing to settle the order in a form which is *intra vires* Greenwood J's jurisdiction under *Rule* 9-5(1).

VI. Error #4: Misconstruing the Test for Settling Orders: Relevant Sources

83. Registrar Gaily[99] and Groves J.[100] rested their decision on *Will Millar Associates Co. v Millar*[101]("***Will Millar***") in which Registrar Wellburn set out a framework he used to settle the order before him: 1) if there is specific wording in the reasons, use them; 2) if there is specific wording in the application, use them; or 3) "if I cannot settle the form of order" refer it to the Chief Justice.[102]

84. While this may often function as a reasonable framework, it is not a comprehensive statement of the applicable law. For example, as discussed above, settling an order

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[97] See, especially, Lever Affidavit, Exhibit "D", p. 43, line 47 to p. 44, line 7 (AB pp. 181-182).
[98] Groves Reasons at paras 13 and 12: "Though that may make some logical sense in terms of absolute clarity …" – which implies that clarity will be useful for, it seems, the defendants' proposed amendment application. No further "clarity" is useful if the Impugned Order only effects a dismissal (AAR, Tab "N").
[99] See, especially, Lever Affidavit, Exhibit "D", p. 29, line 16 to p. 30, line 32, p. 38, lines 7-28, p. 39, lines 20-23, p. 47, line 8, p. 48, lines 5-16, p. 59, lines 17-20, (AB pp. 167-168, 176-177, 185-186, and 197), and Groves Reasons (AAR, Tab "N").
[100] Groves Reasons, para. 13 (AAR, Tab "N").
[101] 1995 CanLII 2176, (1995), 44 C.P.C. (3d) 398.
[102] *Will Millar* at para. 3.

may require interpretation[103] or clarification,[104] and terms may be particularized where such intent is "reasonably or demonstrably expressed" in the reasons.[105]

85. Treating *Will Millar* as a comprehensive statement of the applicable law led to Error #1.

86. It also lead to another error. The lower Court refused to go outside of the *Charter* Reasons to inform itself as to what exactly Greenwood J. was referring to when he struck out the "pleadings against the Province."

87. In settling an order the Court is not restricted to reviewing the reasons. The Court may review any relevant part of the record before the Court including pleadings, oral argument, and other reasons[106]. As stated by Master Bouck: "The registrar may be able to resolve perceived ambiguities in the reasons by reference to the pleadings or application record that formed the basis of the order."[107] In *Pierce*[108] Justice Williamson stated:

> *It would be less than efficacious for another officer of this court to have to review the voluminous material in an attempt to settle the order when the parties are so widely apart, particularly where the trial judge, familiar with the tortuous history of the matter, is available …*

88. For this reason both Registrar Gaily[109] and Groves J. failed to consider Greenwood J's clarifying statement that the *Charter* claims against UBC had not survived the Strike and Dismissal Application.

89. The lower Court should not have settled the order on a basis which seemingly conflicts with this clarifying statement. If Registrar Gaily is correct that "… it's crystal clear, he struck the claim against the Province, end of story …" then why does

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[103] *Re P* at para. 7.
[104] *Starink* at para. 7; *Halvorson* at para. 18.
[105] *Re P* at para. 12.
[106] *Westeel Fabrication Ltd v Envoy Construction Services Ltd*, 2018 BCSC 2176 at para. 6; see also *Inter-Coastal* at para. 16 re: oral argument; see *Pierce v Van Loon,* 2001 BCSC 1096 ("***Pierce***") at para. 1 and *Starink* at para. 1 re: other reasons.
[107] *B.L.S. v D.J.S.*, 2021 BSC 1961 at para. 6.
[108] *Pierce* at para. 6.
[109] Lever Affidavit, Exhibit "D", p. 47, line 8 and p. 48, lines 5-9 (AB pp. 185-186); Groves Reasons at paras. 10, 13 and 16 (AAR, Tab "N").

Greenwood J. express the opinion that the *Charter* claims against UBC are also dead?

90. Groves J. erred by failing to consider the Costs Reasons and settling the order in a form consistent (also) with them.

91. In similar fashion the lower Court gave no, or no proper[110] consideration to the fact that the defendants[111] had particularized for Greenwood J. exactly what the Strike and Dismissal Application meant where it requested the "striking [of] the amended notice of civil claim as against the defendant."[112] The defendants told Greenwood J. this meant "strike the Impugned Allegations." Greenwood J. allowed the Province's application: "the claim against the Province is struck." When the full record is considered, there is no doubt what Greenwood J. considered to have been struck: the Impugned Allegations the Province requested be struck.

VII. Error #5: Failing to Consider the Risk of an Injustice

92. See above at section 3.II. It is a misapplication of the *Rules* to settle an order in a manner which unnecessarily and improperly risks the injustice of the Appeal Proofing Issue.

PART 4 – NATURE OF ORDER SOUGHT

93. An order:

a. allowing the appeal of the Groves Order confirming the Impugned Order; and

b. reversing the Groves Order and settling Greenwood J's order in the form of the Plaintiffs' Draft Order;

c. allowing an appeal of the Groves Order on costs and granting the plaintiffs costs of the applications before Registrar Gaily and Groves J; and

d. awarding the plaintiffs costs of the appeal.

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[110] Groves Reasons at paras. 5 and 6 (AAR, Tab "N").
[111] The Province by their written submissions (Sexton Affidavit, Exhibit "B" (AB pp. 52)), UBC by its consent.
[112] Sexton Affidavit, Exhibit "B" at para. 43 (AB p. 62-63).

94. Such further and other order as this Honourable Court deems just.

Dated at the City of Calgary, in the Province of Alberta, this 11th day of June 2025.

Glenn Blackett

Counsel for the Appellants

APPENDICES: LIST OF AUTHORITIES

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APPENDICES: ENACTMENTS:

Supreme Court Civil Rules, BC Reg 168/2009

Rule 9-5 — Striking Pleadings

Scandalous, frivolous or vexatious matters

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be,

(b) it is unnecessary, scandalous, frivolous or vexatious,

(c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

(d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[am. B.C. Reg. 119/2010, Sch. A, s. 22.]

Admissibility of evidence

(2) No evidence is admissible on an application under subrule (1) (a).

Powers of registrar

(3) If, on the filing of a document, a registrar considers that the whole or any part of the document could be the subject of an order under subrule (1),

(a) the registrar may, despite any other provision of these Supreme Court Civil Rules,

(i) retain the document and all filed copies of it, and

(ii) refer the document to the court, and

(b) The court may, after a summary hearing, make an order under subrule (1).

Reconsideration of order

(4) If the court makes an order referred to in subrule (3) (b),

(a) the registrar must give notification of the order, in the manner directed by the court, to the person who filed the document,

(b) The person who filed the document may, within 7 days after being notified, apply to the court, and

(c) the court may confirm, vary or rescind the order.

Rule 13-1 — Orders

Drawing and approving orders

(1) An order of the court

(a) subject to subrule (15), may be drawn up by any party,

(b) subject to subrules (1.3) and (2) and paragraph (c) of this subrule, must, unless the court otherwise orders, be approved in writing by all parties of record or their lawyers,

(c) need not be approved by a party who has not consented to it and who did not attend or was not represented at the trial or hearing following which the order was made, and

(d) after approval under this rule, must be left with a registrar to have the seal of the court affixed.

[am. B.C. Reg. 149/2022, Sch. 1, s. 5.]

Service of order drawn up by party and signing instructions

(1.1) If an order of the court must be approved in writing by a party of record or their lawyer, the party who draws up the order must serve the order on the party of record along with signing instructions in Form 33.1.

[en. B.C. Reg. 149/2022, Sch. 1, s. 6.]

Time limit for approving or objecting to order drawn up by party

(1.2) A party who is served with an order under subrule (1.1) or the party's lawyer must, within 14 days after being served,

(a) if the party or lawyer approves the terms of the order, sign the order and return it to the party who drew up the order, or

(b) if the party or lawyer disagrees with the accuracy of the terms of the order, deliver to the party who drew up the order a written objection that sets out in detail the reasons why the terms of the order are not accurate.

[en. B.C. Reg. 149/2022, Sch. 1, s. 6.]

Approval not required after non-compliance

(1.3) If a party who is served with an order under subrule (1.1) or the party's lawyer does not return the approved order or deliver a written objection within the time limit set out in subrule (1.2), the order need not be approved by that party or that party's lawyer.

[en. B.C. Reg. 149/2022, Sch. 1, s. 6.]

Entry of order after non-compliance

(1.4) The registrar may enter an order that has not been approved by a party of record or their lawyer if the party who drew up the order files

(a) proof of service on the party of record of the order and the signing instructions referred to in subrule (1.1),

(b) proof that the party who was served with the order or that party's lawyer did not return the approved order, or deliver a written objection, within the time limit set out in subrule (1.2), and

(c) a requisition in Form 17 requesting entry of the order.

[en. B.C. Reg. 149/2022, Sch. 1, s. 6.]

When approval in writing not required

(2) If an order is signed or initialled by the presiding judge or associate judge, that order need not be approved in writing by a lawyer or by a party.

[am. B.C. Reg. 277/2023, Sch. 3, s. 5.]

Form of order

(3) Unless these Supreme Court Civil Rules otherwise provide,

(a) an order made without a hearing and by consent must be in Form 34,

(a.1) an order made at a trial management conference must be in Form 47.1,

(b) an order made after a trial must be in Form 48, and

(c) any other order must be in Form 35.

[am. B.C. Reg. 176/2023, Sch. 1, s. 17.]

Endorsement of order on application sufficient in certain cases

(4) If an order has been made substantially in the same terms as requested, and if the court endorses the notice of application, petition or other document to show that the order has been made or made with any variations or additional terms shown in the endorsement, it is not necessary to draw up the order, but the endorsed document must be filed.

Order granted conditionally on document to be filed

(5) If an order may be entered on the filing of a document, the party seeking entry of the order must file the document when leaving the draft order with a registrar, and the registrar must examine the document and, if satisfied that it is sufficient, must enter the order accordingly.

Waiver of order obtained on condition

(6) If a person who has obtained an order on condition does not comply with the condition, the person is deemed to have abandoned the order so far as it is beneficial to the person and, unless the court otherwise orders, any other person interested in the proceeding may take either the steps the order may warrant or the steps that might have been taken if the order had not been made.

Order of judge or associate judge

(7) An order of a single judge or associate judge is an order of the court.

[am. B.C. Reg. 277/2023, Sch. 3, s. 5.]

Date of order

(8) An order

(a) must be dated as of the date on which it was pronounced or, if made by a registrar, as of the date on which it is signed by the registrar, and

(b) unless the court otherwise orders, takes effect on the day of its date.

Approval of order

(9) An order may be approved by any judge.

Requirement of consent order

(10) A consent order must not be entered unless the consent of each party of record affected by the order is signified as follows:

(a) if the party is represented by a lawyer, by the signature of the lawyer;

(b) if the party is not represented by a lawyer,

(i) by the oral consent of the party who attends before the court or a registrar, or

(ii) by the written consent of the party.

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.

[am. B.C. Reg. 277/2023, Sch. 3, s. 5.]

Appointment to settle

(12) A party may file an appointment in Form 49 to settle an order and must, at least one day before the time fixed by the appointment, serve on all parties whose approval of the order is required under subrule (1) the following documents:

(a) a copy of the filed appointment;

(b) the draft order;

(c) any written objections to the draft order that have been delivered to the party.

[en. B.C. Reg. 149/2022, Sch. 1, s. 7.]

Party failing to attend on appointment to settle

(13) If a party fails to attend at the time appointed for the settlement of an order, a registrar may settle the order in the party's absence.

Review of settlement

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

Registrar may draw order

(15) The court may direct a registrar to draw up and enter an order.

Special directions for entry or service

(16) The court may give special directions respecting the entry or service of an order.

Correction of orders

(17) The court may at any time correct a clerical mistake in an order or an error arising in an order from an accidental slip or omission, or may amend an order to provide for any matter that should have been but was not adjudicated on.

Opinions, advice and directions of the court

(18) The opinion, advice or direction of the court must be entered in the same manner as an order of the court and is to be termed a "judicial opinion", "judicial advice" or "judicial direction", as the case may require.

Orders on terms and conditions

(19) When making an order under these Supreme Court Civil Rules, the court may impose terms and conditions and give directions it considers will further the object of these Supreme Court Civil Rules.

Crown Proceeding Act, RSBC 1996, c. 89

Definitions

1 In this Act:

"**agent**", when used in relation to the government, includes an independent contractor employed by the government;

"**Crown**" means Her Majesty the Queen in right of British Columbia;

"**officer of the government**" includes a minister of the government and an employee of the government;

"**order**" includes a judgment, decree, rule, award and declaration;

"**person**" does not include the government;

"**proceeding against the government**" includes a claim by way of set off or counterclaim raised in proceedings by the government, an interpleader proceeding to which the government is a party, and a proceeding in which the government is a garnishee.

Liability of government

2 Subject to this Act,

(a) proceeding against the government by way of petition of right is abolished,

(b) a claim against the government that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant Governor, may be enforced as of right by proceeding against the government in accordance with this Act, without the grant of a fiat by the Lieutenant Governor,

(c) the government is subject to all the liabilities to which it would be liable if it were a person, and

(d) the law relating to indemnity and contribution is enforceable by and against the government for any liability to which it is subject, as if the government were a person.

Limitations on proceedings and liabilities

3 (1) This Act is subject to the Workers Compensation Act and does not apply to any of the following:

(a) proceedings under

(i) the Income Tax Act,

(ii) the Corporation Capital Tax Act, or

(iii) the Logging Tax Act;

(b) assurance fund proceedings under land title legislation;

(c) proceedings to which the Federal Courts Jurisdiction Act applies.

(2) Nothing in section 2 does any of the following:

(a) authorizes proceedings against the government for anything done or omitted to be done by a person acting in good faith while discharging or purporting to discharge responsibilities

(i) of a judicial nature vested in the person, or

(ii) that the person has in connection with the execution of judicial process;

(b) subjects the government to greater liability for the acts or omissions of an independent contractor employed by the government than that to which the government would be subject for those acts or omissions if it were a person;

(c) affects the right of the government to intervene in proceedings affecting its rights, property or profits;

(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;

(e) authorizes proceedings against the government for anything done in the proper enforcement of the criminal law or the penal provisions of an Act;

(f) subjects the government, in its capacity as a highway authority, to any greater liability than that to which a municipal corporation is subject in that capacity.

Institution of claims in the Supreme Court

4 (1) Subject to this Act, all proceedings against the government in the Supreme Court must be instituted and proceeded with under the Supreme Court Act and, if applicable, under the Class Proceedings Act.

(2) In proceedings against the government, the trial must be without a jury.

Institution of claims in the Provincial Court

5 (1) Without limiting section 4 but subject to subsections (3) and (4) of this section, proceedings may be brought against the government in the Provincial Court.

(2) Subject to this Act, all proceedings against the government in the Provincial Court must be instituted and proceeded with under the Small Claims Act.

(3) Nothing in this Act extends the jurisdiction of the Provincial Court beyond the jurisdiction available to it under section 3 of the Small Claims Act.

(4) In a proceeding against the government under the Small Claims Act, the Provincial Court does not have jurisdiction over

(a) a matter for which notice under section 8 of the Constitutional Question Act is required, or

(b) a matter involving the Canadian Charter of Rights and Freedoms.

Institution of claims in the Civil Resolution Tribunal

5.1 (1) In this section, "civil resolution tribunal" means the Civil Resolution Tribunal established under the Civil Resolution Tribunal Act.

(2) Without limiting section 4, but subject to subsections (4) and (5) of this section and to section 9 [government as party] of the Civil Resolution Tribunal Act, claims may be resolved or adjudicated against the government in the civil resolution tribunal.

(3) Subject to this Act, all proceedings against the government in the civil resolution tribunal must be instituted and proceeded with under the Civil Resolution Tribunal Act.

(4) Nothing in this Act extends the jurisdiction of the civil resolution tribunal beyond the jurisdiction available to it under the Civil Resolution Tribunal Act.

(5) In a proceeding against the government under the Civil Resolution Tribunal Act, the civil resolution tribunal does not have jurisdiction over

(a) a matter for which notice under section 8 of the Constitutional Question Act is required, or

(b) a matter involving the Canadian Charter of Rights and Freedoms.

Appeals and stays of proceedings

6 Subject to this Act, all enactments and rules of court for appeals and stays of proceedings apply to proceedings against the government and proceedings in which the government is a party.

Designation of government

7 In proceedings under this Act, the government must be designated "Her Majesty the Queen in right of the Province of British Columbia".

Service on government

8 A document to be served on the government

(a) must be served on the Attorney General at the Ministry of Attorney General in the City of Victoria, and

(b) is sufficiently served if

(i) left there during office hours with a solicitor on the staff of the Attorney General at Victoria, or

(ii) mailed by registered mail to the Deputy Attorney General at Victoria.

Discovery and inspection of documents

9 (1) In proceedings against the government and proceedings in which the government is a party, if there are, in the rules of the court in which the proceedings are brought, rules relating to one or more of discovery and inspection of documents, examinations for discovery and interrogatories, those rules apply as if the government were a corporation.

(2) Subsection (1) does not affect a rule of law that authorizes or requires the withholding of a document, or the refusal to answer a question, on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.

(3) If the government claims that the disclosure of the document or the answering of the question would be injurious to the public interest, the court may, after holding an inquiry it considers necessary and reasonable, and on finding that the public interest in the administration of justice should prevail over the public interest in withholding the document or answering the question, order, subject to conditions or restrictions it considers appropriate, production and discovery of the document or that the question be answered.

Interpleader

10 (1) Even if an application for relief is made by a sheriff or bailiff or other similar officer, the government may

(a) obtain relief by way of interpleader proceedings in the same manner as a person may obtain relief by way of those proceedings, and

(b) be made a party to the proceedings in the same manner as a person may be made a party to them.

(2) Subject to this Act, the interpleader provisions in the Supreme Court Civil Rules apply to the proceedings.

Rights of parties and authority of the court

11 (1) In proceedings against the government and proceedings in which the government is a party, the rights of the parties must, subject to this Act, be as nearly as possible the same as in a proceeding between persons, and the court may

(a) make an order, including an order as to costs, that it may make in proceedings between persons, and

(b) otherwise give the appropriate relief that the case may require.

(2) If, in proceedings against the government, relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, the court

(a) must not grant an injunction or make an order for specific performance against the government, and

(b) may make an order declaring the rights of the parties instead of an injunction or an order for specific performance.

(3) A person must not make use

(a) of a set off or counterclaim in proceedings by the government for the recovery of taxes, duties or penalties, or

(b) in proceedings of any nature by the government, of a set off or counterclaim arising out of a right or claim to repayment for taxes, duties or penalties.

(4) In a proceeding, the court

(a) must not grant an injunction or make an order against an officer of the government if the effect of granting the injunction or making the order

would be to give relief against the government that could not have been obtained in proceedings against the government, and

(b) may make an order declaring the rights of the parties instead of granting the injunction or making the order.

(5) Without leave of the court, a person must not make use of a set off or counterclaim in proceedings by the government, unless the subject matter of the set off or counterclaim relates to a matter under the administration of the particular government ministry for which the proceedings are brought by the government.

(6) In proceedings against the government in which the recovery of land or other property is claimed, the court

(a) must not make an order for the recovery of the land or the delivery of the property, and

(b) may, instead, make an order declaring that the claimant is entitled, as against the government, to land or property or to possession of it.

Interest on judgments

12 A judgment debt due to or from the government bears interest in the same way as a judgment debt due from one person to another.

Certificate of judgment

13 (1) Subject to this Act, if in proceedings against the government and proceedings in which the government is a party, an order for costs or other order is made by a court against the government, the proper officer of the court must, on application, issue a certificate.

(2) If the court directs, a separate certificate must be issued for the costs, if any, ordered to be paid to the applicant.

(3) A certificate issued under this section may be served on the person named in the record as the solicitor, or as the person acting as solicitor, for the government.

(4) If the order provides for the payment of money by way of damages or otherwise, or of costs, the certificate must state the amount payable, and the Minister of Finance must, subject to this Act, pay out of the consolidated revenue fund to the person entitled, or to the person's order, the amount appearing by the certificate to be due, together with the interest, if any, lawfully due.

(5) The court which makes an order or a court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of the amount payable, or any part is suspended and, if the certificate has not been issued, may order the direction to be inserted in it.

(6) An execution or attachment or process of that nature must not be issued out of a court for enforcing payment by the government of money or costs.

Certificate of settlement

14 (1) If a claim is made against the government and the Attorney General certifies, either before or after proceedings authorized by this Act have been commenced, that

(a) the Attorney General considers that the claim, if pursued, could result in an order referred to in section 13 (4) for the payment of money by the government, and

(b) it is in the public interest to settle the claim in an amount set out in the certificate,

the Minister of Finance must pay that amount to the person making the claim.

(2) If a proceeding authorized by this Act has been commenced and the Attorney General certifies that it is in the public interest to make payment into court, the Minister of Finance must pay into court the amount set out in the certificate.

(3) [Repealed 1998-42-4.]

(4) Money paid by the Minister of Finance under this section must be paid out of the consolidated revenue fund.

Report to Legislative Assembly

15 The Attorney General must prepare in each fiscal year a report respecting the money paid out in the preceding fiscal year under sections 13 (4) and 14 (4) and lay the report before the Legislative Assembly as soon as practicable.

Rights of government to rely on statutes

16 (1) This Act does not prejudice the right of the government to take advantage of an Act.

(2) In proceedings against the government, an Act that could, if the proceedings were between persons, be relied on by the defendant as a defence to the proceedings, whether in whole or in part, or otherwise, may, subject to an express provision to the contrary, be relied on by the government.