



COURT OF APPEAL FILE NO. CA49986
 Alter et al. v. The University of British Columbia et al.
 Respondent's (The University of British Columbia) Factum

COURT OF APPEAL

ON APPEAL FROM the orders of the Honourable Justice Greenwood of the Supreme Court of British Columbia pronounced on the 4th day of June, 2024 and 4th day of July, 2024.

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)

**RESPONDENT'S FACTUM
 THE UNIVERSITY OF BRITISH COLUMBIA**

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

His Majesty the King in Right of British
 Columbia

Glenn Blackett

Emily Lapper, Sergio Ortega, and Karin
 Kotliarsky

Glenn Blackett Law
 600 – 1285 West Broadway
 Vancouver, BC V6H 3X8

Ministry of Attorney General
 1301 – 865 Hornby Street
 Vancouver, BC V6Z 2G3

Telephone: (587) 674-3445
 Email: glennblackett@outlook.com

Telephone: (604) 660-6795
 Email: emily.lapper@gov.bc.ca

Counsel for the appellants

sergio.ortega@gov.bc.ca
karin.kotliarsky@gov.bc.ca

Counsel for the respondent His Majesty
the King in Right of British Columbia

The University of British Columbia

Rodney W. Sieg, Hubert Lai, K.C., and
David Penner

Harris & Company LLP
1400 – 550 Burrard Street
Vancouver, BC V6C 2B5

Telephone: (604) 684-6633

Email: rsieg@harrisco.com
hubert.lai@ubc.ca
dpenner@harrisco.com

Counsel for the respondent The
University of British Columbia

TABLE OF CONTENTS

TABLE OF CONTENTS	3
CHRONOLOGY	4
OPENING STATEMENT	6
PART 1 - STATEMENT OF FACTS	7
PART 2 - ISSUES ON APPEAL	9
PART 3 - ARGUMENT	10
A. Standard of review	10
B. OVERVIEW.....	10
C. The Question of whether the <i>Charter</i> applies to UBC Should Not be Determined in the Absence of Evidence	10
PART 4 - NATURE OF ORDER SOUGHT.....	14
APPENDICES: LIST OF AUTHORITIES.....	15
APPENDICES: ENACTMENTS	16

CHRONOLOGY

Date	Event
December 19, 2022	The plaintiffs file their notice of civil claim.
March 13, 2024	The plaintiffs file an amended notice of civil claim (" Claim ").
March 22, 2024	The respondent His Majesty the King in Right of British Columbia (the " Province ") files an application to strike the Claim against it under rule 9-5(1)(a).
April 5, 2024	The plaintiffs file an application to further amend the Claim under rule 6-1(1) in the event the BC Supreme Court finds the pleading contains impermissible conclusions of law.
May 7-8, 2024	The hearing of the Province's strike application and the plaintiffs' amendment application proceeds before Justice Greenwood.
June 4, 2024	In reasons indexed at <i>Alter v. The University of British Columbia</i> , 2024 BCSC 961, Justice Greenwood grants the Province's strike application and dismisses the plaintiffs' application to amend their claim. Justice Greenwood grants leave for written costs submissions.
June 14, 24 and July 4, 2024	The parties submit written submissions with respect to costs to Justice Greenwood.
July 3, 2024	The plaintiffs file their notice of appeal.
October 10, 2024	In reasons indexed as <i>Alter v. The University of British Columbia</i> , 2024 BCSC 1879, Justice Greenwood orders costs against the plaintiffs.

October 16, 2024	The plaintiffs file an amended notice of appeal.
November 26, 2024	The plaintiffs file a further amended notice of appeal, under the order of the Honourable Madam Justice Bennett (in chambers).

OPENING STATEMENT

The question in this appeal is whether the chambers judge correctly struck the Claim against the Province. The chambers judge relied on multiple bases to support his conclusion, one of which was that The University of British Columbia (“**UBC**”) is not bound by the *Charter*. UBC did not file an application response in the Court below.

Insofar as UBC has an interest in this appeal, it relates to the question of whether the *Charter* applies to the University. UBC’s position is that question should be determined by a judge of the Supreme Court after hearing the evidence at trial so that the analysis of the question is informed by the factual matrix.

The action arose from UBC’s decision to cancel a speaker event on campus in late 2019, which the plaintiffs allege breached their *Charter* rights to freedom of expression and peaceful assembly. As currently pled, a number of material facts are pled in support of the claim that the *Charter* should now apply to UBC in the circumstances at bar. Those alleged material facts should be tested in court and this Court should not decide the question of whether the *Charter* applies to UBC in the absence of the factual matrix.

Because the chambers judge based his order to strike the Claim against the Province on additional, independent grounds, the application of the *Charter* to UBC is not dispositive of the result on this appeal. UBC takes no position on whether the order striking the Claim against the Province may be supported on other grounds.

PART 1 - STATEMENT OF FACTS

1. In the amended notice of civil claim filed March 13, 2024 (the “**Claim**”), the material facts, as pled by the plaintiffs, related to the application of the *Charter* to UBC include:
 - a. the manner and degree of the Province’s control over UBC and UBC’s delivery of the Province’s programs has fundamentally evolved and increased over the last three decades;¹
 - b. UBC is subject to ultimate, extraordinary, routine, regular, and highly detailed control by the Province, including over its core function of delivering university education;²
 - c. UBC is government:
 - i. by its nature, including its assets, structure, powers, and functions,
 - ii. by virtue of the nature and extent of the Province’s control over its assets and operations, and
 - iii. performs a government function, including the delivery of government programs which the Province partakes in decision-making;³
 - d. UBC is instructed and authorized to perform government programs, including the delivery of university education, student safety, and regulation of freedom of expression by students on university grounds;⁴
 - e. the Minister may interfere in the exercise of powers conferred on UBC except:

¹ Amended Appeal Record, filed December 3, 2024 (“**AR**”), p. 32, Claim, Part 1, para. 13

² AR, pp. 34-35, Claim, Part 1, para. 22

³ AR, p. 41, Claim, Part 1, para. 28

⁴ AR, pp. 31-32, 40, Claim, Part 1, para. 12, 25

- i. the formulation and adoption of academic policies and standards,
- ii. the establishment of standards for admission and graduation, and
- iii. the selection and appointment of staff,

which exceptions the Minister does not in fact observe and do not apply to the matters alleged in the Claim;⁵

- f. the *University Act*, R.S.B.C. 1996, c. 468 was significantly amended in 1996;⁶
- g. UBC is subject to various legislation, including:
 - i. the *Public Sector Employers Act*, R.S.B.C. 1996, c. 384,⁷
 - ii. the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165,⁸
 - iii. the *Budget Transparency and Accountability Act*, S.B.C. 200, c. 23,⁹
 - iv. the *Financial Administration Act*, R.S.B.C. 1996, c. 138,¹⁰ and
 - v. the *Sexual Violence and Misconduct Policy Act*, S.B.C. 2016, c. 23.

⁵ AR, p. 34, Claim, Part 1, para. 14(j)

⁶ AR, pp. 34-35, Claim, Part 1, para. 14

⁷ AR, p. 36, Claim, Part 1, para 16

⁸ AR, p. 36, Claim, Part 1, para 17

⁹ AR, p. 36, Claim, Part 1, para 18

¹⁰ AR, pp. 36-37, Claim, Part 1, para 19

PART 2 - ISSUES ON APPEAL

2. The substantive issue on this appeal is whether the chambers judge erred by striking and dismissing the Claim against the Province under Rule 9-5(1)(a) of the Supreme Court Civil Rules (“**SCCR**”).
3. Based on the chambers judge’s reasons and order, the sub-issues are:
 - a. if the *Charter* were found to apply to UBC, do the material facts pled in the Claim support a claim against the Province; and
 - b. regardless of whether the material facts pled in the Claim support a claim against the Province, is the Claim against the Province bound to fail as a matter of law because the *Charter* does not apply to UBC.
4. UBC’s position on this appeal is limited to the second of these sub-issues.

PART 3 - ARGUMENT

A. STANDARD OF REVIEW

5. The chambers judge's decision to strike the Claim under R. 9-5(1)(a) is subject to a standard of review of correctness on appeal.¹¹

B. OVERVIEW

6. This Court need not determine whether the *Charter* applies to UBC on this appeal.
7. As is evident from the Province's factum, the chambers judge's decision to strike the Claim as against the Province may be decided on other, independent grounds, namely, whether the Claim pleads any material facts that could establish a *Charter* breach by the Province, and whether s. 24(1) of the *Charter* creates an independent cause of action against the Province. If this Court agrees with the Province on those grounds, it need not consider the issues that relate to UBC at all. UBC takes no position on the issues that exclusively relate to the Claim vis-à-vis the Province.
8. In the event that this Court rules against the Province on those issues and considers the applicability of the *Charter* to UBC, UBC's position is that the question should not and cannot be decided in the absence of a proper evidentiary basis being established by the trial court through a trial where the evidence can be tested, and an appeal must be based on the trial court's reasons for judgment. Insofar as the chambers judge's order suggests otherwise, it is in error.

C. THE QUESTION OF WHETHER THE *CHARTER* APPLIES TO UBC SHOULD NOT BE DETERMINED IN THE ABSENCE OF EVIDENCE

9. The question of whether the *Charter* applies to UBC was addressed by the chambers judge as a sub-issue in his reasons.

¹¹ *Situmorang v. Google LLC*, 2024 BCCA 9 at para. 52

10. For the reasons set out below, it is a question of mixed fact and law, which will require significant evidence to be led at trial.
11. The SCC has identified two ways in which the *Charter* may be found to apply to an entity under section 32(1) of the *Charter*.¹²
 - a. if an entity itself is “government”, either by its very nature or by virtue of the degree of governmental control exercised over it; or
 - b. if an entity is not government but is implementing a specific government program or policy.

(“Section 32(1) test”)

12. If an entity is found to be “government” under the first branch of the Section 32(1) test, then all of its activities will be subject to *Charter* scrutiny, whereas if an entity is not itself government but is found to be performing governmental activities under the second branch of the test, then only those activities which can be said to be governmental in nature will be subject to *Charter* scrutiny.¹³
13. The Claim alleges that the *Charter* applies to UBC under both branches of the Section 32(1) test. Under the first branch of the test, the Claim alleges that UBC is “government” because it is significantly controlled by the Province and that UBC is “government by nature” (i.e. a special purpose municipality). Under the second branch of the test, the Claim alleges that the *Charter* applies to UBC insofar as it delivers university education and student safety.¹⁴
14. An entity will be considered “government” under the first branch of the Section 32(1) test when either: (1) its activities are subject to routine or regular control by the

¹² *Canadian Federation of Students v. Greater Vancouver Transportation*, 2009 SCC 31 at paras 15-16 (“**GVRD**”).

¹³ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (“**Eldridge**”) at para 44.

¹⁴ Appellants’ Factum, at para 74.

government, as opposed to extraordinary or ultimate control; or (2) it is government by its very nature.¹⁵

15. The SCC held that UBC was not substantially controlled by the government so as to make it “government” and thus subject to section 32 (1) of the *Charter* in *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 (“*Harrison*”).

16. The plaintiffs allege that there is far greater Provincial control, qualitatively and quantitatively, over UBC today than described in *Harrison*, which justifies overturning the SCC’s decision to lead to a finding that UBC is government.¹⁶ UBC disagrees with this proposition.

17. *Stare decisis* is a fundamental doctrine of our justice system that provides that every court is bound to follow any case decided by a court above it in the hierarchy. There are two types of *stare decisis*:

- a. vertical *stare decisis*, which applies to situations where a lower court seeks to depart from a precedent established by a higher court; and
- b. horizontal *stare decisis*, which applies to situations where a court seeks to depart from its own precedent.¹⁷

18. Regarding vertical *stare decisis*, the SCC has stressed that a lower court is not entitled to ignore binding precedent and it may only reconsider a higher court’s ruling in two exceptional situations:

- a. where a new legal issue is raised; and

¹⁵ *Eldridge* at para 44; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 at para 102

¹⁶ Appellants’ Factum at para 21.

¹⁷ *British Columbia Courtroom Procedure*, 2nd Ed. (Bracken, Dull), Chapter 48 Rendering Judgment.

- b. where there is a change in the circumstances or evidence that “fundamentally shifts the parameters of the debate”.¹⁸
19. Whether this applies is a question of mixed fact and law that requires a factual matrix, which will only be present after a full trial. Insofar as the chambers judge held otherwise, he erred.
20. As noted above, if the chambers judge was correct that there is no claim against the Province for other, independent reasons, and therefore the Claim should be struck as against the Province on those grounds, then there was no need even to address the *Charter* issues.

¹⁸ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para 44; See also *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para 44 and *R. v. Comeau*, 2018 SCC 15 at para 29.

PART 4 - NATURE OF ORDER SOUGHT

21. UBC takes no position on whether the appeal should be allowed. UBC does not seek costs and requests that no costs be awarded against it.
22. All of which is respectfully submitted.

Dated: January 19, 2026



Rodney Sieg, Hubert Lai, K.C., and David Penner
Lawyers for the respondent
The University of British Columbia

APPENDICES: LIST OF AUTHORITIES

Authorities	Page # in factum	Para # in factum
<i>Canada (Attorney General) v. Bedford</i> , 2013 SCC 72 at para 44	12-13	18
<i>Canadian Federation of Students v. Greater Vancouver Transportation</i> , 2009 SCC 31 at paras 15-16	11	11
<i>Carter v. Canada (Attorney General)</i> , 2015 SCC 5 at para 44	12-13	18
<i>Eldridge v. British Columbia (Attorney General)</i> , [1997] 3 S.C.R. 624 at para 44	11-12	12, 14
<i>Harrison v. University of British Columbia</i> , [1990] 3 S.C.R. 451	12	15
<i>R. v. Comeau</i> , 2018 SCC 15 at para 29	12-13	18
<i>Situmorang v. Google LLC</i> , 2024 BCCA 9 at para 52	10	5
Secondary Sources		
British Columbia Courtroom Procedure, 2nd Ed. (Bracken, Dull), Chapter 48 Rendering Judgment	12	17

APPENDICES: ENACTMENTS

Canadian Charter of Rights and Freedoms

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Application of Charter

32 (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Supreme Court Civil Rules

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,