



CA49986

Alter et al. vs. The University of British Columbia et al.  
 Appellants' Reply Factum  
 (To Factum of His Majesty the King in Right of British Columbia)

### **COURT OF APPEAL**

ON APPEAL FROM the Order of The Honourable Justice Greenwood of the Supreme Court of British Columbia pronounced on June 4, 2024 and October 10, 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)

**Publication Ban or Anonymity Order (if any) : NIL**

**Sealing Order (if any): NIL**

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### **APPELLANTS' REPLY FACTUM**

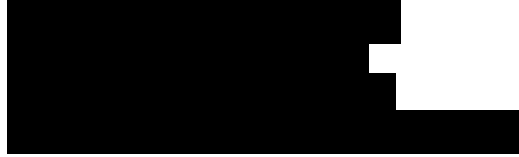
**To Factum of His Majesty the King in Right of British Columbia**  
 Filed by the Appellants

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

Glenn Blackett

Glenn Blackett Law

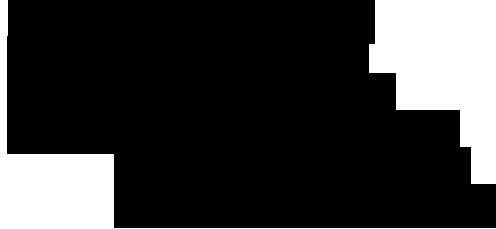


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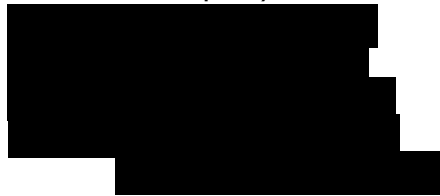


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## APPELLANTS' REPLY TO RESPONDENT'S FACTUM ON APPEAL

### *I. Failure to Engage with the Facts and Arguments*

1. The respondents both assert the plaintiffs' claims are hopeless – while refusing to refute them. Instead, the respondents: dodge the “elephants in the room”, especially the Control Scheme<sup>1</sup>; invent and then refute strawman arguments; ask this Court to ignore the primary claim; and ignore most counter-arguments in the plaintiffs' factum. These avoidance tactics demonstrate the strength of the claims. If the claims were truly hopeless, the respondents would have no fear tackling them. To the extent arguments are made by the respondents, they are made without considering the procedural context. The question is not whether the respondents can make some arguments (for example: that “... the facts pleaded ... speak to a collaborative relationship...”<sup>2</sup>). The question, rather, is whether the plaintiffs' arguments are clearly hopeless.

2. The Control Scheme - the heart of which is described in the NCC starting at para. 22, includes UBC's annual duty to report performance of government objectives under BC's “Accountability Framework”. Yet, BC's Schedule “A” abruptly ends at NCC para. 21. Where BC does address some indicia of control, it often does so incompletely. For example, it completely fails to address the critical fact that “the Minister does not in fact observe” the *Act's* s. 48(1) (see AF p. 48) restriction on interference.<sup>3</sup> At BCF para. 26(a), BC ignores new powers over the BOG (see AF para. 35). At BCF para. 35(c) BC baldly asserts the plaintiffs allege a “collaborative” relationship, which is neither alleged nor an argument appropriate for a striking motion.

3. In Schedule “A” BC does admit that, post-*Harrison*, there are new facts which might demonstrate control, but then fails to mention that admission in the body of its factum at para. 35. BC often asserts some indicia “does not support ... control” (re: NCC paras. 14(d), 17, 18 and 20) without explanation or acknowledgment that many such indicia show governmental nature, not control. BC dismisses several indicia because they were “considered in *Harrison*” as if they did not, therefore, demonstrate control. The SCC

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<sup>1</sup> Definitions in plaintiffs' factum, filed October 16, 2024 (the “**AF**”) adopted herein.

<sup>2</sup> The Province's (“**BC's**”) factum, filed December 23, 2025 (the “**BCF**”) para. 35(c).

<sup>3</sup> See NCC para. 14(j) and BCF paras. 24, 25, 29, 31 and 35(d); see other incomplete responses re: NCC paras. 11, 16, 19 and 21 and AF para. 35.

acknowledged such indicia did demonstrate control, just not enough (*Harrison*, para. 56). If more control is added to existing control, the test is eventually satisfied.

4. BC's treatment of many facts is superficial: a) That a "reporting requirement" was considered in *Harrison* (NCC paras. 14(h) and 14(r), BCF para. 26(h)) without acknowledging that the contemporary requirement includes an "Institutional Accountability Plan and Report" under BC's "Accountability Framework"; b) BCF para. 26(h) references financial regulation without noting the critical change from 1990-era "fiscal accountability" to modern "program accountability"; c) BC ignores the modern use of degree approval power to pursue Crown objectives (NCC paras. 14(k), 23(g) and (h), AF para. 38); d) BC overlooks that the BOG may act in the "best interests of the university" by complying with Crown control. BC also notes several statutory provisions which were not considered in *Harrison*.

5. The BCF also largely ignores UBC's characterization as a "special purpose municipality" complete with public utilities, building and traffic regulation, and courts (NCC para. 27, AF para. 7 and 64).

6. In fact, BC has provided no response to the whole or part of AF paras. 7, 8, 11 to 19, 21 to 33, 35 to 42, 44 to 51, 53 to 55, 57 to 73, 75 to 86. The NCC is neither "certain to fail" nor does it contain "radical defects"<sup>4</sup> because it can be read wearing blinders.

## ***II. Stare Decisis***

7. BC confuses distinguishing (including applying legal principles to different facts to reach a different outcome) and reconsidering (changing the legal principles) (BCF para. 23). The plaintiffs plainly seek to distinguish *Harrison* on the facts and to apply *Eldridge* and *Godbout* to the facts (AF paras. 11 to 56 and paras. 57 to 66, respectively). *Bedford* is only argued in the alternative. Ironically, it is BC which seeks reconsideration of a case: *Ward* (see below).

8. BC argues Greenwood J. did not rely on *Harrison* and *UVic* for their outcomes because he referenced a "vast amount of detail" (Reasons para. 23, BCF para. 33). However, this ignores AF para. 54 which notes the absence of any analysis – apart from

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<sup>4</sup> *Odhavji Estate v Woodhouse*, 2003 SCC 69 at paras. 14-15.

statements like the next sentence: "... [t]he jurisprudence establishes that UBC is autonomous." (Reasons paras. 23 and 24). It is an error of law to render reasons which do not allow for meaningful appellate review.<sup>5</sup>

### **III. Control**

9. The statement in *Maughan v University of British Columbia*, 2009 BCCA 447 ("**Maughan**") at para. 54 is *obiter dicta*. BC cites no case in which a s. 32(1) analysis is performed given the Control Scheme or *Godbout*.

### **IV. Nature**

10. BC's application of *Godbout* (BCF para. 39) is an exercise in form over substance. S. 32(1) is interpreted in a flexible, purposive, and generous, rather than technical, narrow, or legalistic manner (*Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 ("**Dickson**"), para. 45). Neither municipal councils nor first nations are elected by the public *writ* large. They are elected by "eligible voters" *per* residence and membership (*Dickson*, para. 79, *GVRD* paras. 18 and 19). UBC's government is elected by constituencies which work or study at UBC or is appointed by BC (AF para. 64). Municipalities' revenue (taxes, fees, levies, fines, etc.) is also: a) "distinguishable" from federal and provincial taxation power; and b) limited to permitted purposes (*Community Charter*, SBC 2003, c 26 ("**CC**"), ss. 165, 173(1), 191 and 193(1)). The BOG is empowered, within its territorial jurisdiction, to enact bylaws, policies, and rules in areas of planning, heritage, traffic, nuisance, enforcement, and quasi-judicial tribunals (*Act*, ss. 27(2)(d), (t) – (t.4), (x.1) and (x.2)). But for UBC's governance of UBC's campus, these powers would be exercised by BC or the City. *Contra* BCF para 19, the SCC cautioned against "blurring" whether the *Charter* applies to all or only some activities (*Dickson*, para. 73). *Dickson* says neither that each indicium applies only to one test nor that multiple tests may not apply. Rather, the caselaw is "fluid and complex" (*Dickson*, para. 60).

### **V. Program**

11. BC frequently misstates *Eldridge* (BCF paras. 15, 19, 40, 41, 46, 65): a) the second part applies to activities "ascribed to government" including "specific government

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<sup>5</sup> *R v Sliwka*, 2017 ONCA 426 at para 24.

programs” (*Eldridge* para. 42); and b) the impugned conduct must be connected with (not be) the government activity (AF para. 71). *UVic* is distinguishable (AF paras. 41 and 73) and, to some extent, *obiter dicta* (*UVic* para. 22). In neither *UVic* nor *UVIC BCSC* (see BCF para. 39(d)) was the Control Scheme before the Courts, by which university education is more obviously a government activity (AF paras. 22 and 68). With respect, the reasoning in *UVIC BCSC* (BCF para. 44) is contrary to *Eldridge* (AF para. 18) and the rules of *stare decisis* (AF part 3.B.). *Lobo v Carleton University*, 2012 ONSC 254 cannot be “followed”. It was an appeal from a striking motion, not from trial. The plaintiff had, “failed to plead [not prove] the material facts to establish ... a specific government program ...” (para. 9). Here the plaintiffs do not advance the argument at BCF para. 45 (a “public service” is clearly distinct from “government activity” under s. 32(1) (*McKinney*, para. 33)).

12. “University education” and “safety” is not a “slight reframing” of “regulating space” (BCF para. 47) – these are programs expressly described in IARP’s. A connection between programs and impugned conduct does not turn the impugned conduct into a government program (AF para 71). BCF paras. 40 to 51 is another misapplication of *stare decisis* to outcomes rather than legal principles.

## **VI. Cause of Action**

13. BC misinterprets and effectively asks this Court to reconsider *Ward*. For example, the BCF says *Ward* stands for the propositions: a) there can only be damages against an entity which itself breached the *Charter*; and b) “an entity” responsible for a *Charter* breach may have *Charter* damages awarded against it (BCF paras. 53(a) and 59). But *Ward* says a non-state “specific wrongdoer” which is subject to the *Charter* is not liable for *Charter* damages (AF para. 78) – the state is. BC effectively argues, therefore, that *Ward* is “discordant”, “negate[s] ... deterrence”, and is “anomalous” (BCF paras. 67, 70, and 71).

14. BC relies heavily here on strawman arguments. First, that the plaintiffs assert *Ward* permits damages only against “the Crown” (BCF p. 5, paras. 11(b), 53(d), 57, 61, 62). Nowhere do the plaintiffs argue that. They argue *Ward* only permits damages against “the State”, including municipalities and police boards but excluding “private entities” (AF parts 3.F and 3.G). Second, that the plaintiffs assert that a remedy alone (under s. 24(1)) creates a cause of action (paras 53(c) and 56) – entirely ignoring AF paras. 81 to 86.

15. The BCF muddies its *Ward* arguments by alternating use of the terms “involvement” and “participation” (BCF p. 5, paras. 8, 53, 54, 56, 70, 71). In *Ward* the Province and City did not “participate” in the breaches but were sufficiently “involved” with the wrongdoers to make those wrongdoers subject to *Charter* scrutiny – i.e. s. 32(1) is only satisfied with sufficient state “involvement” – while the state remained directly liable for their *Charter* damages. The BCF fails to respond to the plaintiffs’ observation that a private entity is, by definition, not the state. Instead, BC misleadingly conflates state/government entities and private entities under the general term “entity” (BCF paras. 59, 61, 64, 65 and 66) *Contra* BCF para. 62, *Mason* and *Stewart* (for example) awarded damages against government, not private, entities. BC flatly contradicts *Ward* by claiming every entity subject to the *Charter* is “part of government” (BCF paras. 65 and 66, *contra* BCF para. 63) and, therefore, liable for *Charter* damages. In *Ward*, the “specific wrongdoers” subject to the *Charter* were not liable for *Charter* damages.

16. *Contra* BCF para. 68, CAS’s are, like police, government agents exercising coercive state powers subject to the *Charter* under *Eldridge* leg one (*Middlesex v H(T)*, 1992 CanLII 4042, at para. 24). *Contra* BCF para. 69, in *Stolove*, Waypoint conceded it was liable for *Charter* damages (para. 273) and the Court stated, without citing *Ward*, that s. 24(1) damages “are made directly against the government actor responsible for the breach.” *CR* stands for the proposition that the Crown is not liable for *Charter* breaches of a CAS (paras. 109 and 110). *Zaugg* is not on point, it struck a *Charter* damages claim because: a) the plaintiff failed to name any “individuals and institutions” except the Crown (para. 51); b) damages could not be combined with a s. 52(1) declaration (para. 52); and, without citing *Ward*, that “state institutions and those acting under public authority are to be held accountable in their own right under section 32 of the Charter” (para. 50). To the extent any of these cases are contrary authority, they are wrong and should not be followed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Calgary, in the Province of Alberta, this 28<sup>th</sup> day of January 2026.




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Glenn Blackett, Counsel for the Appellants



## APPENDICES: LIST OF AUTHORITIES

<b>Authorities</b>	<b>Page # in factum</b>	<b>Para # in factum</b>
<i>BC Civil Liberties Association v University of Victoria</i> , 2015 BCSC 39	6, 7	11
<i>BC Civil Liberties Association v. University of Victoria</i> , 2016 BCCA 162	5, 6	8, 11
<i>Bedford v Canada (Attorney General)</i> , 2013 SCC 72	5	7
<i>Dickson v Vuntut Gwitchin First Nation</i> , 2024 SCC 10	6	10
<i>Eldridge v British Columbia (Attorney General)</i> , [1997] 3 S.C.R. 624	5, 6, 7, 8	7, 11, 16
<i>Godbout c Longueuil (Ville)</i> , [1997] 3 S.C.R. 844	5, 6	7, 9, 10
<i>Harrison v University of British Columbia</i> , [1990] 3 S.C.R. 451	4, 5	3, 4, 7, 8
<i>Lobo v Carleton University</i> , 2012 ONSC 254	7	11
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<i>Maughan v University of British Columbia</i> , 2009 BCCA 447	6	9
<i>McKinney v University of Guelph</i> , [1990] 3 S.C.R. 229	7	11
<i>Middlesex v H(T)</i> , 1992 CanLII 4042	7	16
<i>Odhavji Estate v Woodhouse</i> , 2003 SCC 69	5	6
<i>R v Sliwka</i> , 2017 ONCA 426	5	8
<i>Stewart v Toronto (Police Services Board)</i> , 2020 ONCA 255	8	15
<i>Ward v Vancouver (City)</i> , 2007 BCSC 3	5, 7, 8	7, 13, 14, 15, 16

## APPENDICES: ENACTMENTS

*Community Charter, SBC 2003, c 26*

### Financial plan

165 (1) A municipality must have a financial plan that is adopted annually, by bylaw, before the annual property tax bylaw is adopted.

- (2) For certainty, the financial plan may be amended by bylaw at any time.
- (3) The planning period for a financial plan is 5 years, that period being the year in which the plan is specified to come into force and the following 4 years.
- (3.1) The financial plan must set out the objectives and policies of the municipality for the planning period in relation to the following:
  - (a) for each of the funding sources described in subsection (7), the proportion of total revenue that is proposed to come from that funding source;
  - (b) the distribution of property value taxes among the property classes that may be subject to the taxes;
  - (b.1) the provision of development potential relief under section 198.1;
  - (c) the use of permissive tax exemptions.
- (4) The financial plan must set out the following for each year of the planning period:
  - (a) the proposed expenditures by the municipality;
  - (b) the proposed funding sources;
  - (c) the proposed transfers to or between funds.
- (5) The total of the proposed expenditures and transfers to other funds for a year must not exceed the total of the proposed funding sources and transfers from other funds for the year.
- (6) The proposed expenditures must set out separate amounts for each of the following as applicable:
  - (a) the amount required to pay interest and principal on municipal debt;
  - (b) the amount required for capital purposes
  - (c) the amount required for a deficiency referred to in subsection (9);
  - (d) the amount required for other municipal purposes.
- (7) The proposed funding sources must set out separate amounts for each of the following as applicable:
  - (a) revenue from property value taxes;
  - (b) revenue from parcel taxes;
  - (c) revenue from fees;
  - (d) revenue from other sources;

- (e) proceeds from borrowing, other than borrowing under section 177 [*revenue anticipation borrowing*].
- (8) The proposed transfers to or between funds must set out separate amounts for
  - (a) each reserve fund under Division 4 of this Part, and
  - (b) accumulated surplus.
- (9) If actual expenditures and transfers to other funds for a year exceed actual revenues and transfers from other funds for the year, the resulting deficiency must be included in the next year's financial plan as an expenditure in that year.

...

### **Limit on expenditures**

173 (1) A municipality must not make an expenditure other than one authorized under subsection (2) or (3).

...

### **Liabilities for use of money contrary to Act**

191 (1) A council member who votes for a bylaw or resolution authorizing the expenditure, investment or other use of money contrary to this Act or the *Local Government Act* is personally liable to the municipality for the amount.

- (2) As an exception, subsection (1) does not apply if the council member relied on information provided by a municipal officer or employee and the officer or employee was guilty of dishonesty, gross negligence or malicious or wilful misconduct in relation to the provision of the information.
- (3) In addition to any other penalty to which the person may be liable, a council member who is liable to the municipality under subsection (1) is disqualified from holding office
  - (a) on a local government,
  - (b) on the council of the City of Vancouver or on the Park Board established under section 485 of the *Vancouver Charter*, or
  - (c) as a trustee under the *Islands Trust Act*
 until 4 years from the date of the vote to which the disqualification relates.
- (4) Money owed to a municipality under this section may be recovered for the municipality by
  - (a) the municipality,
  - (b) an elector or taxpayer of the municipality, or
  - (c) a person who holds a security under a borrowing made by the municipality.

...

**Interest calculation**

193.1 A municipality may, by bylaw, establish the manner in which interest is calculated if

- (a) this or another Act provides a requirement or authority to apply interest to an amount owed to, or owing by, the municipality, and
- (b) the manner in which interest is calculated is not otherwise provided for.